



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maina v Kenyatta University (Petition 133 of 2018)  
[2023] KEELRC 817 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 817 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION 133 OF 2018  
MN NDUMA, J  
MARCH 23, 2023**

**BETWEEN**

**ESTHER NJERI MAINA ..... CLAIMANT**

**AND**

**KENYATTA UNIVERSITY ..... RESPONDENT**

**RULING**

1. The Petitioner/Applicant filed Notice of Motion application dated 21<sup>st</sup> November, 2022 seeking an Order in the following terms:-
  1. Spent
  2. That pending the hearing interpartes and determination of this instant application the honourable Court do hereby issue a Notice to show cause why:-
    - a. The individual(s) responsible for issuing employment contract in the respondent's administration should not be held in contempt of the Court decree and committed to civil jail till the petitioner herein is issued with an employment contract as per the Court's decree dated 10<sup>th</sup> May, 2020.
    - (b) Chador Auctioneers should not be awarded Warrant of Attachment and Sale of Judgment debtor's moveable assets to recover Kshs 55,098 as per the Certificate of Taxation dated 10<sup>th</sup> November, 2022.
  3. that the respondent to pay the costs of this application for willfully and knowingly disobeying Court decree.
  4. Any other order and/or directions that this Court may deem fit to grant.



2. The application is premised on grounds set out on the face of the notice of motion numbered (1) to (7) and buttressed in the supporting affidavit of the applicant the nub of which is that the respondent herein be compelled to issue the applicant with an employment contract with effect from November, 2020 and pay her arrear salaries backdated to that period and continue to pay monthly salaries as and when they fall due.
3. That the applicant obtained judgment and decree in this matter in May, 2022. That the respondent filed an appeal to the Court of Appeal in Civil Appeal No. 261 of 2020 *Kenyatta University v Esther Njeri Maina* which appeal was dismissed with costs on 4<sup>th</sup> November, 2022.
4. That the respondent's Counsel were duly served with the decree, Certificate of Taxation and the judgment in *Civil Appeal No. 261 of 2020* but have blatantly refused to comply with the same. That the application be granted as prayed.
5. The judgment/decreed dated 7<sup>th</sup> May, 2020 issued by Wasilwa J. is to this effect-
  - (i) A declaration that her Right to fair Labour practices was infringed upon.
  - (ii) A declaration that the nature of her employment relationship with Respondent is not casual or temporary but permanent and pensionable with effect from the date of this judgment.
  - (iii) The Respondent should henceforth issue the petitioner with a contract detailing the nature of this contract as per the law and in tandem with other permanent and pensionable employees who are permanent and pensionable on her grade.
  - (iv) The Respondent to pay the petitioner costs of this petition."
6. A Certificate of Taxation in the sum of Kshs 55,098 is also attached to the application.
7. The applicant filed a supplementary affidavit sworn to on 16<sup>th</sup> January, 2023 in which she deposes that on 9<sup>th</sup> January, 2023, the respondent issued her with a letter of offer which does not satisfy the judgment and decree of the Court in that:-
  - (a) It does not have an effective/commencement date of permanent and pensionable engagement as stated in the decree to be effective from the date of judgment which is 15<sup>th</sup> April, 2020.
  - (b) The respondent offered the petitioner a lower grade than that which she is qualified for whereas the Court decreed that the petitioner be issued with a contract as per the law and in tandem with others within her grade.
8. That on 9<sup>th</sup> January, 2023, the petitioner notified the Deputy Vice Chancellor (Administration) of the shortcomings in the letter of offer.
9. The Deputy Vice Chancellor wrote back on 12<sup>th</sup> January, 2023 but has failed and or neglected to correct the situation in line with the judgment of the Court.
10. That the petitioner is academically and professionally qualified for the position of Secretary and Clerk grade A/B and this is in full knowledge of the respondent.
11. That it is wrong for the respondent to place the petitioner on a lower grade of Clerk Typist Grade 111/IV on permanent and pensionable terms. That it is also wrong to place the petitioner on 6 months' probation yet she has served the respondent for a long time and is not a new employee.
12. That the respondent be compelled to comply with the judgment and decree of the Court.



