



Kinoti & 3 others v Executive, Kenyatta University Chapter & 3 others; Kenyatta University (Interested Party) (Petition E043 of 2021) [2023] KEELRC 2028 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 2028 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E043 OF 2021**

SC RUTTO, J

JULY 31, 2023

BETWEEN

**FRANKLINE KABURU KINOTI 1ST APPLICANT
CRISPUS KOINANGE WAWIRE 2ND APPLICANT
ANTHONY WANYONYI WASENA 3RD APPLICANT
MOSES ONYANGO OPIYO 4TH APPLICANT**

AND

**EXECUTIVE, KENYATTA UNIVERSITY CHAPTER 1ST RESPONDENT
SECRETARY, KENYATTA UNIVERSITY CHAPTER 2ND RESPONDENT
CHAPTER ELECTIONS BOARD 3RD RESPONDENT
REGISTRAR OF TRADE UNIONS 4TH RESPONDENT**

AND

KENYATTA UNIVERSITY INTERESTED PARTY

RULING

1. The Applicants took out a Notice of Motion dated 13th October, 2021, brought under Sections 1A, 1B, 3A, 63 (e) of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 5 of the *Judicature Act*. The Motion which is supported by the grounds appearing on its face and the Affidavit of Mr. Frankline Kaburu Kinoti, seeks the following orders:
 - a. Spent



- b. That this honorable Court be pleased to make a factual finding that the 1st, 2nd and 3rd Respondents herein are in contempt of the Order of this Honorable Court dated the 20th Day of August 2021.
 - c. That the representatives of the 1st and 3rd Respondents together with the 2nd Respondent herein be summoned to appear in person before this Honorable Court to show cause why they should not be cited for contempt and be committed to civil jail for a period of six months or such a period and time as this Honorable Court may deem fit and just for willfully disobeying the lawful Orders of this Honorable Court dated the 20th Day of August 2021.
 - d. That the 1st, 2nd and 3rd Respondents do pay costs and interest on the costs of this application.
 - e. That the Court do make such orders or further orders as it may deem fair and just in the interest of justice.
2. The Applicants aver that: -
- a. the 1st, 2nd and 3rd Respondents have demonstrated willingness to defy the lawful orders of this court by all means.
 - b. in quest to such defiance, the said Respondents have violated the subsisting court order dated 20th August 2021 which order was duly served upon them and the said orders have not yet been vacated.
 - c. the 1st and 2nd Respondent have not made any attempt to update the voters' register as per the orders of this Court issued on the 20th August 2021.
 - d. the said Respondents without any justifiable cause continues, in a calculated, high-handed, flagrant and deliberate act of disobedience of this Honourable Court and prompted by malice and ill will, to infringe the petitioners right to free and fair elections as enshrined in the the constitution.
 - e. this Honourable Court is under an obligation to ensure strict compliance of the law and compel compliance when acts of contempt crane their ugly head or attempt to invite anarchy.
3. The Respondents opposed the Application through the Replying Affidavit of Prof. George Lukoye Makokha sworn on 2nd April, 2023. Briefly he avers that: -
- a. the Application was clearly being used for legal hedging purposes in alternative to the Applicant's Notice of Motion Application dated 5th September, 2022 whose ruling was delivered by this honourable court on 24th February, 2023. This explains why the Applicants did not bother to prosecute the instant Application, which was filed much earlier and only came back to court to resuscitate it immediately after the one filed on 5th September, 2022 failed to see light of day;
 - b. there is no contemptible act committed by the 1st, 2nd and 3rd Respondents given that the three supposed Respondents do not exist by virtue of the effects of the judgment of this honourable court delivered by Justice Rika on 20th August, 2021 considering that the said judgement abolished the said three offices;



