



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Emisembe v Nairobi County Branch (KUPPET) & 3 others (Cause
2001 of 2013) [2023] KEELRC 147 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 147 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2001 OF 2013
JK GAKERI, J
JANUARY 25, 2023**

BETWEEN

JANE NYAGOHA EMISEMBE CLAIMANT

AND

NAIROBI COUNTY BRANCH (KUPPET) 1ST RESPONDENT

MOSES OWITI MBORA 2ND RESPONDENT

JULIUS MUITHORE NGANGA 3RD RESPONDENT

JACINTA AUMA BARAZA 4TH RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion Application dated 24th May, 2022 by Jayne Emisembe Nyagoha seeking ORDERS THAT:-
 - i. Spent.
 - ii. The Application dated 21st February, 2022 be and is hereby withdrawn in favour of the instant Application.
 - iii. The honourable court be pleased to cite one, Mr. Moses Owiti Mborra, the Branch Secretary, Mr. Julius Muithore Nganga, the Branch Chairman and Miss Jacinta Auma Baraza, the Branch Treasurer for contempt of court for deliberately disobeying court orders issued on 20th December, 2018.
 - iv. The court be pleased to issue summons against the said Moses Owiti Mborra, Mr. Julius Muithore Nganga and Miss Jacinta Auma to appear before the court and show cause why they cannot be committed to civil jail for six months or such terms as the court may deem just.



- v. The said contemnors Mr. Moses Owiti Mboru, Mr. Julius Muithore Nganga and Miss Jacinta Auma Baraza be committed to civil fail for 6 months for contempt of court for disobeying orders of the court issued on 20th December, 2018.
 - vi. The said contemnors be fined such sums that the court shall deem fit for contempt of orders of the court.
 - vii. The contemnors be denied audience by the court until the subject contempt is purged.
 - viii. The court directs the contemnors to pay interest on the decretal sum at prevailing court rates from the date of judgement.
 - ix. The costs of the Application be borne by the contemnors individually, jointly and severally.
2. The Application filed under Certificate of Urgency is grounded on the grounds set forth on its face and supported by the Affidavit of the Claimant/Applicant dated 24th May, 2022.
 3. The affiant disposes that on 20th December, 2018, the court directed the Respondents to pay the Claimant the sum of Kshs.1,265,293.30.
 4. The order obligated the Respondents to pay the sum ordered with costs of the suit and the decree was served upon the Respondent.
 5. That the Respondents filed an appeal but had no stay of execution orders.
 6. The affiant states that the contemnors had the wherewithal to satisfy the court orders issued on 20th December, 2018.
 7. That attempts by the applicant to have the Respondents comply with the court orders were unsuccessful.
 8. The affiant further deposes that the Respondents were at one point working in cohort with the applicant's counsel on record Enonda & Associates Advocates to frustrate her and counsel filed an application to intimidate her.
 9. That the court had directed the Respondents to refund Kshs.54,000/= that had been irregularly taxed and the same is yet to be paid.
 10. That it was in the interest of justice that the orders sought be granted.

Respondent's case

11. In the Replying Affidavit dated 29th June, 2022, sworn by Julius Muithore Nganga, the affiant deposes that he had not disobeyed any court order and the application was misconceived.
12. The affiant disposes that after judgement was delivered, the Respondent appealed the decision in Civil Appeal No. 361 of 2019 but subsequently, the parties negotiated and reached a compromise to pay the decretal sum in monthly instalment on the understanding that the appeal be withdrawn and the Respondent did so and the first payment of Kshs.200,000/= was made to the Applicant through its counsel on record Enonda & Associates Advocates.
13. That subsequently, the Applicant informed the Respondents that arising out of a misunderstanding with her counsel, payments be made to her directly and as a consequence, the respondents prepared due the following cheques;

No. dated 8th April, 2021
0236



No. dated 30th April, 2021

0238
No. dated 8th June, 2021

0242
No. dated 9th July, 2021

0252
No. dated 4th August, 2021

0256
but the Claimant did not collect the cheques despite several reminders.

