



**Otieno & 37 others v Union of Kenya Civil Servants & 3 others; Registrar of Trade Unions
(Interested Party) (Petition E008 of 2024) [2024] KEELRC 819 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 819 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E008 OF 2024**

S RADIDO, J

APRIL 17, 2024

IN THE MATTER OF CONTEMPT OF COURT

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
10, 41, 50, 232 AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
SECTIONS 44 AND 47 OF THE LABOUR RELATIONS ACT, 2012**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
1(A), 3(H), 5(D), 8(B),(E), (G) AND (J), 20(2), 24 AND 25(2) OF THE
CONSTITUTION OF UNION OF KENYA CIVIL SERVANTS' CONSTITUTION**

BETWEEN

**BERNARD OTIENO 1ST PETITIONER
MALICK M. SHANGUYA 2ND PETITIONER
PATRICK ODERO & 35 OTHERS 3RD PETITIONER**

AND

**UNION OF KENYA CIVIL SERVANTS 1ST RESPONDENT
TOM MBOYA ODEGE 2ND RESPONDENT
ALISOKOR MOHAMUD ISHAQ 3RD RESPONDENT
ABDULMALICK A. ABDALLA 4TH RESPONDENT**



AND

REGISTRAR OF TRADE UNIONS INTERESTED PARTY

JUDGMENT

1. On 31 January 2024, the Court delivered a judgment in Kisumu Petition No. E027 of 2023, Bernard Otieno & Ors v Union of Kenya Civil Servants & Ors, in which it granted the following remedies:
 - i. An order is hereby issued declaring that the 2nd – 4th Respondents are in contravention of their fiduciary responsibilities and duties under the Labour Relations Act as well as the Constitution of the 1st Respondent by failing to make all the books of account of the 1st Respondent available for inspection.
 - ii. An order is hereby issued directing the Respondents to make available all the books of accounts sought by the Petitioners for inspection within the next 15 days.
 - iii. An order is hereby issued that the Petitioners will be at liberty to raise the agenda of financial management of the Union if need be at the National Delegates Conference.
2. Apparently, the Respondents did not abide by the Court orders, and on 22 February 2024, the Petitioners and some unnamed 35 other persons lodged a new Petition with the Court alleging contempt on the part of the Respondents.
3. The specific remedies sought by the Petitioners were:
 - (a) An order be issued declaring that the 1st – 4th Respondents' failure to make available all the books of accounts sought by the Petitioners in Kisumu HCCELRL Pet No. E027/2023 for inspection is contempt of the court.
 - (b) An order of mandamus do issue to the 1st – 4th Respondents compelling them to bring into the Honourable Court within fourteen (14) days from judgment, for inspection, verification and scrutiny by the Petitioners as it may direct documents here below listed;
 - vi) Certified Bank statements of the 1st Respondent for the period 10th October 2021 – 19th January 2023.
 - vii) Certified Staff payroll of the 1st Respondent for the period 1st January 2022 – 31st December 2022.
 - viii) Summary of monthly Expenditure of the 1st Respondent for the months of January 2022, February 2022, October 2022, November 2022 and December 2022.
 - ix) Payment schedule for allowances of National Officials of the 1st Respondent for the period 1st January 2022 – 31st December 2022.
 - x) Schedule of bank loan recoveries of employees and National Officials of the 1st Respondent for the period 1st January 2022 – 31st December 2022.
 - (c) Any other order deemed expedient in the circumstances to punish the contempt and/or disobedience of the court in the interest of justice; and
 - (d) The costs of this application be borne by the Respondents.



4. When the Petition and accompanying Motion under certificate of urgency were placed before the Court on the same day, it directed that the Respondents be served and that they file and serve their responses.
5. On 26 February 2024, the Respondents filed a Notice of Appointment of Advocates as well as a Preliminary Objection contending:

Take Notice that the 1st – 4th Respondents herein shall, before the hearing of the Application and Petition dated 22nd February 2024, raise a Preliminary Objection to be determined in limine, and shall pray for the suit to be struck out with costs on the following grounds, that:

1. The current Employment and Labour Relations Court lacks jurisdiction to deal with this matter because it is premature before this Honourable Court.
2. The Petitioners have not disclosed in any manner whatsoever, the particulars of the contempt the Respondents, whether jointly or severally, have been alleged to have infringed.
3. The current Employment and Labour Relations Court lacks jurisdiction to deal with this matter because it is wrongly founded in law.
4. The Supreme Court of Kenya in *Hermanus Phillipus Steyn v. Giovanni Gnechi-Ruscone*, the Supreme Court, Application No. 4 of 2012, was categorical that the Court of law has to be moved under the correct provisions of the law.
5. The Petition does not state with specificity which Respondent breached any specific Order and as such fails to attain the threshold of a Petition as guided by *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
6. The suit offends the basic principles that surmounts of a Contempt of Court Application, in that:
 - (i) The orders sought herein do not in any way affect the nature of the meeting being held by the 1st Respondent;
 - (ii) The instant suit has been filed under as a new case different from the former case;
 - (iii) The suit has introduced the Registrar of Trade Unions as a party to this Suit, which party was not a party in Kisumu ELRCPET No. E027 of 2023, *Bernard Otieno & 38 Others versus the Union of Kenya Civil Servants & Others*;
 - (iv) A contempt of court is usually an Application is done under the same case and before the same judge/magistrate who previously handled the matter;
 - (v) The Provisions of law relied upon by the Petitioner do not apply to the Application herein for the Orders do not apply to the nature of the meeting being sought to be injuncted on 26th February 2014;