- c. given that their mandate was judicially declared to be lacking by a court of competent jurisdiction, the 1st and 2nd Respondents therefore remain mere ordinary members of the union.
- d. consequently, as mere members of the union, they lack the mandate to act and or purport to act as officials of Kenyatta University's UASU Chapter in line with the clear provisions of section 35(6) of the [Labour Relations Act](#) 2007 as was suitably interpreted by this honourable court;
- e. immediately after this honourable court's judgment delivered by Hon. Justice Rika, the said Applicants moved to freeze the Chapter's Union Bank Account Number 01021059158700 held at National Bank's Ruiru Branch, which account has remained blocked since August 2021 and the Applicants never denied their role in the blocking of the said account even after they were served with the Respondent's Notice of Motion Application dated 2nd August 2022 which was ultimately withdrawn after the National Office of the Union stepped in to organise and finance the fresh elections at the Kenyatta University Chapter.
- f. the instant Notice of Motion seeking to cite the Respondents for contempt is dated 13th October 2021. By this date, the period within which the obligation for holding the fresh elections at Kenyatta University had not lapsed. Therefore, the Applicants' acts including the blocking of the Chapter Union's Bank Account as well as the instant motion only serve to disclose a pre-meditated conduct of attempted entrapment of the 1st and 2nd Respondents towards committing contempt of court.
- g. even if the honourable court had not declared that the 1st and 2nd Respondents did not have the mandate to run the affairs of the Union's Kenyatta University Chapter, it would still have been impossible for the Respondents to conduct the elections given that they would still have had no access to their bank accounts to enable them finance the conduct of the elections;
- h. he is advised by their Advocates on Record, which advice he verily believes to be correct, that the 1st and 2nd Respondents bear no responsibility and obligation capable of being enforced against them with regard to the management of the Kenyatta University's UASU Chapter considering that they are ordinary members of the Union with no leadership mandate to run the affairs of the Union.
- i. the responsibility for management of the Chapter, including that of organising elections, became the exclusive preserve of the National Office immediately the NDC resolved to have the National Office take over the management of the Chapter.
- j. the resolution, being pursuant to the orders of this honourable court as contained through its judgment delivered on 20th August 2021, appreciated fully well that there was a vacuum in the Chapter's leadership.



- k. consequently, the 1st and 2nd Respondents, being ordinary members of the Union with no leadership roles whatsoever, cannot be held accountable for the elections which is a management function.
- l. he is aware that the said elections were initially supposed to have been held on 15th September 2022 save that the instant Applicants obtained ex parte orders from this honourable court on 9th September 2022.
- m. the said orders stayed the elections pending the hearing and determination of the Notice of Motion Application;
- n. he is aware that pursuant to the discharge of the ex parte orders which had been granted to the Applicants on 9th September, 2022, the National Secretary General Issued notice dated 24th February, 2023 through which members were invited for the delayed AGM.
- o. he is aware that on 28th February, 2023, the UASU National Secretary General formally notified the Registrar of Trade Unions of the changes to the office bearers of UASU's Kenyatta University and sought to have the said new officials registered through his letter dated 28th February, 2023.

Submissions

4. The Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.
5. It was the Applicants' submission that the reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice and maintain public confidence in the administration of justice by courts. That without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. Placing reliance on the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, the Applicants further argued that for a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him, which the 1st, 2nd and 3rd Respondents have done.
6. The Applicants went on to argue that the 1st, 2nd and 3rd Respondents were served with the judgement through their advocates on record and they were therefore aware of the orders which were also binding to them. That specifically, orders (e) and (f) of the judgment were binding on the 1st, 2nd and 3rd Respondents.
7. It was the Applicants' further submission that the 1st, 2nd and 3rd Respondent were aware of the terms of the order specifically order (e) and (f) of the judgement as they even went to appeal the said judgment at the Court of Appeal.
8. It was the Applicants' position that despite the Appeal, the Respondents are still bound by the said orders as the same have not been set aside nor varied by the Court of Appeal.
9. The Applicants further contended that since the judgment was delivered on 20th August, 2020 and the same served upon the Respondents, they have not demonstrated any attempt to write to its members as to how the voters' register is going to be updated.



