



**Maitha v Kenyatta University (Cause E187 of 2022)
[2024] KEELRC 1041 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1041 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E187 OF 2022**

**JK GAKERI, J
APRIL 18, 2024**

BETWEEN

DR JOSEPH MAINGI MAITHA CLAIMANT

AND

KENYATTA UNIVERSITY RESPONDENT

RULING

1. Before the court for determination is the Applicant’s Notice of Motion dated 9th October, 2023 seeking ORDERS THAT;
 1. The Honourable Court be pleased to find the Respondent’s Officers namely Professor Paul Wainaina Vice-Chancellor, Professor Geoffrey Musee Deputy Vice-Chancellor Administration and Finance and N. Gikaria Human Resource Manager in contempt of court by wilfully disobeying the order issued on 20th September, 2022 unless they pay the applicant as directed in the Ruling of 20th September, 2022.
 2. The Honourable Court be pleased to issue an order of committal to civil jail against the Respondent’s Vice-Chancellor for such a period as this Honourable Court may deem fit and just for wilfully disobeying the court order issued on 20th September, 2022 directing the Respondent to conclude the disciplinary process and/or lift the Applicant’s suspension within forty five (45) days from the date of the Ruling and that the Respondent pays the Applicant the due and unpaid 50% salary.
 3. The Honourable Court be pleased to sentence the Respondent to pay a fine as this Honourable Court deems fit for the wilful disobedience of the court orders.



4. The Honourable Court to order the Respondent to purge the contempt.
5. Costs of the application be provided for.
2. The Notice of Motion is expressed under Section 5(1) of the *Judicature Act* and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and is based on the grounds set out on its face and the affidavit of Dr. Joseph Maingi Maitha sworn on 9th October, 2023 who depones that the Respondent declined to comply with the court orders even after the Claimant's letters dated 3rd November, 2022, 9th November, 2022 and 8th December, 2023 and the suspension lapsed on 3rd November, 2022.
3. That the Respondent's officers should be punished for disobeying court orders.
4. The affiant states that the Respondent received the applicant's computation of unpaid salary of Kshs.7,608,599.5 but only paid Kshs.1,227,764/= on 4th April, 2023 and remains in contravention of the court directions.

Response

5. In its Replying Affidavit sworn by Nderitu Gikaria on 25th January, 2024, the Respondent deposes that the applicant filed a Notice of Motion dated 23rd March, 2022 which the court allowed.
6. The affiant deposes that the Reinstatement Application was opposed vide a Replying Affidavit by one Professor Paul Okemo.
7. That an order arising from the contempt Ruling is a Contempt Order.
8. The deponent states that after the ruling, advocate for the parties engaged in negotiations to settle the terms of the Contempt Ruling and Order and the matter was mentioned severally and the Respondent's counsel by letter dated 14th December, 2022 to the applicant's advocate explained the reasons why the disciplinary process could not be concluded as previously explained in the Replying Affidavit.
9. That the UASU elections held on 25th March, 2021 were nullified by a judgement delivered on 20th August, 2021 and fresh elections were ordered within 60 days and none had been held.
10. The affiant deposes that the applicant's counsel submitted its computation of the applicant's salary including allowances vide letter dated 31st January, 2023 but the Respondent objected to the inclusion of allowances as per the court's order which specified the salary only, which is exclusive of allowances and did not earn the allowance during the suspension and the applicant's counsel responded vide email dated 16th February, 2023.
11. That the Respondent paid the sum of Kshs.1,227,764/= to the applicant's bank account as the withheld salary which the applicant confirmed.
12. That the applicant's suspension could not be lifted because of the judgment in Petition No. E043 of 2021 and there was no wilful and/or intentional disobedience of the court order as the disciplinary process cannot be concluded without a representative of UASU as required by Clause 8 of the Collective Agreement between UASU and the Respondent.
13. That automatic lifting of the suspension would prematurely absolve the applicant from the charges against him.



14. The affiant deposes that the applicant's suspension was consistent with the Terms of his employment as he breached the Respondent's Code of Conduct and Ethics, 2015 which amounted to gross misconduct consistent with the provisions of the Employment Act, 2007.
15. That the applicant's previous application and the instant application are premature as the Respondent's internal disciplinary process is yet to run its course for reasons beyond the control of the Respondent and the applicant ought to have waited for the process to conclude before coming to court and other employees of the Respondent suspended prior to and after the applicant are awaiting disciplinary proceedings on account of the non-representation of UASU on the Senior Board of Discipline and the applicant was aware of the issue.
16. That no finding of contempt can or ought to issue as there has been no wilful/intentional breach of court orders as the Respondent is not to blame for delay which is a consequence of nullification of the election of UASU representatives who are part of the disciplinary process.
17. That the applicant has not alleged or complained about his salary since the withheld salary was paid as directed by the court.
18. Finally, the affiant deposes that the heavy standard of proof of beyond reasonable doubt in committal proceedings is quasi criminal in nature and ought to go with procedural fairness which the applicant has not shown.

