



**Republic v County Executive Member for Finance & Economic Planning
of the County Government of Kisumu & another (Judicial Review
E005 of 2022) [2024] KEELRC 13310 (KLR) (2 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13310 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E005 OF 2022
JK GAKERI, J
DECEMBER 2, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY EXECUTIVE MEMBER FOR FINANCE &
ECONOMIC PLANNING OF THE COUNTY GOVERNMENT OF
KISUMU 1ST RESPONDENT
COUNTY PUBLIC SERVICE BOARD OF THE COUNTY GOVERNMENT OF
KISUMU 2ND RESPONDENT**

RULING

1. Before the Court for determination is the Applicant’s Notice of Motion dated 8th October, 2024 filed under certificate of urgency seeking orders that:
 1. Spent.
 2. This Honourable Court may deem fit and just to permit the Respondents herein to appear in Court to purge their contempt of Court for which punishment by this Honourable Court is pending.
 3. This Honourable Court be pleased to set aside its finding on the 24th September, 2024 declaring the Respondents guilty of contempt and the subsequent order sentencing them to 3 months imprisonment.
 4. Any other order that this Court deems fit and just in the circumstances.
2. The Notice of Motion is expressed under Article 159 and 259 of the *Constitution* of Kenya Section 8 and 9 of the *Law Reform Act*, Sections 3, 4(1)(a), 6 of the *Contempt of Court Act*, 2016 and Rule 7(2) of



the *Employment and Labour Relations Court (Procedure) Rules* 2024 and is based on the grounds set forth on its face and the Supporting Affidavit of Mr. George Omondi Okong'o sworn on 8th October, 2024 who deposes that he is County Executive Committee Member (CECM) Finance and Economic Planning of the 1st Respondent and is aware of the fact that he was found guilty of contempt of Court on 24th September, 2024 and committed to civil jail for 3 months.

3. The affiant deposes that unforeseen circumstances and exigencies were to blame for his non participation in Court proceedings regarding the Decree against the 1st Respondent and apologizes for the same.
4. That the alleged contempt or deliberate disobedience of Court order is a misrepresentation of fact by the affiant.
5. That when the matter came up he was in Rabat Morocco for United Cities and Local Governments of Africa (UCLGA) and Kisumu City sits in the Evaluation Committee and has been attending meetings for at least one week every other month for the last six (6) months and thus out of the office and since resuming efforts here been made to act on the ex parte applicant's file and the County Government has paid at least Kshs 1,085,853.00 of the total decree amount.
6. That since County Governments are starved of cashflow, the outstanding balance shall be paid through amicable scheme of arrangement.
7. The affiant expresses remorse and offers an unconditional apology to the Court.
8. Court records reveal that this matter has been dragging on since early 2022 and has been characterized by Application after Application as the Ex parte applicants attempts to delay execution of a judgment against the Respondent delivered on 7th April, 2021 of Kshs 2,539,120 in Kisumu ELRC Cause No. 282 of 2018. *Lucy Atieno Malengo v County Public Service Board Kisumu*, County.
The amount comprised salary and gratuity.
9. Records further reveal that a certificate of order against the Government dated 1st February, 2022 was issued in respect of the sum of Kshs 2,539,120.00 payable by the County Public Service Board of Kisumu and the Governor and a decree of even date.
10. Leave to commence Judicial Review proceedings was granted on 22nd March, 2022 but owing to the absence of parties variously the Notice of Motion remained unheard until 5th July, 2022 when Counsel for the Respondent informed the Court that the Respondent had not budgeted for gratuity in the 2021/2022 financial year but it was budgeted for in the 2022/2023 year and prayed for 28 days for the Respondent to compute the amount and record a consent and the Ex Parte applicant's Counsel agreed.
11. On 27th September, 2022 the Respondent was granted 30 days to settle the amount but no payment had been made by 2nd November, 2022, and a mention was slated for 15th November, 2022 when the same story was rehashed by the Respondent's Counsel.
12. The Court issued an order of mandamus to compel the Respondents to pay the outstanding sum of Kshs 2,539,120.00 to the Ex Parte Applicant and costs of the application.
13. Arising from the Respondents in action, the ex parte Applicant field a Notice of Motion dated 6th April, 2024 seeking directions as nothing appears to have happened in 2023.
14. On 10th June, 2024, Counsel for the Respondent informed the Court that some money had been paid to the ex parte applicant and sought time to attempt an out of Court settlement.



15. The Court directed the Respondent to file a reply within 7 days and parties were free to settle the matter out of Court and hearing of the Notice of Motion was scheduled for 1st July, 2024 on which date Counsel for the Respondent sought 7 days to file a reply and promised payment within 14 days and did not attend a mention slated for 24th September, 2024 to confirm settlement when the sentence for contempt was made.

The Respondent filed the instant Notice of Motion on 9th October, 2024.