10. According to the Applicants, the judgement requires that the election be carried out within 60 days from the date of the judgment. That the 3rd Respondent is therefore in contempt as they did not make the effort to publish a date when the elections will be conducted as the order says the elections be carried within 60 days from date of judgement. In support of the Applicants' arguments, the Court was invited to consider the determinations in *Carey v Laiken*, 2015 SCC, *A.B. & Another v R.B.* [2016] eKLR and *T. N. Gadavarman Thiru Mulpad v Ashok Khot and Anor* [2006] 5 SCC.
11. On the part of the Respondents, it was submitted that a computation of time arising from the obligation of paragraph 30(f) of the judgement of the Court should have meant that the 60 days lapsed on 20th October 2021. Consequently, the fresh elections ought to have been held at the UASU Kenyatta University Chapter by 20th October 2021.
12. The Respondents stated in further submission that once the Court had found that the mandates of the 1st and 2nd Respondent had lapsed, it follows that the holders of those offices ceased being officials of the said Chapter. They therefore became ordinary members of the Union without any additional responsibilities. That the corollary to that declaration, was therefore to mean that the said Respondents had no obligation to organize the fresh elections as a result of the nullification of the elections held at the chapter on 25th March 2021. In the Respondent's view the Application seeking to cite them for contempt is wrongfully before this Court.
13. It was the Respondents further submission that based on the provisions of Sections 34(1) and 35(6) of the *Labour Relations Act* as read with Articles 14 and 19 of the UASU Constitution, the judgement of the Court left the Chapter destitute with lack of officials. That this reality caused an unmitigated quagmire that might not have been contemplated by the Court as without officials to run the affairs of the Chapter, there was no one left to assume the responsibility to implement the Court's judgement.
14. With regards to maintenance of the voter register, the Respondents argued that the same is tied to the parties responsible for organizing the elections. That the person organizing the elections must, ipso facto be the same one with the responsibility to update the register. Therefore, having established that the responsibility to organize the elections fell on the National Office of the Union, which responsibility was then taken up *vide* the NDC's Resolution of 17th December 2021, it also became the responsibility of the National Office to update the voter's register as required by the judgement of the Court.
15. Citing the case of Mwangi H.C. *Wang'ondu v Nairobi City Commission* Nairobi Civil Application No. Nairobi 95 of 1988, the Respondents further submitted that the offence of contempt of court is one that requires a very high threshold to be proved.
16. It was submitted that the Applicants have not demonstrated the existence of any contemptible conduct against the Respondents hence the Court was urged to dismiss the Application.

Analysis and determination

17. It is worth pointing out that despite the Application being filed on 13th October, 2021, the same was not determined in a timely manner as should have been the case. This was partly occasioned by the fact that the main suit proceeded for hearing before Hon. Justice Rika. As such, this Court was seized of the matter on 22nd November, 2022 following recusal of the learned Judge on 9th December, 2021. As it is, this Court's attention was drawn to the instant Application on 24th February, 2022, upon delivering a Ruling on the Applicant's Application dated 15th September, 2022.



18. From the record, the singular issue falling for the Court's determination is whether the 1st, 2nd and 3rd Respondents, willfully disobeyed the court's orders issued on 20th August, 2021 upon service and/or knowledge of the same.
19. In the Kenyan context, Section 5 of the *Judicature Act* confers jurisdiction on the superior courts to punish for contempt and uphold the dignity and authority of subordinate courts.
20. The *Black's Law Dictionary (9th Edition)*, defines contempt of Court to mean:

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.
21. Contempt can also be termed as the conduct or wrong doing that conflicts with, or challenges the authority of the court. An essential ingredient for successful contempt proceedings is that the alleged contemnor must have committed a willful or deliberate disobedience or breach of an order.
22. Courts have affirmed that the essence of contempt proceedings is to safeguard the supremacy of the law. Essentially, the reason courts will punish for contempt is to safeguard the rule of law, which is fundamental in the administration of justice. Indeed, without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice.
23. In the instant case, the Applicants seek to have the Respondents appear in Court and show cause why they should not be cited for contempt and be committed to civil jail for a period of six months or such a period and time as this Honorable Court may deem fit and just for willfully disobeying this Court's order of 20th August, 2021.
24. Contempt of Court is in the nature of criminal proceedings hence, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed. Restating this position, the Court in the case of *Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227, reckoned thus:

“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... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. 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... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”



25. Having perused prayer 3 of the Motion hereof, I note that it seeks to have the representatives of the 1st, 2nd and 3rd Respondents cited for contempt. The 1st, 2nd and 3rd Respondents are the University Academic Staff Union (UASU) Executive, Kenyatta University Chapter, the University Academic Staff Union (UASU) Secretary, Kenyatta University Chapter and the University Academic Staff Union (UASU) Chairman, Kenyatta University Chapter Elections Board. Notably, the officials sought to be cited for contempt have not been identified by name and it is not clear who they are. Put differently, the Applicants did not give the names of the UASU Executive, KU Chapter, the UASU Secretary, KU Chapter and the UASU Chairman of the KU Chapter Elections Board. The officials of the said positions are not parties to these proceedings. In the circumstances, who is being cited for contempt?
26. Given the nature of contempt of court proceedings, the onus was on the Applicants to be clear as to who the contemnors are and to effect service upon them appropriately.
27. In addition to the foregoing, it is notable that at the time Judgment was delivered on 20th August, 2021, the mandate of the officials who were in office at the time had since expired and further, the Court nullified the election results of 25th March, 2021, hence the 4th Respondent was directed not to effect registration. Thus the pertinent question, who were the officials responsible for complying with the court's order? This is bearing in mind the provisions of Section 35(6) of the *Labour Relations Act*, which bar a person who is not registered by the Registrar in accordance with the *Act*, from acting, or purporting to act as an official of a trade union.
28. Connected to the foregoing issue, the Respondents filed an Application dated 2nd August, 2022 seeking interpretation of the Court's orders with regards to the body with the mandate to call for elections. From the record, it is apparent that the said Application was not determined hence there was no clarity as to the body responsible for calling and conducting fresh elections.
29. In the case of *Carey v Laiken*, 2015 SCC 17 (CanLII), [2015] 2 SCR 79, it was determined that:
- “The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.”
30. And further, in the case of *Alfred Mutua v Boniface Mwangi* [2022] eKLR, the learned Judge reckoned thus:
- “ 22. In my view, considering the seriousness with which the Court takes contempt of court proceedings, every stage of the hearing must be expressly clear to the Defendant and any ambiguity must be resolved in favour of the Defendant since such proceedings are quasi-criminal in nature, otherwise a benefit of doubt would inure to the benefit of the Defendant.”
31. Applying the above determinations to the case herein, it is apparent that since the Application by the Respondents was not determined, the lack of clarity on the part of the Respondents as to who was responsible for calling and conducting fresh elections, was not resolved. Therefore, the doubt must be resolved in favour of the Respondents.
32. As has been stated herein, there cannot be deliberate and willful disobedience, unless the contemnor was well aware of his or her role in ensuring compliance with the Court's orders. This is moreso noting



that contempt is criminal in nature, hence it is essential that breach of the order be proved to the required standard, beyond reasonable doubt.

33. Another factor I find worth mentioning is that the Court directed that the voter's register be updated and upon inspection, the elections in respect of KU Chapter were to be held within 60 days. The instant Application was filed on 13th August, 2021 before expiry of the 60 days' timeline issued by the Court. Therefore, it cannot really be said that at the time the instant Motion was filed, there was contempt of the court's orders as the period given for compliance was still running.
34. Bearing in mind the circumstances of this case and in the interest of justice, I am not satisfied that the Applicants have proved their case to the required standard. Consequently, the Application dated 13th October, 2021 is disallowed with an order that each party will bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Mabeya instructed by Mr. Omari for the Petitioners/Applicants

Mr. Odhiambo for the 1st, 2nd and 3rd Respondents

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