Applicant's submissions

19. As to whether the application is merited, counsel submitted that by 5th February, 2024, the Respondent had not served the Replying Affidavit and was thus not contesting the orders sought by the applicant. Counsel urged the court to allow the application dated 9th October, 2023 as the Respondent had disobeyed court orders.
20. Reliance was made on the holding in Edward Muriga through Stanley Muriga V Nathaniel D. Schulter Civil Appeal No. 23 of 1977 on undefended suits.
21. Counsel submitted that non-compliance with court orders was tantamount to contempt of court under Section 51 of the Judicature Act.
22. Counsel cited the sentiments of the Court of Appeal in Shimmers Plaza Ltd V National Bank of Kenya Ltd (2015) eKLR where the court expressed its displeasure with the trend of disobedience of court orders.
23. According to counsel for the applicant, the fact that the Respondent only paid Kshs.1,227,764/= as unpaid salary while its computation was Kshs.7,608,599.5 as at December 2022, amounted to contempt of court and the applicant had not been allowed to render services.
24. Reliance was also made on the sentiments of Mwita J. in Kenya Human Rights Commission V Attorney General & another (2018) eKLR on what constitutes contempt of court to urge that the Respondent had disobeyed court orders.

Respondent's submissions

25. By 13th March, 2024 when the court prepared this ruling, the Respondent had not filed its submissions.



Determination

26. The singular issue for determination is whether the applicant's Notice of Motion dated 9th October, 2023 is merited.
27. It is common ground that the applicant, an employee of Kenyatta University was suspended indefinitely from 24th February, 2020 and had been on suspension for 25 months by the time he filed the Notice of Motion dated 23rd March, 2022 which sought various orders including lifting of the suspension and payment of the unpaid salary and allowances for the duration of the suspension.
28. In its ruling dated 20th September, 2022, the court found that although the Respondent promised to invite the Claimant to defend himself, he was not and the delay was attributed to the absence of UASU representatives following the judgment in Petition No. E043 of 2021 consolidated with Petition No. E093 of 2021 Frankline Kaburu Kinoti & 3 others V University Academic Staff Union (UASU) Executive Kenyatta University Chapter & 3 others; Kenyatta University (Interested Party) 2021 eKLR.
29. The learned trial judge annulled the election results of March 2021 and ordered fresh elections within 60 days of the judgement dated 20th August, 2021.
30. In its Replying Affidavit dated 26th April, 2022, the Respondent could not confirm whether UASU repeat elections had been held and the applicant did not address the issue.
31. In its ruling dated 20th September, 2022, the court ordered that;
 - a. The Respondent shall conclude the disciplinary proceedings and/or lift the applicant's suspension within 45 days from the date of the ruling failing which the suspension shall be deemed to have lapsed.
 - b. The Respondent shall pay the applicant the due and unpaid 50% salary to date.
 - c. Costs shall be in the cause.
32. The pith and substance of the instant Notice of Motion is whether the Respondent has disobeyed the foregoing orders or not. While the Respondent deposes that it has complied with Order (b) as it paid the unpaid half salary due to the applicant and could not implement (a) on account of the stalemate occasioned by the absence of UASU representative as ordained by the CBA, the applicant deposes and his counsel submitted that the Respondent has blatantly disobeyed court orders.
33. Strangely, in its Replying Affidavit dated 25th January, 2024, the Respondent relies on the contents of the Replying Affidavit in the earlier notice of motion dated 26th April, 2022 on the issue of UASU elections and Petition No. E043 of 2021 and makes no reference to the current position, almost 2 years later. An affirmation that no elections had been held would have been sufficient.
34. The Respondent's Replying Affidavit was filed on 19th February, 2024 after extension of time to do so on 23rd November, 2023 and 19th February, 2024.
35. The applicant's counsel submitted that the Respondent had not served its Replying Affidavit and that the Notice of Motion was unopposed.
36. Equally, it is common ground that parties had agreed to negotiate the matter and the Respondent's counsel requested the applicant's counsel to compute the applicant's unpaid salary as directed by the court and gave a figure of Kshs.7,608,599.5 and the Respondent paid the sum of Kshs.1,227,764/= as the unpaid salary.



