



**Mwalali & 19 others v Radio Frequency Systems Limited & 2 others
(Cause 305 of 2019) [2024] KEELRC 801 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 801 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 305 OF 2019
B ONGAYA, J
APRIL 17, 2024**

BETWEEN

- JACKSON MUTISO MWALALI 1ST CLAIMANT**
JACQUILINE NJOROGE 2ND CLAIMANT
KENIX ONYANGO ODONDI 3RD CLAIMANT
JACOB ODHIAMBO 4TH CLAIMANT
MICHAEL MWANGI 5TH CLAIMANT
DUNCAN NGIGE 6TH CLAIMANT
GILBERT OCHIENG OWINY 7TH CLAIMANT
IRENE MUTHONI KAHENYA 8TH CLAIMANT
STEPHEN KARANJA GICHUNI 9TH CLAIMANT
HARLES MADOWO 10TH CLAIMANT
VASQUIZ OYARO 11TH CLAIMANT
WILSON WAMBUA 12TH CLAIMANT
ZETH O.MAGANYA 13TH CLAIMANT
GIDEON BIWOTT 14TH CLAIMANT
JOEL MAINA 15TH CLAIMANT
CHARLES CHENGO 16TH CLAIMANT
KENNEDY MARANGA 17TH CLAIMANT
JOHN MBATHA KIDOGO 18TH CLAIMANT
DANIEL MUTUA MUINDI 19TH CLAIMANT



EVANSON GITHINJI 20TH CLAIMANT

AND

RADIO FREQUENCY SYSTEMS LIMITED 1ST RESPONDENT

ONGICHO EVANS ASUGA T/A ONGICHO – ONGICHO & COMPANY

ADVOCATE 2ND RESPONDENT

MICHAEL JOHN MWAURA 3RD RESPONDENT

RULING

1. The 1st respondent filed the application by the notice of motion dated 13.02.2023 through Midenga & Company Advocates. The application was under order 9 rule (9) (a) of the Civil Procedure Rules; Articles 25(c), 50 (1), 159 2(b) and (c), 162 (1) and (2) (b) of *the Constitution* of Kenya; and section s 1A, 1B, 3, 3A, and 80 of the *Civil Procedure Act*; sections 12 and 13 of the *Employment and Labour Relations Court Act*, Cap 234B of Laws of Kenya; section 5 of the *Judicature Act*, Cap 8 Laws of Kenya; Part 81 (Applications and Proceedings in Relation to Contempt of Court) of the Civil Procedure (Amendment No.2) Rules, 2012 of England sections 1A, 1B, 3, 3A, and 63 *Civil Procedure Act*, Cap 21 laws of Kenya; and, all other enabling law.
2. The applicant prayed for orders as follows:
 - a. ... (Spent).
 - b. ... (Spent).
 - c. Notice to show cause to issue to the 2nd and 3rd respondents or contemnors to state why they should not be committed to civil jail for disobedience of the orders of the Honourable Court (Ongaya J) issued on 19.06.2019.
 - d. The respondents or contemnors be committed to civil jail and detained in prison for six (6) months or such period as the Honourable Court will deem fit or both fine and imprisonment for contempt of Court's orders given on 19.06.2019.
 - e. Pending hearing of prayers (b) and (c) above for committal herein, the respondents or contemnors be ordered to purge the suit contempt and in so doing to render just and true accounts of Kshs. 29, 103, 892.50 that was meant for the claimants herein terminal dues, including, but not limited to furnishing the Honourable Court with certified bank accounts evidencing transfer of Kshs. 29, 103, 892.50 to the claimants.
 - f. Such further or other consequential orders as the Honourable Court may deem just.
 - g. Costs of the application be borne by the respondents or contemnors.
3. The application was based on the supporting affidavit of Simon Wallington Horner sworn on 13.02.2023 as Chief Executive Officer and Director of the 1st respondent, and, upon the following grounds:
 - a. The 2nd and 3rd respondents have disobeyed the Court's order issued on 19.06.2019.
 - b. The 2nd and 3rd respondent received Kshs. 29, 103, 892.50 from the 1st respondent company to pay salary arrears from 01.04.2018 to 30.04.2019 and terminal dues for all the claimants herein



but have since failed or refused to pay the claimants in blatant disobedience of the orders of the Court.

