



Nyariki & 3 others v County Government of Nyamira & 2 others (Petition E055 of 2021) [2024] KEELRC 1356 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1356 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E055 OF 2021**

CN BAARI, J

JUNE 6, 2024

BETWEEN

**LAMECH MACHUKI NYARIKI 1ST PETITIONER
LEWIS OBURU'NYARIBO 2ND PETITIONER
DOUGLAS MECHA OSORO 3RD PETITIONER
DAN ISSAC ONYANCHA 4TH PETITIONER**

AND

**COUNTY GOVERNMENT OF NYAMIRA 1ST RESPONDENT
GOVERNOR, COUNTY GOVERNMENT OF NYAMIRA 2ND RESPONDENT
NYAMIRA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT**

RULING

1. This ruling relates to the Petitioners/Applicants motion dated 15th September, 2023, seeking to cite the 1st Respondent's CEC member for finance, the Governor, the Chief Officer in charge of finance, the Chairman of the 3rd Respondent, the Payroll Manager and the Human Resource Director of the 2nd Respondent for contempt of court for alleged disobedience of the orders of this Court issued on 31st January, 2022.
2. The motion is supported by grounds on the face and the supporting affidavit of Douglas Mecha Osoro, sworn on 15th September, 2023.
3. The Applicants aver that the Court granted an order directing that the Respondents retain the Petitioners' terms and conditions of employment as they were before the letter dated 25th August, 2021, and pay the costs of the petition. The orders herein further settled the suit as between the parties.



4. It is the Applicants assertion that the Respondents retained the Petitioners in their previous positions, but failed to pay them the requisite house allowance as ordered by court.
5. They aver further that the Respondents only paid Kshs. 2,145,344/- in respect of costs leaving out Kshs. 154,656/- without any reason or explanation contrary to the court order of 7th February, 2022.
6. It is the Applicants position that the Respondents have failed to reinstate the 3rd Applicant/Petitioner-Douglas Mecha Nyaribo, despite the court order without any reason whatsoever in complete disobedience of the orders of the Court.
7. The Respondent's opposed the application vide a replying affidavit sworn by Rael Momanyi, the County Chief Officer, Public Service Management sworn on the 9th November, 2023.
8. Both parties filed submissions in the matter.

The Applicants/Petitioners Submissions

9. The Applicants submit that the orders of the court were duly served upon the Respondents and that a return of service was filed as prove of the said service.
10. It is their submission that costs of the suit is not a tax invoice as to attract any tax in the manner that the Respondents are suggesting, as the amount was not Advocates fees. They assert that costs awarded by court is a payment to the party and not their Advocates.
11. It is their submission that pursuant to the court order of 31st January, 2021, their salaries were reinstated but the house allowance was not.
12. The Applicants further submit that they obtained an opinion from the Commission on Administrative Justice, confirming that the decision by Governors to reduce house allowance for county government employees is illegal and contrary to the law.

The Respondents' Submissions

13. The Respondents submit that a court cannot aid or lend their authority to a party seeking to pursue or enforce an object or agreement that the law prohibits.
14. It is the Respondents' submission that house allowances were reviewed by the Salaries & Remunerations Commission, and to proceed to pay the amount that applied earlier is illegal and a direct injury to public interest, and thus not enforceable.
15. It is the Respondents' submission that they have not failed to comply with the order of the court, but that whilst they retained the terms and conditions of the Petitioners' employment before the letter dated 25th August, 2021, the consent therein, did not of itself bar the Respondents from thereafter undertaking the lawful and due process of law to correct an illegality.
16. The Respondents submit that the action to withhold the special house allowance was undertaken upon reinstatement of the Petitioners to their terms and conditions of employment as ordered by the court, and equally in compliance with the directive of the SRC, and in exercise of its administrative functions as a county.
17. The Respondents submit that they are not in contempt of the court orders, and that they duly paid the costs as consented to the advocates and remitted the withholding tax to KRA as of law.



