



**Nyairo v Teachers Service Commission & 3 others (Petition E015 of 2021) [2023] KEELRC 1326 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1326 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E015 OF 2021  
NZIOKI WA MAKAU, J  
MAY 8, 2023**

**IN THE MATTER OF: ALLEGED VIOLATIONS OF THE HUMAN RIGHT AND FUNDAMENTAL FREEDOMS IN ARTICLES 2, 3, 10, 19(1) & (2), 20(1) & (2), 21(1), 22(1), 23, 25 (A) & (C), 27 (1), (2), (3) & (5), 28, 29 (A), (C), (D) & (F), 31 (C) & (D), 35 (1) (B), 41 (1) (2) (B), 47 (1) & (2), 48, 50(1) & 2(D)(K) & (E),**

**AND**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF THE EMPLOYMENT ACT SECTIONS 5, 9, 10, 28, 30, 34 & 40;**

**AND**

**IN THE MATTER OF: EMPLOYMENT AND LABOUR RELATIONS COURT ACT NO. 20 OF 2011 SECTION 12**

**BETWEEN**

**CAROLINE KEMUMA NYAIRO ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**BOARD OF MANAGEMENT, NGENIA HIGH SCHOOL ..... 2<sup>ND</sup> RESPONDENT**

**JOHN KIPTANUI KOECH ..... 3<sup>RD</sup> RESPONDENT**

**WARUTERE PAUL WANAINA THE HEAD TEACHER NGENIA HIGH SCHOOL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner/Applicant herein filed the instant application on July 27, 2022 in which she seeks the following orders:



- a) Spent
  - b) That the Honourable Court be pleased and does hereby review, vary and or clarify its judgment issued on July 27, 2021 on the award of Five Hundred Thousand Kenya Shillings Only Kshs 500,000/- to the Petitioner as against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein.
  - c) That the Honourable Court be pleased and does hereby review and or vary its judgment issued on July 27, 2021 as regard the violation and or infringement of the Petitioner/Applicant's rights to fair hearing, fair trial and fair administrative actions.
  - d) That the Honourable Court be pleased and does hereby, vary and or review its judgment issued on July 27, 2021 as regards the violation and or infringement of the Petitioner/Applicant's rights to fair labour practices.
  - e) That the Honourable Court be pleased and does hereby hold the 1<sup>st</sup> Respondent's officers and agents in contempt of the Court Orders, Decree and or directions issued on July 27, 2021 by this Honourable Court.
  - f) That the Honourable Court be pleased and does hereby hold the 1<sup>st</sup> Respondent's Chief Executive Officer one Dr. Nancy Macharia in contempt of the Court Orders, Decree and or directions issued on July 27, 2021 by this Honourable Court.
  - g) Costs of the instant application.
  - h) Any other further orders and or relief the Honourable Court deems just and equitable to issue in the circumstances.
2. The application was supported by the affidavit of the Petitioner filed contemporaneously with the application as well as a further affidavit filed in reply to the affidavit dated September 27, 2022 by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  3. The application was canvassed by way of written submissions and the Petitioner/Applicant submits that the Court has the power to order a review under section 16 and Rule 33 of the Court Rules. It was submitted that the court has all the powers and discretion to exercise a wide jurisdiction in reviewing its own judgment. The Petitioner submits that the powers have to exercised judiciously. The Petitioner submits that the 1<sup>st</sup> Respondents herein communicated its disciplinary process's decision on or about 24<sup>th</sup> May 2021. At this point in time the parties were filing submission and were waiting for the court's judgment. The Petitioner submits that the disciplinary committee communicated to the Petitioner/Applicant the decision and not the reasons for the decision and that the Commission further communicated that the Petitioner/Applicant was to be suspended for four (4) months and she was thereafter to be redeployed and or reassigned. The Petitioner submits that it's now over six hundred and thirteen (613) day and over twenty (20) months from the date the 1<sup>st</sup> Respondent communicated its decision and that the period for suspension has ended and the 1<sup>st</sup> Respondent is yet to properly reappoint the Petitioner/Applicant and or redeploy her to any school.
  4. The Petitioner/Applicant submits that she has now gone over 20 months without a salary, allowance and or medical benefit care as her fellow teachers duly appointed teachers. It is submitted that this a miscarriage of justice arising from similar facts and that its only proper for the court to address itself to this new set of facts. The Petitioner submits that these new set of facts was not and could not be available to the Petitioner/Applicant as they are currently happening and the situation begun four