14. That the Applicant was called to collect the cheque, confirmed she would but did not, something she repeatedly did.
15. That at one point, the Respondents stopped drawing the cheques.
16. The affiant further states that the Respondents had always been willing to pay the decretal amount as structurally agreed between the Applicant and the Respondent.
17. That their funding is dependent on fund disbursed from the KUPPET National Office.
18. Finally, the affiant states that the respondents are not in a position to pay the decretal sum at once and was ready to pay on monthly basis in the sum of Kshs.50,000/= in light of financial constraints.

Applicant's submissions

19. The Claimant submitted that she was surprised by the copies of cheques allegedly drawn by the Respondents in her favour as they were never issued to her. That the allegation that she was called to collect the cheques was incorrect. That she would ask the trial court to direct that the cheques be submitted to the court for her collection. That the Applicant was not informed of the payment.
20. The applicant further submitted that the amount paid by the Respondent to the applicant's advocate did not get to her.
21. That the decretal sum was to be deposited in a joint account between the applicant and the applicant's advocate but that changed and the Respondents paid to the applicant's advocates without the Claimant's knowledge.

Respondents submissions

22. Consent for the Respondents identifies a singular issue for determination, whether the 2nd Respondent is in contempt of court.
23. Counsel submitted that the Applicant had not moved the court in good faith for having refused to collect cheques drawn in her favour.
24. Counsel urged that Respondents had at all times complied with court directives and orders.
25. It was urged that contempt proceedings were in the nature of criminal proceedings and the standard of proof was that of beyond reasonable doubt.
26. That the applicant was bound to demonstrate that the Respondents/Contemnors had made no effort to pay the decretal sum and wilfully disobeyed court orders.
27. Reliance was made on the decisions in North Tetu Farmers Co. Ltd V Joseph Nderitu Wanjohi (2016) eKLR and Gatharia K. Mutitika V Baharini Farm Ltd (1985) KLR 227 to reinforce the submission.



28. It was further urged that courts had taken the position that the power to punish for contempt was discretionary and should be used sparingly.
29. Counsel contended that the respondents engaged the applicant who had acknowledged that its advocates on record would receive some money and later intimated in writing that respondents should not deal with her advocate on record.
30. Counsel underscored the fact that the respondents had made attempts to pay as evidenced by the copies of cheques on record that were never collected.
31. That having admitted that there were discussions on payment in instalments, the applicant was estopped from insinuating that payment would be made through her advocate's office yet she had a counsel on record.
32. Finally, the court was urged to allow the Respondents to pay the decretal sum in instalments of Kshs.50,000/= per month.

Determination

33. The issue for determination is whether the application is merited.
34. From the outset, I wish to express my disappointment with both parties for lack of good faith in finalising the matter before the court. Had both parties engaged and in good faith, this matter would not be in court today almost 4 years after judgement was delivered.
35. Simply stated, the Claimant/Applicant seeks to have the 2nd, 3rd and 4th Respondents committed to civil jail for contempt of court for having disobeyed orders of the court issued on 20th December, 2018.
36. It is common ground that the Claimant was awarded judgement in ELRC Cause No. 2001 of 2013, Jayne Nyagoha Emisembe V Nairobi County Branch of KUPPET, the sum of Kshs.1,265,293.30 with costs.
37. It is also not in dispute that subsequently, the Respondents filed an appeal in the Court of Appeal which was subsequently withdrawn after the parties agreed that the decretal sum be liquidated by instalments, an arrangement that appear to have fallen through at the behest of both parties.
38. Challenges appear to have crippled in when by letter dated 28th January, 2021, the Claimant/Applicant intimated to her counsel on record Enonda & Associates that she would no longer require their services by which time the law firm had already received Kshs.200,000/=, being the first instalment in satisfaction of the decretal sum, which the law firm retained pending full payment of its costs. The Claimant/Applicant notified the 1st Respondent as well but did not inform the Respondents whether she had another counsel and by letter dated 10th February, 2022, the Claimant/Applicant notified the court, Respondent's counsel and her former counsel that henceforth she would act in person and provided her email, postal address and phone number. The rather acrimonious separation impacted negatively on the matter.
39. From the communication on record, it would appear that the Claimant/Applicant engaged the Law firm of Shisanya & Co. Advocates sometime in May 2021 and by letter dated 7th October, 2021, the law firm notified Enonda & Associates that the Claimant/Applicant would not be pursuing the sum of Kshs.54,940/= from the law firm having conceded to a proposal contained in their letter dated 7th September, 2021. A copy of this letter was not attached.



