



Dzila v Kwale County Assembly Service Board & 6 others (Cause 21 of 2020) [2023] KEELRC 1942 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1942 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 21 OF 2020
M MBARŪ, J
JULY 27, 2023

BETWEEN

HAMISI BWENI DZILA CLAIMANT

AND

KWALE COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

COUNTY ASSEMBLY OF KWALE 2ND RESPONDENT

SAMMY NYAMAWI RUWA 3RD RESPONDENT

OMAR KITENGELE 4TH RESPONDENT

ANTHONY YAMA 5TH RESPONDENT

MWAKABURU HAMISI 6TH RESPONDENT

CELINE LUSWETI 7TH RESPONDENT

RULING

1. The claimant filed application dated 17 May 2022 seeking for orders that an injunction be issued against the respondents from proceedings with the disciplinary process until such time that they comply with the orders issued on April 1, 2022 and they be punished for contempt of court with committal to civil jail for breach of the orders of the court.
2. The application is supported by the claimant's affidavit and on the grounds that on 25 February 2022 this court delivered judgment and issued orders against the respondents restraining them from suspending him from office as the clerk County Assembly of Kwale on the grounds that the issues raised in these proceedings or other disciplinary proceedings commenced in accordance with Section 23 of the County Government Service Act. The court also directed that the suspension cannot be



- imposed by the County Assembly Service Board unless in accordance with the process under Section 23 of the Act. Further, that the 1st respondent should pay 50% of due costs.
3. On 10 March 2022 the claimant filed application seeking stay of the disciplinary hearing by the respondents pending determination of the appeal and on April 1, 2022 this court directed that the disciplinary proceedings against the claimant initiated by the respondents be temporarily stayed on condition that he be retained on full pay without reporting to work, typed proceedings be issued by 8 April 2022 and stay of execution to lapse on 29 April 2022 subject to the outcome as ordered by the Court of Appeal.
 4. On 21 April 2022 the claimant filed application seeking stay of execution pending appeal and which was certified urgent. There was no stay of execution after April 1, 2022 and this meant that the claimant's suspension was stayed and he would go back to work and the respondent would grant him access to his office pending the hearing of the matters before the Court of Appeal.
 5. However, in breach of the court orders, the claimant reported to work on 2 May 2022 but was denied access to his office and was not allowed to attend board meetings. On May 1, 2022 the board sent a letter to the claimant requiring him to attend a disciplinary meeting on 4 May 2022 but the notice was improper and he requested that there be proceedings on 20 May 2022 but there was no reply. The Board proceeded ex parte and that they had filed a motion to the County Assembly for his removal as clerk.
 6. On 13 May 2022 the Board sent communication to the claimant attaching letter for him to appear before the select committee on 16 May 2022 and the claimant replied and indicated he would not be able to attend but there was no reply.
 7. The board is in breach of the court orders herein by denying the claimant access to his office and should be punished for contempt.
 8. In reply, the respondents filed the replying affidavit of Seth Mwatela Kamanza the current speaker of the 1st respondent sworn in office on 21st September 2022 and the judgment herein delivered on 25 February 2022 was to the effect that the respondents were restrained from suspending the claimant from office as clerk of the County Assembly of Kwale on the basis that the issues raised in these proceedings or other disciplinary proceedings commenced as the case may be, unless, as the claimant may be found culpable in accordance with section 23 of the *County Assembly Services Act*, 2017 and in accordance with other laws. The court also issued a declaratory order that "suspend" in section 22 of the *County Assembly Service Act* means "remove" and "suspend" under the section should not be imposed by the County Assembly Service Board unless in accordance with and after conclusion of the due process as prescribed under section 23 of the Act.
 9. The 1st respondent was also directed to pay 50% of the claimants costs.
 10. Kamanza also aver that following judgment on 25 February 2022 the court allowed the respondents' disciplinary mandate over the claimant. The claimant reported back to work on 14 March 2022. The Board invited the claimant to appeal before it on 14 March 2022 as directed by the court. The claimant filled leave forms indicating that he required to prepare for the disciplinary hearing and the Board allowed the request.
 11. The Board then convened another meeting on 15 March 2022 and resolved to invite the claimant for disciplinary hearing on 21 March 2022 where he was to personally appear or through his advocate of choice. This letter as served through email. Upon service of the notice, the claimant moved the court seeking to stay the disciplinary hearing of 21 March 2022. The application is marred by intellectual



dishonesty and the claimant deliberately concealed this fact to the Board when he applied for leave which was granted. He has therefore come to court in bad faith. The claimant was given an office and allowed to work and later applied for leave to prepare for disciplinary hearing on 21 March 2022.

12. The application seeking stay to allow hearing at the Court of Appeal was heard and ruling delivered on 1st April 2022 and the court directed that the disciplinary process against the claimant be stayed on condition that he is retained on full pay and without reporting to the office and such stay to lapse on 29 April 2022 subject to the outcome at the Court of Appeal as otherwise, parties to comply with the judgment.

The stay order was to lapse until 29 April 2022.