37. In the applicant's interpretation of the court order, salary included attendant allowances while the Respondent's interpretation is that salary was the basic salary only.
38. The court order is explicit that only the unpaid salary was to be paid. The allowances were not part of the package.
39. The foregoing is reinforced by the reasoning that since the applicant did not apply for a review of the ruling dated 20th September, 2022 or appeal against it or seek clarification from the court, the submission that the unpaid salary included allowances is difficult to sustain. With that clarification, it is arguable that the Respondent complied with Order (b) of the Ruling dated 20th September, 2022.
40. As regards Order (a), the Respondent contends that its statutes require a staff union representative in the Staff Disciplinary Board and the absence of a representative from the Kenyatta University Chapter had stalled staff disciplinary processes at the Respondent's institution as the union is an integral part of the process and doing otherwise would offend the statutes.
41. Shockingly, it is true that notwithstanding the directions of Rika J. dated 20th August, 2021 that UASU elections, Kenyatta University Chapter be conducted within 60 days of the judgment, no elections have taken place as of the date of preparing this Ruling and as a consequence many processes that require the unions input or participation have been on paralysis since August 2022, a regrettable state of affairs for a public institution of the stature of the Respondent.
42. Although union matters are the exclusive preserve of members, the Respondent, the employer of the local members of the union has a role to play in resolving the stalemate so as to unlock the paralysis which undoubtedly does not augur comfortably with the Respondent's mandate.
43. Engagement of the various camps, if any, in the resolution of the stalemate would be or would have been a positive step and worth disclosure by the Respondent.
44. Regrettably, the Respondent has not indicated to the court why the stalemate is yet to be resolved and whether there was a possibility that it would be resolved in the near future.
45. These are pertinent issues because the applicant and other employees who may be in similar circumstances are prejudiced and are the proverbial grass when elephants fight.
46. In light of the foregoing, it is clear to the court that after it became apparent that the directions given on 20th September, 2022 could not be implemented, within the 45 days, it was incumbent upon the Respondent to apply for review of the orders or appeal the same in a higher court.
47. For unexplained reasons, although the Respondent had real time facts of the situation all along, it did not bring them to the attention of the court.
48. From the record, it is discernible that after the ruling on 20th September, 2022, it is the applicant's counsel who moved the court for a mention of the matter which took place before the Deputy Registrar on 17th January, 2023 after the 45 days had lapsed and after several mentions the Respondent paid the applicant Kshs.1,227,764/= in May 2023.
49. For unexplained reasons, the Respondent made no effort to fulfil the court orders until it was moved by the applicant in early 2023.
Whether the Respondent's officials are guilty of contempt of the court
50. While the applicant's counsel submitted that he Respondent is guilty for disobedience of court orders dated 20th September, 2022, the Respondent deposes that it did not disobey the court orders as the



statement in UASU, Kenyatta University Chapter was occasioned by the judgment in Petition No. E043 of 2021 and as such there is no wilful and/or intentional disobedience of court orders.

51. It requires no gainsaying that court orders are sacrosanct and must be observed by the person(s) against whom they are directed. They are not optional and are not empty platitudes. Court orders enjoy the force of law and are enforceable in accordance with the law.

52. The foregoing is fortified by the sentiments of the Court of Appeal in *Shimmers Plaza Ltd V National Bank of Kenya Ltd* (2015) eKLR as follows;

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional rather it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Rousevelt, the 26th President of the United States of America once said

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”.

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity, left right and center. This would amount to abdication of the sacrosanct duty bestowed on us by *the constitution*. The dignity, and authority of the court must be protected, and that is why those who flagrantly disobey them must be punished lest they lead us all to a state of anarchy . . .”

53. (See also *Miguna Miguna V Dr. Fred Matiangi & 7 others* (2018) eKLR, *Hadkinson V Hadkinson* (1952) ALL ER, *Econet Wireless Kenya Ltd V Minister for Information of Kenya & another* (2005) eKLR, *Gullab Chand Papatlal Shah & another Civil App No. 39 of 1990, Teachers Service Commission V Kenya National Union of Teachers and 2 others* (2013) eKLR and *Republic V Attorney General & another Ex Parte Mike Maina Kamau* (2020) eKLR on the need to punish contempt of court to protect the rule of law, a fundamental element in the administration of justice).

54. According to Black’s Law Dictionary (10th Edition) contempt means;

“The act or state of despising; the conduct of being despised or conduct that defies the authority or dignity of a court or legislature because such conduct interferes with administration of justice.”

55. As regards the standard of proof in *Gatharia K. Mutitika V Baharini Ltd*, the court stated;

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily . . . It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be quasi criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge . . .”