18. The Respondents reiterate that the order of the court was not a bar to subsequent procedural and lawful actions being undertaken, and that indeed the 3rd Petitioner herein, Douglas was reinstated, but subsequently further disciplinary actions were opened, investigated and undertaken by the county.
19. The Respondents submit further that the Petitioner Douglas Osoro, in a bid to circumvent the law, is knowingly convoluting issues and seeks for this honorable court to make a determination on a separate and distinct employment issue as between him and the Respondent, which matter was not and is not subject of the orders of 31st January, 2022.
20. The Respondents submit that they are not in contempt of any court orders, and that they have to the extent of the order complied fully.

Determinaiton

21. Two issues arise for determination:
 - i. Whether the Respondents are in contempt of court
 - ii. Whether costs of the suit are taxable.

Whether the Respondents are in contempt of court

22. In *Republic v Attorney General & another Ex Parte Mike Maina Kamau* (2020) eKLR, Mativo J. Had this to say on compliance with court orders;

“ Court orders must be obeyed at all times in order to maintain the Rule of Law and good order. This of course means that the authority and dignity of courts must be upheld at all times and this differentiates civilized societies from those applying the law of the jungle. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors. The court does not, and ought not to be seen to make orders in vain; otherwise, the court would be exposed to ridicule and no agency of the constitutional order would then be left in place to serve as a guarantee for legality and for the rights of all people.

A court order is binding on the party against whom it is addressed and until set aside, remains valid and is to be complied with. It is a crime to unlawfully and intentionally disobey a court order.”

23. The orders subject of the motion herein, were entered by consent of the parties. A second consent was adopted by this Court on 7th February, 2022, in relation to the costs of the suit, and the two set of orders now form the basis of the contempt motion.
24. The Respondents submission is that the reviewed house allowance now payable to employees of county governments, is that provided by the Salaries and Remuneration Commission. On their part, the Applicants/Petitioner attribute the revised house allowance to a decision by governors upon change of regimes in the county governments.
25. An opinion has been presented before this court from the Commission on Administraitve Justice. The decision of the Salaries and Remuneration Commissin going by the advisory, affects all employees of county governemnts and not just the Applicants/Petitioners.



26. In my view, the review of house allowance being that it affects all county employees, would only be brought and addressed under a new suit, and not through a contempt motion, as the changes affect all employees in county governments, and not just the Applicants.
27. Natural justice would thus require that county governments and the SRC are heard on the issue, as any orders would have a ripple effect in all the county governments.
28. Further, the orders subject of the contempt motion were issued in January, 2022, which goes to say that the Applicants received the reviewed house allowances for close to 2 years without complaining and which amounts in my view to acquiescence.
29. In the circumstance, I find and hold that the orders of this court issued on 31st January, 2022, did not consider the reviewed house allowances and the subsequent changes cannot be said to contravene those orders.
30. On the order for payment of costs, it is indeed true that costs of the suit are awarded to the winning party, and not their Advocates. Section 6 (1) of the VAT Act 2015 provides as follows; -

“Tax shall be charged on any supply of goods or services made or provided in Kenya where it is a taxable supply made by a taxable person in the course of or in furtherance of any business carried on by him.”
31. Section 2 of the same Act defines “supply” to include the sale or provision of taxable services to another person and “a taxable service” as that which has not been specified in the Third Schedule. Legal services are not listed amongst exempt supplies in the Third Schedule of the Act.
32. By the foregoing provisions, it follows that the costs of the suit are subject to VAT and for this reason, the withholding tax deducted and remitted to KRA does not in my view contravene the order of the Court.
33. The 3rd Respondent has not shown that he was not reinstated when the orders subject of this motion was issued. The Respondents submission that the 3rd Respondent is currently facing new disciplinary action has also not been controverted.
34. I am in agreement with the Respondents that the orders of this Court did not bar the Respondents from taking disciplinary action against any of the Petitioners herein in the future, and by doing so, does not in any way amount to infringement of the orders earlier granted.
35. It then follows that should the 3rd Petitioner be aggrieved by the new disciplinary proceedings, his recourse can only be in a new suit and not in contempt proceedings.
36. In whole, I find and hold that the Applicants have not proved a case of contempt of court.
37. The motion is dismissed with costs.
38. It is so ordered.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF JUNE, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:



Ms. Okaka h/b for Mr. Yogo for the Applicants

Mrs. Ligunya present for the Respondents

Ms. Anjeline Wanjofu - Court Assistant.

