Mberia & 3 others v County Secretary, County Government of Meru & 2 others; Kwiriga & 4 others (Interested Parties) (Petition 1 of 2022) [2023] KEELRC 637 (KLR) (3 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 637 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

PETITION 1 OF 2022

ON MAKAU, J

MARCH 3, 2023

BETWEEN

JOSEPH KITHURE MBERIA ..... 1ST PETITIONER

PAUL MWAKI ARIMI ..... 2ND PETITIONER

JOHN NTOITI ..... 3RD PETITIONER

KENNETH KIMATHI MBAE ..... 4TH PETITIONER

AND

COUNTY SECRETARY, COUNTY GOVERNMENT OF MERU .... 1ST RESPONDENT

MERU COUNTY PUBLIC SERVICE BOARD ..... 2ND RESPONDENT

GOVERNOR COUNTY GOVERNMENT OF MERU ..... 3RD RESPONDENT

AND

PATRICK MUGENDI KWIRIGA ..... INTERESTED PARTY

TONY KIRIMA ANONDO ..... INTERESTED PARTY

FRANCIS MUNGAI ..... INTERESTED PARTY

DANIEL MUTHURI KIMATHI ..... INTERESTED PARTY

MUREGA BAICHU ..... INTERESTED PARTY

RULING

1. On October 7, 2022, Marete J granted conservatory order restraining the respondents, their servants and/or agents from implementing the impugned decision contained in the letters to the petitioners

dated August 28, 2022, September 6, 2022 and September 7, 2022, which sent the petitioners to compulsory leave and further appointed other persons to act as Chief Administrative Officers in place of the petitioners. The order was to remain in force until the application dated October 4, 2022 was heard and determined.

2. On October 17, 2022 the claimants brought another Notice of Motion dated even date seeking the following orders:-

    1. That the application be certified urgent and be heard *ex-parte* and service thereof be dispensed with in the first instance.

    2. That this Honourable court be pleased to enjoin Mr patrick Mugendi Kwiriga, Mr tony Kirima Anondo, Mr francis Mungai, Mr daniel Muthuri Kimathi And Murega Baichu as interested parties/respondents for the purpose of this application.

    3. That the respondents be denied audience of the court until they purge the contempt;

    4. That summons to issue against the Respondents ;and the proposed interested parties to appear in person before the Honourable Court and show cause why they should not be committed to civil jail for such terms as the court may deem fit for contempt of court orders issued on the October 7, 2022 by Hon.Justice D.K.Njagi Marete;

    5. That the respondents and the proposed interested parties be cited for contempt of court and be committed to civil jail for a term of 6 months until they purge the contempt and complies with the Orders of this Honourable Court issued on the October 7, 2022.

    6. That this Honourable Court be pleased to grant any other order that it deems fit to ends of justice.

    7. Cost of this application be provided for.

3. The application is premised on the grounds set out in the body of the Motion and the Supporting Affidavit sworn by the 1st Petitioner on October 17, 2022. In brief the applicant contended that the order made on October 7, 2022 was served upon the respondents and the interested parties but they have blatantly failed or refused to allow the applicants back to their officers; that the respondents have instructed the interested parties to stay put in acting capacities; and that they have all vowed publically to disrespect the said court orders.

4. Further the applicants contended that every person, against whom an order has been made by a court of competent jurisdiction has plain and unqualified obligation to obey it unless and until the order is discharged. Consequently, the applicants urged the court to punish the Respondents and the interested parties for contempt of court to safeguard the authority of the court, sanctity of court orders and the rule of law, which is fundamental in the administration of justice.

5. The Respondents opposed the application vide a Replying Affidavit sworn on January 12, 2023 by Mr Rufus J M Miriti, County Secretary, who deposed that the petitioners are still employees of the County Government of Meru in their respective Boards and they are drawing their full employment benefits; that upon issuance of the conservatory order, the applicants were invited to resume work but they declined to do so; that the respondents hold judiciary and this court in high esteem and they would

not disobey directions issued by court; that if door locks were changed and goons deployed to bar the claimants entry to their offices, that was not under the control or instructions from the respondents; that the alleged actions by the interested parties and third parties have no nexus with the respondents and that the issues raised herein are now spent because they are the subject matter in Meru HC Petition No E024 of 2022 Hon.Kawira Mwangaza v County Assembly of Meru & Another. Consequently, they prayed for the application to be dismissed with costs.

6. In a supplementary affidavit sworn on January 16, 2023, the 1st claimant maintained that the respondents have publically vowed that they will not allow the claimants back to their offices and have deployed goons armed with crude weapons to prevent the claimants from accessing their offices; that the respondents have refused to cancel the letters deploying the interested parties to replace the claimants in position they held; that the letters sending the claimants to compulsory leave have also not been cancelled since the court order was issued on October 7, 2022; that the door locks have been replaced to deny the claimants access to their offices; and that the Meru HC Petition No E024 of 2022 deals with impeachment of the Governor by the County Assembly and therefore it has no relationship with the instant matter at all.

Submission

7. It was submitted for the applicants that the proposed interested party's are necessary in these proceedings because they were appointed to act in the positions held by the applicants as per the exhibits annexed to the petition herein. Further the interested parties have in disobedience of the court order acted on instructions from the respondents to stay put and not to allow the applicants back to their offices. Therefore the court was urged to allow joinder of the proposed interested parties in order to enable the court to effectively and completely adjudicate upon and settle at the questions in the petition.

8. As regards contempt of court order, it was submitted that there is a valid or unambiguous court order issued against the respondents, they are aware of it and/or they have been served with it but they have disobeyed it. Consequently, the court was urged to find that the respondents and the interested parties are guilty of contempt of court order made on October 7, 2022, and punish them by sending them to prison for six months.