months after the court's judgment. The Petitioner submits that the court in its judgment in the first sentence of paragraph 13 stated as follows;

From a reading of the above it is amply clear that whereas there was infarctions by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, the infarctions would be such as to compel a court to order payment of compensation of Kshs 500,000/- for the infringement of the petitioner's rights. The 1<sup>st</sup> and 4<sup>th</sup> Respondent having shown not to have been malicious in their conduct escape this dragnet...

The Petitioner submits that the court proceeded to again state as follows: in the fourth sentence of the 13 paragraph as follows:

...in as far as this suit goes the relief, she gets is a declaration that the intrusive actions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are found to have been in contravention of the petitioner's right to dignity under articles 28 and 29 of the Constitution.

5. The Petitioner submits that the paragraph gives with one hand and takes with the other and that its not clear whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent have been committed to pay the sum of Kshs 500,000/-. She submits that this honourable court excused the 1<sup>st</sup> and 4<sup>th</sup> Respondents. She submits that it is not clear to her; and she seeks clarity on the subject.
6. The Petitioner submits that there is a breach, infringement and or curtailment of the constitutional dictates and rights of Petitioner/Applicant's by the 1<sup>st</sup> Respondent. The Petitioner submits that the 1<sup>st</sup> Respondent has clearly breached, infringed and or curtailed the petitioner's rights to a fair hearing, fair trial, access to justice, right of access to information and fair administrative action. She asks how can an administrative process take four years? Is there no conscience in the disciplinary process? How can an individual not know her fate for four years and unpaid due to an ongoing disciplinary process? How can a disciplinary process not be manifestly unjust when a decision is made 20 months ago and the Petitioner/Applicant having served her suspension cannot be redeployed and or returned to her employment position.
7. The Petitioner submits that the above are sufficient grounds for this court to review its judgment in light of the new facts that have arisen post the judgment of this court. Further to the above, the Petitioner submits that it's now manifestly clear that there was no report presented by the 4<sup>th</sup> Respondent. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have had all the time to present the same to this court and to the Petitioner/Applicant and in all times, they have failed to provide the same. She submits that its manifestly clear that this disciplinary process was fraught with irregularities and illegalities and the court is bound to review its judgment judiciously.
8. On the issue as to whether the Respondents are in contempt of court, the Petitioner submits that contempt of court is defined by the Black's Law Dictionary as follows:

“Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity. Committed by a person who does any act in wilful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to a proceeding therein, wilfully disobeys its lawful orders or fails to comply with an undertaking which he has given”.

9. The Petitioner submits that the High Court Constitutional Division at Nairobi, in Kenya Human Rights Commission v Attorney General & another [2018] eKLR declared the entire Contempt of Court



Act No. 46 of 2016 null and void due to lack of public participation. The Petitioner submits that the court in Republic v Principal Secretary, Ministry of Defence Ex Parte George Kariuki Waitihaka [2019] eKLR at paragraph 34 stated as follows:

“The Contempt of Court Act is however no longer operative as from the date of the judgment declaring it unconstitutional in Kenya Human Rights Commission v Attorney General & Another (supra)

.... I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court’s orders. It was in this respect observed in Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.”

