



Bunde & 10 others v Family Health Options Kenya (Employment and Labour Relations Cause E161 of 2023) [2024] KEELRC 2776 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2776 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E161 OF 2023
AN MWAURE, J
NOVEMBER 8, 2024**

BETWEEN

WILSON BUNDE & 10 OTHERS CLAIMANT

AND

FAMILY HEALTH OPTIONS KENYA RESPONDENT

RULING

1. The Applicants filed a Notice of Motion dated 17th July 2024 under Certificate of Urgency in which they sought orders that this Honourable Court: -
 1. Spent
 2. This court be pleased to declare and hold that having been served/being aware of the orders this Honourable Court gave on 8th November 2023, Respondent/Contemnors herein Mr. Edward Marienga being the Executive Director of the Respondent and the entire Board members, have disobeyed those orders and hence in civil contempt of court.
 3. The said Respondent/Contemnors herein Mr. Edward Marienga being the Executive Director of the Respondent and the entire board members be sanctioned as this court may deem fit and appropriate including committing to civil jail for a period of six months or pay the sum Kenya Shillings Five Hundred Thousand or both
 4. The Respondent/Contemnors herein be denied audience by this Honourable Court, until they purge the contempt of the court which has impeded and continues to impede the course of justice in this matter
 5. The Respondents/Contemnors be ordered to immediately pay all the outstanding terminal dues amounting to Kshs. 2,204,632.91 and release the certificate of service to all 11 claimants



6. The costs of this application be borne personally, jointly and severally by the Respondent/Contemnors, on full indemnity basis.

Claimant/Applicant's case

2. The Claimant/Applicants aver that the parties executed a consent on 7th November 2023 and this Honourable Court issued orders on 8th November 2023 in the following terms:
 - I. That the Respondent consents to settle the amount owed to the 11 claimants as per the attached schedule herein subject to PAYE (where necessary) by instalments of five (5) months for dues above Kshs. 500,000 and instalments of two (2) months for due below Kshs. 500,000 from the date of this consent until the full settlement
 - II. That the Respondent shall deliver monthly cheques to the Claimant's Advocates for onward receipt and subsequent payments with the first instalment payable on/or before the 10th day of December, 2023
 - III. That the Respondent shall immediately issue a Certificate of Service to all the eleven Claimants as required under section 51 of the [Employment Act](#) Laws of Kenya upon clearance
 - IV. Parties shall be at liberty to apply in case of non-compliance
 - V. That costs of the suit is awarded at Kshs. 200,000
3. The Claimants/Applicants aver that payments were to be completed by April 2024, with the first instalment due on 10th December 2023, and subsequent instalments to be paid on or before the 10th day of each following month.
4. The Claimants/Applicants aver that the respondent has failed to pay the remaining balance of Kshs. 2,204,632.91 from the agreed Kshs.5,623,503.51.
5. The Claimants/Applicants aver that the non-compliance is continuance wilful and has prejudiced their livelihood.
6. The Claimants/Applicants aver the respondent has no valid reason for disobeying the court's enforceable orders.

Claimants/Applicants' submissions

7. The Claimants/Applicants submitted that the respondent's actions are contemptuous to the court process as orders were served upon it.
8. The Claimants/Applicants submitted that the respondent is in breach of the Court's due process by disrespecting and acting contrary to the said orders hence penalize the culpable persons in strict accordance with the provisions of the law.
9. The Claimants/Applicants relied on the cases of Republic V Kenya School of Law & 2 Others Ex parte Juliet Wanjiru Njoroge & 5 others [2015] eKLR, [Republic V the Municipal Secretary, Ministry of Defence \(Misc. Application No. 276 of 2015\)](#) and [Council of Governors V Seth Panyako and Others \(Cause No. 69 of 2019\)](#).

Respondent's submissions

10. The Respondent submitted that the payments were remitted to the Claimant/Applicant advocates and it was fully paid with no outstanding benefits due under the consent or otherwise.



11. In *Hellen Gesera Ayoti (suing as the legal representatives of the Estate of the Late Justus Momanyi Ayot) V P.N Mashru* [2016] eKLR the court held that the NET salary of a person's earnings is gross salary including allowances less other deductions towards union dues, contributions Sacco loans and any other loans are assumed to be deducted for the family that goes to the improvement of living conditions for the family.
12. The Respondent submitted that the *Employment Act* 2007 requires employers to ensure that all statutory and other deductions are made from the employee's wages and remitted to the relevant authorities on time. The Respondent submitted Section 19(1)(f) as read together sub-sections (4) and (5) of the *Income Tax Act* specifies the time period and other requirements for making such deductions, remittances, penalties, and sanctions to be imposed on a defaulting employer to make such deductions and remittances.
13. In *Co-operative Bank of Kenya Ltd V Erastus Kihara Mureithi* [2013] eKLR the court held that the employer's responsibility to ensure timely and accurate deductions are done according to the law.
14. The Respondent submitted that the application is malicious, vexatious and an abuse of the court process and be dismissed with costs.

Analysis and determination

15. The issue of determination is whether the respondent has disobeyed the court orders.
16. The application emanates from a consent executed by both parties on 7th November 2023 and this Honourable Court issued the orders on 8th November 2023. Thereafter, the Respondent was served with the said orders.
17. The Claimants/Applicants aver that the orders of 8th November 2023 were served upon the respondent and the respondent has failed to remit the balance of Kshs. 2,204,632.91.
18. The Respondent argues that the Claimants/Applicants were paid fully through its Advocates as per the list attached to the submissions amounting to Kshs. 3,418,875.60 after statutory deduction. There is sufficient evidence that the respondent remitted the entire amount as per the consent.
19. In Kenya, we do not have any governing law on contempt of court. In *Kenya Human Rights Commission vs. Attorney General & Another* [2018] eKLR, Justice Mwita declared that the *Contempt of Court Act* No. 46 of 2016 is invalid for lack of public participation as required in Articles 10 and 118(b) of *the Constitution* of Kenya and was encroaching on the independence of the judiciary.
20. Subsequently, we revert to section 5 of the *Judicature Act* provides as follows:
 - “(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.
 - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”



21. In *Samuel M. N. Mweru & Others V National Land Commission & 2 others* [2020] eKLR Justice Mativo established the test for contempt as follows:

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove

- (i) the terms of the order,
- (ii) Knowledge of these terms by the Respondent,
- (iii) Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements, the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than in civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.”

22. The court has carefully studied the submissions of the respective parties as well as the accounts presented by the aforesaid respective parties. The claimants aver they are owed an amount of Kshs.2,204,632/97 from their entitlements.

The Respondent in their submissions claim they have paid the entire amount less the statutory deductions. They annexed their schedule showing the deductions on each employee including tax, loans and salary advance.

23. As far as taxes are concerned it is trite law that taxes must be deducted and is provided in Section 49(1) (c) of the *Employment Act* 2007. It is also captured in their consent that provides payment is less the Pay As You Earn (PAYE).

24. In that case the court does not find there is proof of contempt by the respondents. There is no evidence of deliberate disobedience of courts orders and therefore the court finds the application lacks merit.

25. The court had urged the parties to settle the matter out of court but that did not happen. The parties should agree on what other costs the respondents owed the claimants less the statutory deductions in order to affirm if all amounts have been settled as per the consent filed in court.

26. This application dated 17th July 2024 is not proved and is dismissed accordingly and each party will meet their costs of this application.



27. The respective parties can have a meeting and agree on any other amounts if any owed to the claimants if they so wish and inform the court on 19th December 2024. Mention on 19th December 2024.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