Reply

16. By a Replying Affidavit sworn on 23rd October, 2024 by Lucy Atieno Matengo, the Ex parte Applicant, the affiant reiterates the contents of the affidavit dated 16th April, 2024 in support of the application for contempt of even date that Judgment in this matter was rendered on 7th April, 2021 and the Respondents have failed to comply with the judgment and the Court's order jolted them to file the instant application.
17. The affiant deposes that the applicant's explanation relates to his absence from Court on 24th September, 2024 and not how the Respondents intended to settle the judgment sum.
- 18.. The Ex Parte applicant recounts the process since 10th June, 2024 when the Respondents were accorded 7 days to respond to the application for contempt and did not appear on 24th September, 2024 after having been accorded the 14 days as requested for to settle the judgment sum.
19. The affiant further recounts the numerous promises the Respondents have made to settle the judgment sum but failed to honour promise and have not indicated how and when they intend to settle the amount due and no satisfactory explanation has been provided why the judgment has not been settled.
20. That the Respondents do not deserve the Honourable Court's audience until they purge the contempt herein.
21. A panoramic view of the Court record reveals that the Respondent have not responded to any of the Ex Parte Applicant's application despite being accorded time by the Court to do so and has made promise after promises severally, using various reasons to hold off the Ex Parte's applications, and who has graciously agreed to accord the Respondent time to pay the amount due.
22. Puzzlingly, the instant Notice of Motion makes no promise of any shape or form or undertaking to pay the amount outstanding. Indeed, the affiant makes no reference the amount outstanding but seeks orders favourable to himself exclusively.
23. There is no evidence to suggest that the so called "amicable scheme of arrangement" has been proposed to the ex parte applicant and whether the ex parte Applicant is amenable to be privy to such a scheme.
24. More significantly, no timelines are proposed to enable the Court hold the deponent accountable thus giving the real issue a wide berth. If the Applicant's averments are to be believed, it would mean that no payment has been made to anyone as he was away on and off attending meetings till September. If that was the case, it would amount to dereliction of duty.
25. While the affiant's apology appears genuine, its effect is diminished by the fact that the affiant has conveniently ignored the foundation of his application which is simply non-payment of the amount outstanding in violation of a Court order.
26. In the Court's view, the contempt of Court herein cannot be purged by an appearance in Court whose essence or purpose has not been demonstrated even by way of preview.



27. In fact, the applicant's Counsel has been explaining why the amount remains outstanding and promising settlement since 2022 when gratuity was included in the Respondent's budget.
28. An explanation by the contemnor would not in the Court's view placate the ex parte application or persuade the Court to set aside its order dated 24th September, 2024 issued after the Respondent was 7 days on 10th June, 2024 and 17 July, 2024 respectively to file a response and 14 days to process payment on 17th July, 2024.
29. The obligation to obey Court Orders has been explained variously.
30. In *Republic v Ahmad Abulfathi Mohammed & Another* [2018] eKLR, the Supreme Court expressed itself as follows:
- Authorities on the necessity to punish for contempt are legion. We have considered those provided by the Respondent, and also cite the following in affirmation of the principle..."
31. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya and Another* [2005] eKLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal v Shab & Another Civil Application No.39 of 1990* (unreported) where the Court of Appeal stated as follows:
32. It is essential for the maintenance of the Rule of Law and order that the authority and dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In *Hadkinson v Hadkinson* [1952] 2A11 ER 567, it was held that;
33. It is the plain and unqualified obligation on every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or valid."
34. In *Attorney General v Times Newspaper Ltd* [1974] ac 273 Lord Diplock stated
- ...There is an element of Public Policy in punishing Civil contempt since the administration of justice would be undermined if the order of any Court of law could be disregarded with impunity".
35. See also *A. B. & another v RB* Civil Application No.4 of 2016 [2016] eKLR. In *B v Attorney General* [2004] eKLR 431 Ojwang J (as he then was) stated;
- 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".
36. The Court expressed similar sentiments in *Republic v County Chief Officer Finance & Economic Planning Nairobi City County Ex Parte David Mugo Murangi* [2018] eKLR; *Central Bank of Kenya & Another v Ratilal Automobiles & Others* Civil Application No. 247 of 2006, *Wildlife Lodges Ltd v County Council of Narok and Another* [2005] 2 EA 344.



37. Finally, in the words of A. K. Ndung'u in *Republic v County Government of Kitui Ex Parte Fairplan Systems Ltd* [2022] eKLR;

...Any lapse in enforcement of Court Orders is a sure invite to a total breakdown of law and order and the rule of law as we know it. The inevitable result would be anarchy and erosion of our social fabric. This Court has an obligation to stand firm and guard against such an eventuality. This, would achieve by strict enforcement of its orders..."

38. The Court is guided by the foregoing sentiments. The copies of documents attached to the Supporting Affidavit show that the applicant was out of the Country attending meetings and the County had no funds on 19th June, 2024 more than 5 months ago.

39. Relatedly, that was the last financial year. A subsequent letter to confirm that the situation had not changed would have embellished the applicant's case.

40. Regrettably, Counsels who appeared before the Court on 10th June, 2024 and 1st July, 2024 weakened the applicant's application as on 10th June, 2024 M/s Odhiambo sought time to try an out of Court settlement and no update was given to the Court on the efforts expended on the issue to-date.

41. Similarly, on 1st July, 2024, M/s Awour blamed the rigours of closing the financial year as the cause of the delay in payment and prayed for 14 days to process the payment and again no update has been provided to date.

42. As deposed by the ex parte applicant none of the documents relied upon by the application make reference to how or when the applicant is proposing to pay the outstanding sum and costs as awarded by the Court.

43. Finally, the attempts the applicant alleges to have made to meet the obligations of his office since he resumed duty on an undisclosed date lack supportive evidence and are thus unverifiable and unproven.

44. Flowing from the foregoing it is discernible that the Applicant's Notice of Motion dated 8th October, 2024 is for dismissal and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 2ND DAY OF DECEMBER, 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.