- c. To date, the claimants continue to live in squalor whereas the two respondents, who used the employees as decoy to transfer the funds for their benefits, continue to collude and squander the loot unbothered of the welfare of the employees. The employees have suffered including during the Covid-19 pandemic.
 - d. The two respondents have knowledge of the consent court order in issue given on 18.06.2019 leading to the consent decree issued on 19.06.2019 between the claimants and 1st respondent. The consent was for Kshs.29, 103, 892.50 payable by the 1st respondent to the claimants in salary arrears and terminal dues. It was the amount of money transferred to the account of the 2nd respondent and marking the suit settled. The money was duly transferred to the 2nd respondent's account on 21.06.2019. The ruling of the Court dated 19.07.2019 confirmed the consent orders.
 - e. The claimants filed a complaint with the Advocates Complaints Commission. By letter dated 23.01.2020, the Commission stated an in-house dispute resolution had taken place on 22.01.2020 where the 2nd respondent Advocate alleged that of the decretal amount of Kshs. 29, 103, 892.50 he received for the claimants, Kshs. 15, 000, 000.00 had been returned to the 1st respondent to settle outstanding loans. As a way forward the 2nd respondent was to respond fully to the claimant's complaint. By letter, dated 17.01.2023, the 1st respondent's counsel Midenga & Company Advocate wrote to the Commission confirming that the Kshs. 15,000,000.00 had not been returned to the 1st respondent. The Advocates requested for copies of all documents given to the Commission by the 2nd respondent Advocate and the complainants.
 - f. Their conduct makes mockery of the Court orders and due process and unless the instant application is allowed, the two respondents will continue to disobey the Court orders. The orders prayed for should be granted.
4. The 3rd respondent opposed the application by filing his replying affidavit sworn on 08.05.2023. It was filed through M.M Gitonga Advocates LLP. The 3rd respondent urged as follows:
- a. He is the 1st respondent's director and shareholder. He believed the application was frivolous, incompetent and an abuse of Court process. He cannot be held liable for the 1st respondent's liabilities as the company is a separate legal entity.
 - b. The applicant has not particularised the manner the 3rd respondent is in contempt of Court. The order dated 19.06.2019 is not exhibited at all to show the alleged contempt. In any event, the order appears to have been directed at the 1st respondent and not the 3rd respondent who had no duty to comply at all. The 3rd respondent was not a party to the suit. The Court adopted the consent dated 18.06.2019 and became functus officio. No action was required of him in obedience of the Court order. Once the decretal amount was transferred, the 1st respondent became discharged. The application is calculated to harass and intimidate the 3rd respondent.
 - c. The claimants have lodged a complaint with the Advocates Complaints Commission per section 53 of the *Advocates Act* and the forum under the Act is the correct forum.
 - d. No execution proceedings have been initiated by the claimants against the 1st respondent.



5. For the 2nd respondent, Evans A. Ongicho Advocate filed his replying affidavit in person and sworn on 27.02.2023 and a further replying affidavit sworn on 27.07.2023. It was urged as follows:
- a. The dispute was heard and determined by the Court, which is now functus officio. The Advocates Complaints Commission is handling the issue.
 - b. The application is about rival directors of the 1st respondent. The Court should not entertain the application.
 - c. That he met the claimants and made payments to the claimants and to Safaricom Sacco per exhibit EOA2 but some of which are not legible as the bank slips have faded overtime.
 - d. With respect to issues in dispute a similar application was made for the 1st respondent on 26.06.2029 and a ruling delivered on 19.07.2019. The matter has been heard and determined.
6. The Court has considered the parties' submissions and returns that the contempt application must fail. The Court finds as follows:
- a. While the order said to be disobeyed is on record, the extracted order has not been exhibited and on the face of the application and the supporting affidavit, it cannot be said that the applicant has established the particulars of the contempt as against the cited two respondents.
 - b. The applicant alleges contempt only as based upon the correspondence by the Advocates Complaints Commission and which correspondence shows the Commission has not finalised the case and its investigations. To that extent, the Court considers that there is no evidence that beyond reasonable doubt, the cited Advocate is in contempt of Court orders as alleged.
 - c. In any event, the claimants appear to have treated the dispute as one of Advocate – Client concern and not contempt of court order. They therefore correctly filed a complaint with the Advocates Complaints Commission as per the *Advocates Act*. In absence of any other thing, the issue at hand appears to be founded and routed in the Advocate-Client relationship between the 2nd respondent and the claimants and not satisfaction of the decree herein. The procedure under the *Advocates Act* will properly apply to resolve any emerging claimants' concerns as may be necessary.
 - d. The 3rd respondent has not been shown involved in the dispute between the 2nd respondent and the claimants as may have been reported to the Commission. The alleged contempt as against the 3rd respondent appears indeed remote and unfounded.
 - e. The application is therefore liable to dismissal with costs.

In conclusion, the application for contempt dated 13.02.2023 filed for the 1st respondent is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 17TH APRIL 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