9. To fortify the above submissions, the petitioners relied on several authorities including *Shimmers Plaza Ltd v National Bank of Kenya Ltd* (2015) eKLR where the Court of Appeal held that knowledge supersedes personal service of a court order. The applicants further submitted that the power to punish for contempt of court is provided under Section 5 of the *Judicature Act*.

10. On the other hand it was submitted for the respondents that the applicants are still employees of the County Government of Meru, they are drawing their full salaries and other benefits, no letters of termination or deployment or leave have been issued to them after the said court order, and no appointment letters have been issued to any other party by the respondents to replace the applicants from their job positions.

11. Further, it was submitted that the application is defective because it anchored on provisions of the *Contempt of Court Act* No 46 of 2016, which is non-existent, the same having been declared unconstitutional by the High Court in *Kenya Human Rights Commission v Attorney General & Another* (2018) eKLR. Consequently, it was submitted that the applicable law in contempt proceedings in Section 5 of the *Judicature Act* and the failure to invoke it has rendered the application fatally defective since the omission cannot be cured by Article 159 of the *Constitution*.

12. To fortify the foregoing submissions reliance was placed on the case of *Daniel Kimani Njihia v Francis Mwangi Kimani & another* (2015) eKLR and *Michael Mungai v Housing Finance Co. (K) Ltd & 5 others* (2017) eKLR where the Supreme Court held that litigants must be clear on the jurisdiction they are invoking, especially by invoking the correct provisions of the Constitution or statute because such omission is not mere procedural technicality to be cured under Article 159 of the Constitution.

13. It was further submitted that the application is sub-judice because the contempt of court issue is pending in Meru HC Petition No E024 of 2022 Hon.Kawira Mwangaza v County Assembly of Meru & another. Reference was made to the petition annexed as exhibit RM-2, paragraph 56, 57, 74 and 75 where the issue of contempt of court orders issued by this court are pleaded. The said issue was framed as a ground for impeachment of the Governor which necessitated 3rd Respondent to seek redress in the High Court. Consequently, it was submitted that the issue of contempt of court should be left to the Constitutional court to determine so as to avoid conflicting decisions over the matter. For emphasis, reliance was placed on the case of *Beatrice Muthoni Gathima & 2 Others v Arthur Wambugu Muiga & 4 others* (2022) eKLR.

14. As regards the merits of the application it was submitted that the applicant has not discharged the evidentiary burden of proof that the respondents have indeed disobeyed the court order, and the manner in which the orders was disobeyed. Further, the screenshots produced as exhibits are not authentic as no certificate of electronic evidence has been produced as required under Section 106 B (2) and 106 (4) the *Evidence Act*. Reliance was placed on *Aggrey Wafula v Public Service Commission & 5 others* (2022) eKLR where the court dismissed contempt proceedings for failure to produce evidence of probative value and failing to demonstrate the manner in which the orders were disregarded by the respondents.

15. Finally it was submitted that there is no evidence produced to show that the 2nd and 3rd Respondents disregarded the court order herein. For emphasis, reliance was placed on *Kenya National Union of Nurses v County Government of Meru & Another* (2022) eKLR where Marete J dismissed contempt proceedings for lack of evidence to disobedience of court order by the respondent. Consequently, the respondents urged this court to dismiss the application for want of proof of the alleged disobedience.

Determination

16. The issues for determination are:-

    a. Whether the application if fatally incompetent.

    b. Whether the application is subjudice.

    c. Whether the respondents and the interested parties should be cited for contempt of court order issued on October 7, 2022.

    d. Whether the proposed interested parties should be joined as such in the proceedings herein.

Fatal defect

17. The respondents contend that the application herein is fatally defective because it is brought under a non-existent law, *Contempt of Court Act* which was declared unconstitutional by the High Court in

2018. The applicants are in agreement that the proper law is Section 5 of the *Judicature Act*. I have carefully considered the objection by the respondents. Order 51 Rule 10(1) provides that:

> " Every order, rule or other statutory provisions under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."

18. The above rule has to be weighed against the decision of the Supreme Court in the case of *Michael Mungai v Housing Finance Co. (K) Ltd & 5 others* (2017) eKLR where the court strike out an application after holding that:-

> " In the case of Hermanus Philipus Steya v Giovanni Gunechi –Ruscone, Supreme Court, Application No 4 of 2012, this court was categorical that a court has to be moved under the correct provisions of the law. We reiterate that the only legal regime for the Supreme Court is the constitution, the *Supreme Court Act* and the Supreme Court Rules, 2012 (as amended). Hence it is preposterous for the applicant to purport to bring his application under other statutory provisions that are not the *Supreme Court Act*. It is sadder that he has the audacity to even invoke provisions of repealed pieces of legislations. No court can be moved on the basis of a repealed law. What right if at all does a repealed law give? The answer is clear: none."

19. The instant application is brought under Section 3, 4(1) (a), 5, 28 and 34 of the *Contempt of Court Act* No 46 of 2016, Section 1A and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law. Obviously the substantive provisions upon which the application is anchored is the *Contempt of Court Act* No 46 of 2016. It is common ground and the court takes judicial notice that the said statute was declared unconstitutional by the High Court. The said decision has not been set aside and I see no reason why I should not uphold it.

20. It follows that the jurisdiction of this court to punish the respondents has been invoked through a non-existent legislation. In Michael Mungai case, supra, the Supreme Court held that no right can be derived from a repealed law. The said omission is a substantive issue that goes to the jurisdiction of the court. It is not a mere technicality which can be cured by Article 159 (2) (d) of the *Constitution* and Order 51 Rule 10(1) of the *Civil Procedure Rules*. As the matters stand now, I must hold that the jurisdiction of the court was not properly invoked and the application is struck out with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 3RD DAY OF MARCH, 2023.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.