10. The Petitioner submits that the court in Republic v Principal Secretary, Ministry of Defence Ex Parte George Kariuki Waitihaka (2019) eKLR restated the principles on the rule of law as detailed in Kenya Human Rights Commission v Attorney General and Another [2018] eKLR thus:-

“Lastly, it was also noted in Kenya Human Rights Commission vs Attorney General & Another (supra) that the Court has inherent powers to enforce its orders under Article 159 of the Constitution as follows:

“57. Article 159 of the Constitution recognizes the judicial authority of courts and tribunals established under the Constitution. Courts and tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with the Constitution and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.

11. The Petitioner submits that in the case of Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another CCT 19/11(75/2015) Nkabinde, J observed that: -

“The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”



12. The Petitioner cites the case of *Hon. Martin Nyaga Wambora and another v Justus Kariuki Mate & another* [2014] eKLR, where the Court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice.

It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim.”

13. The procedure for contempt existing before the enactment of the *Contempt of Court Act* No. 46 of 2016 is as provided by the Court of Appeal in *Christine Wanagari Chege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR. The Petitioner submits the court stated that the English law is applicable law pursuant to section 3 of *Judicature Act* and further as stated in section 5(1) of the *Judicature Act*, which provided that 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. The Petitioner asserts that the foregoing thus made Rule 81 of the English Civil Procedure Rules as the applicable law and procedure on breach of judgment, order or undertaking. The Petitioner submits that section 3 of the *Judicature Act* Chapter 8 Laws of Kenya makes common law applicable and that the English law is also applicable, more so, the English *Civil Procedure Rules of 1998* as variously amended thereafter.
14. The Petitioner cites the decision of the Court in *Republic v Principal Secretary, Ministry of Defence Ex Parte George Kariuki Waitbaka* [2019] eKLR which laid out the common law and English Civil Procedure Law that were applicable to contempt of court as follows:
- a) The terms of the order.
  - b) Knowledge of these terms by the Respondent.
  - c) Failure by the Respondent to comply with the terms of the order.
15. The Petitioner submits that the Court orders on surrender of documents within three days were very clear, they were not ambiguous and or subject to any misinterpretation. The Respondent’s counsel was present in court and cannot therefore claim that he had no knowledge of the contents and demands of the court’s directions.
16. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (hereinafter ‘the Respondents’) submit that the issues for determination are:-
- a. Whether the application meets the threshold for review
  - b. Whether the 1<sup>st</sup> Respondent is in contempt
17. On the first issue, the Respondents submit that Rule 33 of the *ELRC Procedure Rules* provides the parameters for review and submits that the application herein was made on July 27, 2022 which was a year after the judgment on July 27, 2021. The Respondents submit that there are no reasons or justification put forth on the bringing this application one year after the judgment was delivered. The Respondents submit that the Applicant herein is guilty of inordinate delay in bringing the purported



application for review. The Respondents submit that faced with a similar scenario, Onesmus Makau J. in *Unilever Tea (K) Limited v Richard Ombati Kiboma* [2021] eKLR held that

The said delay has not been explained by the applicant save that it was busy pursuing the respondent for directions on the decretal sum that was deposited as security. The explanation given if not plausible. In the circumstances I find and hold that the delay in making the application was unreasonable delay and not excusable.

