



**Nganga v County Government of Mombasa & another (Cause  
081 of 2022) [2023] KEELRC 1522 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1522 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 081 OF 2022  
AK NZEI, J  
MARCH 9, 2023**

**BETWEEN**

**JOSEPHINE NDINDA NGANGA ..... CLAIMANT**

**AND**

**MOMBASA COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion herein dated November 11, 2022, the claimant seeks the following orders:-
  - a. that this honourable court be pleased to find the 2<sup>nd</sup> respondent's Chief Executive Officer Mr. Jeizen Faruk, the 1<sup>st</sup> respondent's County Chief Officer Devolution and Public Service Administration Mrs. Justina Mwikya, County Chief Officer Medical Services Dr. Khadija Shikely and the County Chief Officer Public Health Ms. Pauline Odinga to be in contempt of this Court's orders granted on October 25, 2022.
  - b. that this Honourable Court be pleased to order that the 2<sup>nd</sup> respondent's Chief Executive Officer Mr. Jeizan Faruk, the 1<sup>st</sup> respondent's County Chief Officer Devolution and Public Service Administration Mrs. Justina Mwikya, County Chief Officer Medical Services Dr. Khadija Shikely, and County Chief Officer Public Health Ms. Pauline Odinga, be arrested and committed to civil jail for a term not exceeding six months.
  - c. that the court be pleased to order that the respondents should not be heard by the court until they purge the contempt.
  - d. that this court be pleased to award damages, to be assessed to compensate the claimant/applicant.
  - e. that costs of the application be borne by the respondents.



2. The application is based on the claimant/applicant's supporting affidavit sworn on November 11, 2022. The facts of the case are that on October 25, 2022, this court gave an ex-parte interim orders of injunction in the following terms:-

- “(a) in the meantime, an interim order of injunction is hereby issued restraining the respondents, their officers, agents or servants from stopping or withholding the claimant/applicant's salary, and from taking any disciplinary action against her pending inter-partes hearing of the application dated 18/10/2022.
- (b) the claimant/applicant shall serve this order on the respondents within 3 days of today.”

3. It is deponed that the order, duly extracted, was served on the respondents on October 25, 2022. A duly served and acknowledged copy of the order was filed herein by the claimant/applicant together with an affidavit of service. The claimant/applicant further deponed that the 1<sup>st</sup> respondent's payroll is managed by the 2<sup>nd</sup> named contemnor, Mrs. Justina Mwikya, and that in defiance of this court's orders, the respondents have continued to withhold the claimant/applicant's salary.

4. It is the claimant/applicant's further deposition that in disobedience of this court's said orders, the County Chief Officer Public Health Services, Ms. Pauline Odinga issued summons dated November 7, 2022 directing the claimant/applicant to attend a disciplinary hearing on November 11, 2022. A copy of the said letter of summons is annexed to the claimant/applicant's supporting affidavit.

5. It is further deposed by the claimant/applicant that after service of the court's Order dated October 25, 2022, the County Chief Officer Medical Services, Dr. Shikely (the third Contemnor), wrote to the IEBC requesting for documents to investigate the claimant/applicant's disciplinary issue despite the court's order. A copy of the IEBC's response to a letter from the office of the County Chief Officer Medical Services, dated October 26, 2022, is annexed to the claimant/applicant's supporting affidavit.

6. The claimant/applicant further deponed that by a letter dated November 8, 2022, she requested for withdrawal of the summons issued to her, but the request was ignored. The claimant/applicant annexed a copy of her said letter dated November 8, 2022, shown to have been duly served on the respondents on November 8, 2022, to her supporting affidavit. The said letter reads in part: -

“RE:- summons to appear before disciplinary meeting dated November 7, 2022

I acknowledge receipt of the above referenced letter received by me on November 8, 2022.

Kindly note that the Honourable Judge of the Employment and Labour Relations Court at Mombasa issued an order dated October 25, 2022 stopping any disciplinary action against me. The said orders were served upon the County Government of Mombasa and the Mombasa County Public Service Board on the same day.

Further, you have continued to withhold my salary.

Take notice that you are acting in contempt and defiance of the above stated Court orders and unless you withdraw the said letter forthwith, I shall be forced to apply for your punishment for contempt of Court....”

7. The application is opposed by the four named contemnors, who filed separate replying affidavits on November 30, 2022. The common averments in the contemnors' relying affidavits are as follows:-

- a. that disciplinary proceedings against the claimant/applicant have been stopped.