56. It requires no belabouring that contempt of court is the mechanism which ensures that court decisions and orders are obeyed by all and sundry.

57. According to Cromwell J. in *Carey V Laiken* (2015) SCC 117, the three elements of civil contempt are;



- i. “The order alleged to have been disobeyed must state clearly and unequivocally what should and should not be done. This ensures that a party will not be found in contempt where the order is unclear . . .
 - ii. The party alleged to have breached the order must had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine.
 - iii. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.”
58. (See also *Katsuri Ltd V Kapurchand Depar Shah* (2016) eKLR that;
- “The applicant must prove (i) the terms of the order, knowledge of the terms by the Respondent, failure by the Respondent to comply with the terms of the order.”
59. In *Mahinderjit Singh Bitta V Union of India & others* IA No. 10 of 2010, the Supreme Court of India stated;
- “In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and wilful violation of the order of the court, even to constitute a civil contempt. Every party before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution.”
60. (See also *Indian Airports Employees Union V Ranjan Catterjee & another* AIR 1999 SC 880: 1999 (2) SCC 537).
61. The court is further guided by the sentiments of *Mativo J. (as he then was) in Republic V Attorney General & another Ex Parte Mike Kamau Maina* (Supra);
- “The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and mala fides. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith). The requirement that is the refusal to obey should be both wilful and mala fides and the unreasonable non-compliance, provided its bona fide does not constitute contempt . . .
- They show that the offence is committed, not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this convinces.
- Honest believe that non-compliance is justified or proper is incompatible with that intent . . .”
62. From the foregoing, it is clear that contrary to the applicant’s averment that the standard of proof of contempt of court is beyond reasonable doubt analogous to criminal cases, it is not though it is higher than a preponderance of probabilities but lower than beyond any reasonable doubt.



63. In determining the instant application, the court is additionally guided by the sentiments of the court in *Gatharia K. Mutitika V Baharini Farm Ltd (Supra)* as follows;

“ . . . The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and can be brought to bear upon the subject.”

64. As to whether the applicant has demonstrated the requirements of the offence of contempt of court, the court proceeds as follows;

65. As regards awareness of the orders dated 20th September, 2022, the record is unambiguous that the orders were clear and unequivocal as to what was to be done by the Respondent.

66. The Respondent has neither pleaded nor averred or submitted that the orders were ambiguous.

67. Second, as regards actual knowledge of the orders, the record is clear that the Respondent was aware of the orders having participated in the Notice of Motion dated 23rd March, 2022 by way of Replying Affidavit and submissions and its counsel was in court when the orders were made on 20th September, 2022 and a pre-trial date set.

68. Finally, as regards intentional and wilfulness of the violation of the court orders, while the Claimant’s counsel urged that the Respondent has consistently continued to disobey the court orders, the Respondent averred that there was neither wilful nor intentional disobedience of the court orders as the absence of a UASU Representative, a requirement of clause 8 of the CBA has paralysed the disciplinary process.

69. Similarly, the Respondent maintains that the applicant’s conduct which led to the suspension amounted to gross misconduct.

70. Although the applicant did not address the foregoing requirements as outlined by judicial authority, no sustainable claim was made that the non-compliance with the court orders was deliberate and mala fides.

71. As alluded to elsewhere in this ruling, although the Respondent did not move the court even after it became apparent that the Order (a) made on 20th September, 2022 would not be fulfilled, the court discerns no ground on which to attribute mala fides on its part.

72. Having indicated that it was unaware of any UASU election, Kenyatta University Chapter, the Respondent would appear to have had the belief that it had a justifiable reason not to obey the court orders.

73. This far, the court is not satisfied that requirement of wilful or deliberate or intentional disregard or violation of court orders has been demonstrated.

74. Finally, the court is further guided by the sentiments of *Matavo J. (as he then was) in Sheila Cassatt Issenberg & another V Anthony Machatha Kinyanjui (2021) eKLR* as follows;

“But even as courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind that the power to punish for contempt is a discretionary one and should be used sparingly. That is why the court observed in *Carey V Laiken (Supra)*, that if courts were to find contempt too easily “a court’s outrage might be treated as just so much bluster that might ultimately cheapen the role and authority



of the very judicial power it seeks to protect. The court’s contempt power should be used cautiously and with great restraint. It is an enforcement power of last resort rather than first resort.”

75. For the reasons adverted to herein above and having regard to the circumstances of this case, and the materials before the court, the court is unpersuaded that the applicant has established that the orders sought are merited in this instance.
76. In the upshot, the applicant’s Notice of Motion dated 9th October, 2023 is declined.
77. In the circumstances, it is only fair that parties bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF APRIL 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE



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