40. Instructively, the Claimant/Applicant had filed an undated Notice of Motion Application seeking a Garnishee Order Nisi in respect of Account Number 0100003712855 CFC Stanbic Bank Ltd, Buru Buru Branch to satisfy the decretal sum.
41. The Application does not appear to have been prosecuted.
42. Closely related to the foregoing, by letter dated 30th October, 2020, the Claimant/Applicant's counsel, Enonda & Associates Advocates notified the court that she had withdrawn the Bill of Costs dated 17th December, 2019.
43. The Claimant/Applicant accused the Respondents and her former counsel for having agreed on the payments without involving her. She adduced no evidence in support of the claim.
44. The Respondents on the other had provided several documents suggesting that it engaged the Claimant on the satisfaction of the decretal sum.
45. A handwritten agreement dated 27th February, 2020, between the Applicant and one Julius Nganga and Cornelius Mwanza signed by the three persons states "that they had agreed that the sum of Kshs.1.3 million awarded by the court and costs of Kshs.700,000/= would be paid by the Respondent. The Kshs.1.3 million would be paid in 10 months and the Applicant had agreed to waive some amount from the legal fees."
46. However, the agreement appear to have fallen through.
47. Copies of minutes of the Respondent's meeting held in July and October 2020 reveal that the Claimant/Applicant's judgement remained part of the agenda.
48. Minute BGC/02/07/2020 of the meeting of the Respondent's Governing Council held on 18th July, 2020 acknowledged that the matter was still active and Mr. Julius Ng'ang'a, the Branch Chairman and Cornelius Mwanza, the secretary had met the Applicant on 27th February, 2020 to discuss an out of court settlement.
49. Secondly, MIN BGC/05/07/2020 of the meeting held on 29th July 2020 stated that Mr. Julius Ng'ang'a and Cornelius Mwanza met the Applicant again on 22nd July, 2022 at Hurlingham and it had been agreed that the;
 1. Respondent could commence payment through the Claimant's/Applicant's counsel on record.
 2. Appeal be withdrawn.
 3. Payment be made in instalments staggered for 10 months upon initial payment of Kshs.200,000/=.
 4. The agreement be formalized.
50. It was reported that the agreement had been drawn but the Claimant/Applicant refused to sign and this was the second time.
51. The meeting resolved that the Applicant be engaged once again on the payment and be paid Kshs.300,000/= on agreement and balance be paid in 5 months as follows, Kshs.200,000/= per month for 4 months and Kshs.160,000/= in the fifth month.
52. Finally, MIN BGC 02/07/2020 of the Governing Council meeting held on 3rd October, 2020 stated that, the meeting was informed that the Claimant/Applicant's advocate had by letter dated 31st August,