13. The respondent filed a replying and further affidavits in which the respondent emphasise technical errors in the application in that the prayers sought in the application have been overtaken by events considering that the respondent has already given the petitioner an offer of employment on permanent and pensionable terms. That the prayer in respect of alleged contempt of Court is extremely vague in terms and is incapable of being granted as framed. The proposed mode of execution for costs cannot issue against the Respondent – a government institution.
14. That the Court is *functus officio* and it is no longer open to the Court to re-open an issue in the manner proposed by the petitioner.
15. That the Order for stay remained in force until 4<sup>th</sup> November, 2022. That the respondent has endeavoured to comply with the Order thereafter.
16. That there is a pending reference against the taxation by way of notice of motion dated 17<sup>th</sup> November, 2020 which was fixed for hearing on 8<sup>th</sup> December, 2020.
17. That the hearing and disposal of the reference has delayed due to the delay on the part of the Deputy Registrar to supply reasons for Taxation. That the petitioner cannot be allowed to recover costs before the reference is heard and determined.
18. That the applicant has filed multiple applications which amount to harassment of the respondent. That the respondent has complied with the Court Order and the application lacks merit. That the Court of Appeal has rendered judgment and specifically directed that the respondent is at liberty to transfer the petitioner from one campus to another depending on exigencies of duty.
19. That the application be dismissed with costs.
20. The applicant filed supplementary affidavit taking issue with the respondent restating that the letter of appointment dated 9<sup>th</sup> January, 2023 does not comply with the Court Order and is riddled with errors which applicant has requested be corrected.
21. That the letter by Deputy Vice Chancellor dated 12<sup>th</sup> January, 2023 did not remedy the errors pointed out by the applicant.
22. That the applicant responded to the letter on 13<sup>th</sup> January, 2023. That the letter should bear date of appointment; post and grade; terms of appointment; department candidate is posted to; salary scale including the annual increment band; Entitlement to allowance's conditions of termination; and provision for acknowledgement of offer by the appointee.
23. That the letter given to the applicant does not have date of appointment; salary scale and conditions of service. That it is not a genuine offer of employment. That the applicant be placed on job grade A/B to which she is academically and professionally qualified. That the application be granted with costs.
24. The respondent filed further affidavit alleging that the matters which are irrelevant to the application were introduced by the applicant in the supplementary affidavit. The contents of the replying affidavit are reiterated.
25. That the application is overtaken by events and there is nothing for the Court to determine. That the respondent has paid the applicant costs on without prejudice basis, reserving the right to ventilate the reference. That the issue is overtaken by events.
26. That the petitioner does not qualify for grade III/IV which the respondent has offered her. That the petitioner is even not more qualified for appointment to grade A/B she seeks to be placed to.



27. That the application lacks merit and be dismissed.
28. The parties made oral submissions. The Court has considered same together with the depositions by the parties. The Court realizes that the applicant is not represented by an advocate and will downplay the technicalities raised by the respondent regarding the manner in which the application for contempt was originated.
29. However, applications for contempt of Court are serious in nature as they seek to have the cited persons be found guilty of a criminal offence which attracts penal consequences including payment of fines and or incarceration.
30. In this regard, the burden of proof borne by an applicant in a contempt application is higher than on a balance of probabilities though not beyond reasonable doubt. This is an intermediate burden of proof to which the applicant is strictly bound to discharge.
31. The Court has considered the application and the orders sought. The Court has carefully considered the rebuttal by the respondent and is satisfied that the respondent has complied with the orders of the Court by giving the applicant a job at an appropriate level on a permanent and pensionable basis. The Court is also satisfied that the respondent has paid the costs of the suit though reserving the right to prosecute the pending reference.
32. It is the finding by the Court that the applicant has failed to discharge the onus of prove placed on her in an application of this nature.
33. Most of the matters raised by the applicant are now *res-judicata*, the substantive suit having been determined by the Court in her favour and the appeal filed by the respondent at the Court of Appeal was also largely determined in favour of the applicant.
34. The applicant ought to gracefully take up her new responsibilities and put these perennial disputes with the employer to rest.
35. The Court in arriving at its decision has been guided by the Court of Appeal decision [\*Akbar Abdullah Kassam Esmail v Equip Agencies Limited & 4 Others\*](#) [2014] eKLR and various authorities cited therein on the manner in which an application for contempt ought to be originated; prosecuted, and the standard and burden of proof to be discharged by the applicant.
36. Accordingly, this application lacks merit and is dismissed with no Order as to costs this time round. The Court shall not hesitate to Order payment of costs by the applicant should she persist in further unnecessary applications against the respondent.
37. It is so ordered.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 23<sup>RD</sup> DAY OF MARCH, 2023.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Applicant in person

Njoroge Regeru & Co. Advocates for Respondent

Ekale – Court Assistant