- (vi.) The Application is mischievous, vexatious and totally unmerited as the Claimant has not established sufficient cause to warrant the orders sought;
 - (vii) That the Application is merely speculative and an abuse of the Court process
7. The totality of this matter therefore, leads to the inescapable conclusion the Petitioners have prematurely and irregularly sought this Honourable Court's audience.
6. On the same day, the Court directed the Respondents to file and serve an affidavit attesting to compliance with the judgment of the Court delivered on 31 January 2024.
7. On 1 March 2024, the firm of Okongo Wandago filed a Notice of Appointment to act for the 2nd Respondent (the Notice was irregular as the firm of Rashid Law Advocates had already filed a Notice of Appointment to act for all the Respondents. Notices of Change of Advocate were filed on behalf of the 2nd and 4th Respondents on 4 March 2024).
8. The 2nd Respondent filed replying affidavits on behalf of the Union and his behalf on 4 March 2024. The 3rd Respondent also filed a replying affidavit on the same day.
9. On the same day, the Court directed the parties to file and exchange affidavits and submissions.
10. The 4th Respondent filed a replying affidavit on 11 March 2024 and the 1st Petitioner filed a further affidavit on 21 March 2024.
11. The Honourable Attorney General entered an Appearance for the Registrar of Trade Unions on 18 March 2024.
12. The Petitioners filed their submissions on 25 March 2024 (should have been filed and served before 15 March 2024).
13. The Respondents submissions were not on record by the agreed timeline of 22 March 2024.
14. The Petitioners identified 3 Issues for the Court's adjudication in their submissions:
- i. Whether the Respondents have delivered to the Court documents directed by the Court on 26th February 2024 in line with the subject judgment of the Court in Kisumu ELRC PET E027/2023?
 - ii. Whether the conduct of the Respondents in so far as their failure to comply with the judgment of the Court in Kisumu ELRC PET E027/2023 above infringe on the right to access justice as well as the fair hearing rights of the Petitioners?
 - iii. If there is contempt of court by the Respondents?
15. The Court has considered the Petition, Motion, affidavits and submissions.
16. The primary complaint asserted by the Petitioners is that the Respondents failed to comply with the terms of the judgment delivered on 31 January 2024, despite knowing the orders issued therein.
17. In essence, the Petitioners are alleging contempt of court orders on the part of the Respondents.
18. The High Court invalidated the *Contempt of Court Act* in Kenya Human Rights Commission v Attorney General & Ar (2018) eKLR.



19. With the repeal of the Act, the High Court held in Samuel N.M. Mweru & Ors v National Land Commission & 2 Ors (2020) eKLR that:

since the Act that repealed section 5 of the *Judicature Act* has been declared unconstitutional, the effect is that section 5 of the *Judicature Act* still stands.
20. Since the *Contempt of Court Act* was invalidated, the legal framework on contempt is founded on the *Judicature Act* and more so section 5 of the Act.
21. The Court of Appeal addressed its mind to the procedure and practice in contempt applications in Christine Wangari Chege v Elizabeth Wanjiru Evans & Ors (2014) eKLR. The High Court also considered the question in Samuel N.M. Mweru & Ors v National Land Commission & 2 Ors (2020) eKLR.
22. Under the prevailing practice, an application for contempt should be commenced through an application in the proceedings where the orders said to have been disobeyed were issued.
23. Contempt of court goes to the authority and dignity of the Court. Where a Court finds contempt established, it can penalise or punish the person found in contempt.
24. In the instant case, the Petitioners have instituted a new Petition invoking several Constitutional provisions alleged to have been disobeyed by the Respondents in not complying with the orders of the Court issued in Kisumu Petition No. E027 of 2023.
25. In the humble view of the Court, and despite the constitutional edict not to take cognisance of procedural technicalities, the Petitioners should have approached the Court in Kisumu Petition No. E027 of 2023, and not filed a fresh Petition.
26. The Petitioners also raised the question of access to justice.
27. The instant proceedings do not implicate concerns about access to justice since the parties had already accessed the Court and had their grievances heard and a determination made thereon.
28. Lastly, it was not proper for the Petitioners to include some unnamed 35 persons as Petitioners. All parties to a suit should be properly identified by name.
29. The Court finds the instant Petition alleging contempt of court incompetent.

Conclusion and Orders

30. The Petition is struck out with no on costs since the parties are all officials and or members of the same trade union.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 17TH DAY OF APRIL 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioners Otieno Aluoka & Co. Advocates

For 1st and 3rd Respondents Rashid LAW Advocates

For 2nd Respondent Okongo Wandago & Co. Advocates



For 4th Respondent Roba & Associates

For Interested Party Ms Masaka, Principal Litigation Counsel, Office of the Hon Attorney General

Court Assistant Chemwolo