- 2020 stated that the Claimant had never met officials of the Respondent to discuss modalities of settling the amount awarded by the court.
53. The meeting resolved that the Respondent would no longer engage the Applicant owing to her dishonesty, untrustworthiness and lack of good faith and payments would be made through the Applicant's advocate.
 54. From the end of January 2021, the Claimant had withdrawn instructions from Enonda & Associates Advocates.
 55. Finally, although the Respondent provided copies of cheques dated 8th April, 2021 for Kshs.100,000/=, 30th April, 2021 for Kshs.100,000/=, 8th June, 2021 for Kshs.100,000/=, 9th July, 2021 for Kshs.50,000/= and 4th August, 2021 for Kshs.100,000/=, it provided no tangible evidence to prove that it in fact contacted the Claimant/Applicant to collect the cheques. There was no evidence of the alleged calls to the Applicant.
 56. If the Respondent's evidence is to be believed, it drew five (5) cheques in a span of 4 months and none was collected by the Claimant. This evidence is however consistent with the Respondents' minutes which reveal that indeed the Applicant had agreed on how the decretal sum would be liquidated but declined to sign the agreement and purported to disown the engagements she had had with the officials of the Respondent.
 57. Be that as it may, it is also unclear why the Applicant made no effort to get in touch with the Respondent yet she had notified them that Enonda & Associates Advocates ceased to act for her. How were the cheques to be dispatched to her and she had no counsel on record.
 58. Puzzlingly, the Claimant/Applicant is urging the court to believe that the Respondents defiantly neglected, failed and/or refused to pay the decretal sum since December 2018.
 59. On the contrary, the parties engaged consistently which inter alia led to the withdrawal of the Respondent's appeal, taxation of the Bill of Costs and negotiations in late 2020 which culminated in the first payment of Kshs.200,000/=.
 60. Documentary evidence on record is unambiguous that the Respondents had been willing to comply with the court order and engaged the Claimant/Applicant personally until she not only refused to sign an agreement but disowned the negotiations. Her conduct would not pass the requirement of good faith.
 61. The Applicant appear to place the blame squarely on the feet of the Respondent and its officials yet she unilaterally disowned negotiations she had voluntarily participated in and now seeks committal orders against the officials of the 1st Respondent.
 62. In Simple legal parlance, contempt of court is any conduct or action that defies or disrespects authority of the court.
 63. According to Black's Law Dictionary, 10th Edition, Contempt is The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice."
 64. Contempt impedes the fair and efficient administration of justice.



65. In *Econet Wireless Kenya Ltd V Minister for Information & Communication of Kenya & another* (2005) KLR 828, Ibrahim J. (as he then was) stated as follows;

“It is essential for the maintenance of the rule of law and order that the authority and the 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. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation shown by the fact that it extends even in cases where the person affected by the order believes it to be irregular or void.”

66. Similar sentiments were expressed by the Supreme Court of India in *T.N. Gadavarma Thiru Mulpad V Ashok Khot & another* (2006) 5 SCC.

67. As correctly submitted by the Respondent’s counsel, contempt of court proceedings are in the nature of criminal proceedings and the standard of proof against the contemnor is higher than the balance of probabilities in ordinary civil suits. This is because the suit implicates the liberty of the alleged contemnors. Wilful and deliberate disobedience of the court order must be proved for the action to succeed (see *Sheila Cassatt Issenberg & another V Antony Machatha Kinyanjui* (2021) eKLR).

68. The heavy burden imposed on the party suing for contempt of court was explained in *Gatharia K. Mutitika V Baharini Farms Ltd* (Supra) as follows;

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily . . . It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge . . . The jurisdiction of committing for contempt being practically, arbitrary and unlimited should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject . . .”

69. The court is guided by these sentiments.

70. Needless to emphasize, because of the seriousness of the contempt proceedings, the person(s) against whom proceedings are instituted must have been aware of the court order.

71. Relatedly, the order must state what must be done and must not be done unambiguously.

72. In the instant application, it is common ground that the Respondents were aware of the judgement delivered on 20th December, 2018 as well as the decree and even appealed against it but subsequently withdrew the appeal and its clarity was not in contest.

73. It is also evident that the documentary evidence on record reveals that the Respondent made significant efforts to engage the Applicant and the parties agreed on the way forward until the Claimant broke up with her counsel on record and disowned the engagements. Although the Respondent remained proactive, it is unclear why it could not adopt other methodologies of communicating with the Applicant. It had her email and postal address and could send her registered mail.



74. Evidence of emails or registration certificate to the Applicant would have further buttressed the Respondents case.
75. In the circumstances of this case, it is the finding of the court that the applicant has not sufficiently demonstrated that the alleged contemnors deliberately disobeyed the court orders issued on 20th December, 2018 or other orders.
76. Based on the material before the court, the court is not satisfied that the Applicant has not proved her case to the required standard.
77. In the upshot, the Notice of Motion dated 24th May, 2022 is dismissed with no orders as to costs.
78. The Respondent is directed to pay the decretal sum by 8 monthly instalments effective 30th November, 2022. The amount shall be deposited in the Applicant's bank account by the 4th day of every succeeding month till payment in full.
79. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF JANUARY 2023

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.

DR. JACOB GAKERI

JUDGE