- b. that the respondents have not willfully disobeyed the court order calling for the reinstatement of the claimant's salary as purported in the application as the respondents are caught between a rock and a hard place in so far as compliance with the order is concerned.
  - c. that the claimant was never honest while filing the present claim as she did not indicate the real reason as to why her salary was stopped and she was subjected to disciplinary proceedings.
  - d. that the order was granted without the court having had the benefit of considering the 1<sup>st</sup> and 2<sup>nd</sup> respondent's replying affidavit to know that the claimant participated in the general elections and as a result, she ought to have resigned by February 2022, and that she has been drawing salary illegally from the respondents since then.
  - e. that complying with the order is a kin to allowing the claimant to capitalize on her ability to perpetuate an illegality with the Court and the respondents being seen as aiders and abettors of this outright abuse of the Court process and violation of the Rule of Law.
  - f. that the respondents risk being subjected to audit queries for acting illegally by paying the claimant in light of the provisions of section 43(5) of the [Elections Act](#).
  - g. that the claimant hoodwinked the Court into making orders which are difficult to implement as they require the respondent to act illegally.
8. It is important to state here, for record purposes, that this court's interim orders in issue were given ex-parte on October 25, 2022 pursuant to the claimant's Notice of Motion dated October 18, 2022. The said Notice of Motion application was presented to the court in Chambers under a certificate of urgency on October 21, 2022. The court certified the application as urgent, directed the claimant to serve the application and fixed the same for October 25, 2022 for directions and/or further orders.
  9. Upon being served, the respondents filed a Memorandum of Appearance on October 24, 2022, but neither filed any response to the application dated October 18, 2022 nor attended court on October 25, 2022 when the interim order of injunction in issue was granted. It is, indeed, not honest for the respondents to purport to "accuse" the court of not having considered matters which they had not placed before the court when the order in issue was made. Enough said of that.
  10. It is worth noting that the claimant/applicant remains in the 1<sup>st</sup> respondent's employment, as she did not resign when she ought to have resigned as stated by the respondents, and has not resigned to date. This is the reason why disciplinary proceedings are shown to have been initiated by the 1<sup>st</sup> respondent's Chief Officer Medical Services against the claimant/applicant in the run-up to the filing of the present suit. Dismissal of an employee involves due process as set out in sections 41, 43 and 45 of the [Employment Act](#), and until the process is undertaken and completed and the employee dismissed, if there is a valid ground for dismissal, an employee remains such, and is entitled to earn their salary if still working. Due process is an integral part of the Rule of Law.
  11. Stopping and/or withholding a serving employee's salary and thereupon issuing a show cause letter as it happened in the present case amounts to an unfair labour practice, and is also an unfair administrative act.
  12. Back to the present application dated November 11, 2022; the contemnors have not denied service of this court's order dated October 25, 2022. They have not denied knowledge of it. They contemptuously disobeyed the order and allege to have chosen which part of the order to comply with and which one not to comply with. They did not appeal against the order, and the order was not set aside on appeal or discharged on review. The respondents deliberately and brazenly chose to disobey



this court's said order. The word and tenor of the contemnors' replying affidavits as reproduced in paragraph 7 of this Ruling attest to that fact.

13. This court heard the claimant/applicant's application dated 11/11/2022 on December 15, 2022 and fixed a date for delivery of a Ruling thereon. On December 16, 2022, however, the respondents filed a Notice of Motion evenly dated seeking stay of proceedings and setting aside, varying and/or discharging of this court's orders dated October 25, 2022 which are the subject in the Notice of Motion dated November 11, 2022 which the court had already heard and was pending delivery of this Ruling. The court declined to give any orders on the said Notice of Motion dated December 16, 2022 until a Ruling on whether or not the Contemnors are in contempt of court is made.
14. This court recently stated as follows in Judicial Review Application No.E003 of 2022 (*Republic v Principal Secretary, Ministry of Land And Physical Planning & 2 others; Rachel Mutheu Ndambuki (ex-parte Applicant)*)[2023] eKLR:

“Court orders are legal pronouncements and commands that have the force of the law and are enforceable in law. They vest rights in parties. This court made specific orders, pronouncements and commands in Mombasa ELRC Constitutional Petition No. 2 of 2019 on October 6, 2019. The respondents disobeyed the said orders and continue to do so...