18. The Respondents submit that this has been underscored by the court in the case of *Mathew Munga Mungai v Homegrown Company Limited* [2019] eKLR where the Court held the applicant therein was guilty of inordinate delay having filed the application 6 months after delivery of judgment. The Respondents cited the case of *Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute* [2018] eKLR where the court restated the parameters for consideration in an application for review one of them being that such applications should be brought without unreasonable delay. The Respondents submit that the Applicant is guilty of laches and the application is an afterthought which should not be countenanced by the court. The Respondents submit that the application has been brought belatedly and is unmerited and ought to be dismissed on this account only.
19. As to whether there an error apparent on the face of the record, the Respondents submit that the court clearly pronounced itself to the effect that the intrusive actions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, that the same were an infringement of the Petitioner's right to dignity under Article 28 and 29 of the *Constitution*. They submit that the court consequently exonerated the 1<sup>st</sup> and 4<sup>th</sup> Respondents. The Respondents submit that the upshot of the foregoing is that the judgment rendered by the court was aptly clear and unambiguous. The Respondents submit that the argument by the Petitioner is that the court failed to have the alleged sum of Kshs 500,000/- in its final determination. The Respondents submit that the Court did not make such an award. The Respondents submit that the Applicant extracted a decree on the judgment which did not reflect the allegedly omitted award. The Respondents submits that an error ought to be construed on the face of the judgment, however, the Applicant attempts to force a correction that would suit her prayers in the already spent petition. The Respondent submits that this argument is best suited for an appeal and not review. The Respondents submit that the Applicant has misconstrued and/or misunderstood the part of the judgment that is obiter dictum. The Respondents submit that there is no mistake or error apparent on the face of the record has been exhibited by the Applicant. The Respondent submits that the gist of the foregoing being that, the Applicant seeks alteration of the substratum of the judgment. In support of these arguments, the Respondents cited the cases of *Ekuru Aukot v IEBC & 30 others* [2017] eKLR and *National Bank of Kenya v Ndungu Njau* [1997] eKLR.
20. The Respondents submit that there is no discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by that person at the time the decree was passed or order made. The Respondents submit that the Petitioner had not produced any iota of evidence to substantiate her claim and that she only seeks to alter the substratum of the judgment. The Respondents submit that the application is disguised as a review albeit the same seeking this Honourable Court to reopen the case and litigate on matters already decided upon. The Respondent submits that this is a blatant breach of section 7 of the *Civil Procedure Act*. The Respondent cites the case of *Abdulkadir A. Khalif v Principal Secretary Ministry of Lands & Physical Planning & 4 others; National Land Commission & another (Interested Parties)* [2020] eKLR where the Court of Appeal held:-

Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*.



If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

21. The Respondents submit on the issue as to whether the 1<sup>st</sup> Respondent is in contempt by asserting that the 1<sup>st</sup> Respondent fully complied with the orders of the court by furnishing all the information and documents in its possession as ordered by the court vide a letter dated July 29, 2021 within the timelines set by the Court. It is submitted that it is trite that the Respondent could not send documents not within its possession. The Respondents submit that it is a settled principle that the first step to take prior to bringing the application for contempt is to serve the alleged contemnor with the court order in question. Secondly, the applicant is obligated to serve the alleged contemnor with a penal notice notifying them of any default in compliance with the court order. It is submitted that from the onset, no notice has to date been issued by the Applicant for the Respondents to make good such allegation of contempt, if any. The Respondents cite the case of *Woburn Estate Limited v Margaret Bashforth* [2016] eKLR where the Court of Appeal extensively discussed the procedure in commencing contempt of court proceedings. The Respondent submits that each stage of the procedure must be scrupulously followed and observed. They cite the cases of *Silverse Lisamula Anami v Justus Kizito Mugali & 2 others* [2017] eKLR and *Arkay Industries Ltd v Diamond Trust Bank & another* [2022] eKLR. The Respondents submit that the prayers for contempt before the court are a non-starter and the same bereft of merit and only fit for dismissal. The Respondents thus urge the dismissal of the motion with costs to the Respondent.
22. The application for review, must be made timeously and within the narrow confines of the law. The motion before me was made a whole year after the decision sought to be reviewed. The application seeks to have the Court additionally punish the alleged contemnors for contempt of court. No evidence has been adduced showing the order served, the penal notice issued and the manner of disobedience of the court order which the alleged contemnors were aware of. Contempt of court must be proved to a degree of particularity. It is beyond a balance of probabilities and the high mark of beyond reasonable doubt. There was no evidence adduced to suggest there is basis to find the Respondents in contempt.
23. On the alleged error apparent on the face of the record, the reading of the decision is clear. No orders were made in regard to the award of monetary compensation and as such there is no clarification to be made or any error on the face of the record. As such the motion before me is devoid of merit and is dismissed with costs to the Respondents.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MAY 2023.**

**NZIOKI WA MAKAU**

**JUDGE**