The culture of impunity in all its shapes and shades has no place in a civilized society like ours, and must come to an end. One cannot talk about the Rule of Law without talking about obedience of Court orders. Disobedience of Court orders is a vice that, if not checked, can eat into the fabrics that hold a society together.”

15. The Court of Appeal stated as follows in the case of *Shimmers Plaza Limited v National Bank of Kenya Ltd*[2015] eKLR:-

“unfortunately, what we have now is persons both ordinary mortals and persons in authority treating court orders with unbridled contempt, with blatant impunity. Was the respondent one such person.”

Unfortunately, the answer to this question is in the affirmative. The order was made in the presence of Counsel for the respondent who as stated earlier must be presumed to have informed the respondent of the same. He went ahead and transferred the property before the due date of the judgment, seemingly impatient to have this matter concluded once and for all. He acted in clear contempt of court. government institutions, state officers, banks and all and sundry are enjoined by law to comply with court orders. We must deprecate in the strongest terms possible the worrying trend in this country where court orders are treated with tremendous contempt by persons and institutions which think, wrongly of course, that they are above the law. We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26<sup>th</sup> President of the United States of America, once said:-

“no man is above the law and no man is below it; nor do we ask any man's permissions to obey it. Obedience to the law is demanded as a right, not as a favour.”

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and center. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the court



must be protected, and that is why those who flagrantly disobey them must be punished lest they lead us to a state of anarchy. We think we have said enough to send this important message across.”

16. The contemnors in the present case maintained that the claimant/applicant did not resign in February 2022 when she ought to have resigned and that complying with the court’s orders regarding her salary would be tantamount to aiding an illegality, and could lead to an audit query. The court held as follows in the case of *Martin Nyaga Wambora & 4 others v Speaker of The Senate & 6 others* [2014] eKLR :-

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“280. On the effect of disobedience of court orders, we cannot put it better than the court did in *Hadkinson v Hadkinson* [1952] 2 All ER 2011 where it was stated as follows:-

“ it is the plain and unqualified obligation of 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 even void...

A party who knows of an order, whether null or void, regular or irregular, cannot be permitted to disobey it....it would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular and who might be affected by it was plain. He should apply to the Court that it might be discharged. As long as it existed, it, must not be disobeyed. Such being the nature of this obligation, two consequences will in general flow from its breach.

The first is that anyone who disobeys an order of the court is in contempt of court and may be punished by committal or attachment or otherwise. The second is that no application to the court by such person will be entertained until he has purged himself of his contempt...”

17. The *Contempt of Court Act* was invalidated in its entirety by the High Court for lack of public participation in the case of *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR:-. The present application herein will therefore be determined on the basis of section 5 of the *Judicature Act* which provides:-

“(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 original criminal jurisdiction of the High Court.”

18. By dint of article 162(2) (a) of the *Constitution* of Kenya 2010, this Court is a Superior Court of coordinate status with the High Court of Kenya, and is seized of power and jurisdiction to punish for contempt of court pursuant to Section 5 of the *Judicature Act*. A court of law should never allow its orders to fall to the ground. Court orders must be obeyed and must serve the purpose for which they



are given and/or issued. The court stated in Wendano Matuu Co. Limited v Jobua Kimeu Kioko & 6 others, Philip Muli Munyaka [Interested Party] [2019] eKLR:-

“in my considered view, court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders, the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit, the same is valid unless set aside on review or on appeal. In *Econet Wireless Kenya Ltd v Minsiter For Infaormation and Communication of Kenya & another* [2005] IKLR 828, the Court stated:-

“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 contemnors. It is the plain and unqualified obligation of 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 the order believes it to be irregular or void.”

19. It was held as follows in Carey v Laiken [2015] SCC 17: -

“contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly depended on the ability of the courts to enforce their process and maintain their dignity and respect.”

20. The contemnors were aware of this court’s order dated October 25, 2022, the same having been served on the 1<sup>st</sup> and 2<sup>nd</sup> respondents, of which the four contemnors are Chief Officers. Indeed, the Contemnors never disputed knowledge of the order in their replying affidavits. They contemptuously deponed that they could not comply with the Court’s order. It is my finding that the four named contemnors; Mr. Jeizan Faruk, Mrs Justina Mwikya, Dr. Khadija Shikely and Ms. Pauline Odinga, are guilty of contempt of court, and that they must be punished accordingly.

21. The four contemnors shall personally appear before this court for mitigation and sentencing.

22. It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> MARCH 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for claimant/Applicant

..... for respondent