13. The claimant reported back to the office on 2 May 2022 and then declined to subject himself to the biometrics system.
14. The claimant was accorded an office space which he declined to occupy. Since the orders of stay lapsed on 29 April 2022 the Board resumed the disciplinary hearing which had commenced against the claimant and notice issued dated 30 April 2022 but the claimant evaded physical service by Saidi Mwatsavwa the Sergeant at Arm and ChimnaSindi the Commissionaire wherein he informed them that they should not bother looking for him and that he would receive the letter on the date of the hearing on 4 May 2022. The notice was scanned and sent to the claimant via email on 2 May 2022 and via whatsapp on 1st May 2022 and the claimant acknowledged receipt.
15. On the due date for hearing, 4 May 2022 the claimant send text message to the speaker that he had reported to work and in reply was informed that the disciplinary hearing would be at 10AM and should attend but the claimant declined to attend and made reference to his advocates letter to the Board. The claimant was therefore at work on 4 May 2022 but deliberately refused to attend disciplinary hearing before the Board as required to exculpate himself. No reasons were given to justify non- attendance. Although the claimant was at work, was aware of the disciplinary hearing, he failed to attend.
16. The Board heard the claimant's case in his absence and adjourned to consider his response of 23 March 2020. The claimant was requested to make his written submissions through email of 4 May 2023 but he failed to make any submissions to the Board. The Board held that the claimant had failed to exculpate himself of the 4 charges made against him out of the total 8, and through letter dated 9 May 2022 a letter to this effect was served upon him followed with an email of 11 May 2022. The Board invoked section 23 (2) of the [County Assembly Services Act](#) by submitting a Notice of Motion to the Speaker of the Assembly and which motion sought to revoke the appointment of the claimant. The motion was tabled before the Assembly on 11 May 2022 after which a select committee of 11 members was established with a mandate to prepare report to the be tabled to the House. The select committee was tasked to investigate the 4 charges preferred against the claimant and to table their recommendations to the house. The claimant was invited to attend on 16 May 2022 through notice dated 13 May 2022 and which was served through email on the same date.
17. The claimant did not attend. Instead, his advocate sent an email dated 15 May 2022 to the committee indicating that he was held up in another matter in the High Court and would not make it.
18. On 16 May 2022 the claimant sent an email to the select committee and made reference to his advocates email. In the absence of the claimant, the select committee proceeded to consider the charges and evidence against the claimant and unanimously resolved that the 4 charges made against the claimant were justified and that it supported the Notice of Motion seeking to revoke the appointment of the claimant. The resolution was presented to the House and a resolution to revoke the appointment of



the claimant was passed on 17 May 2022. This resolution was brought to the attention of the claimant through email dated 18 May 2022 and subsequently through Gazette Notice No.5693.

19. Kamanza also aver that the claimant had filed application dated 19 April 2022 for stay pending appeal in he Court of Appeal in Civil Appeal No.E022 of 2022 set for hearing on 6 June 2022 and the respondents opposed the application and when parties attended for hearing on 6 June 2022 the claimant admitted that his application had been overtaken by events and withdrew his application which was allowed.
20. The claimant has since filed appeal against the judgment herein and which is active before the Court of Appeal being Civil Appeal No. E102 of 2022.
21. The constitution of the 1st and 2nd respondents has since changed and the previous members of the Board and Assembly have vacated office with new members which constitute;
Mwatela Kamnza as chairperson Hon. Victor Nyanje
22. Hon. Douglas Tsuma Chimako Edward Changa Chibu Mwanasha Bakari Mbwiza.
23. After the general elections held in August 2022 the 3rd and 4th respondents vacated office and the 1st respondent board has new members with a speaker.
24. This being a contempt of court application, the same is against individuals who are no longer members of the Board and as such cannot succeed against parties and persons unrelated to the initial claim and application should be dismissed with costs.
26. Submissions by the claimant were filed late without leave. The respondents did not file written submissions.

Determination

27. On the application by the claimant, the two orders sought of restraining the respondents from proceeding with the disciplinary process against him following court orders of 1st April 2022, such has since been overtaken by events since the disciplinary process sought to be stopped took effect on 17 May 2022 when he filed this application.
28. As to whether the respondents are in contempt of court and therefore be committed for contempt of court by civil jail for breach of orders of April 1, 2022, the subject orders issued by the court were that;
30.
 - i. The disciplinary proceedings against the applicant initiated by the respondents be and are hereby temporarily stayed upon the conditions that:
 - a. The applicant to retain full remuneration without reporting at the office
 - b. The Deputy Registrar to cause the typed and certified proceedings in the case to be expeditious ready and not later than April 8, 2022so as to facilitate parties to move the Court of Appeal as soon as possible and not later than April 29, 2022.
 - c. In any event, the stay of execution orders now granted herein to lapse upon close if April 29, 2022and subject to the outcome as may be ordered by the Court of Appeal, parties to otherwise comply with the judgment.
 - ii. Parties to bear own costs.

Is there contempt by the respondents as cited?



29. It is noteworthy that the instant application is dated 17 May 2022 but is being prosecuted way after a year. a lot has transpired in the interim.
30. There was a national general election in August 2022. The composition of the respondents has since changed and as confirmed by the Speaker of the 2nd respondent Mr Kamanza in his Affidavits, there are new members of the Board different and separate from persons cited in the instant application. The claimant in his application has not taken these changes into account.
31. An applicant in a contempt application has the onus to prove the existence of contempt and, in discharging this onus, the applicant must show this existence of contempt of Court beyond reasonable doubt. Demonstrate that there is disobedience of a court order, there is breach committed deliberately and mala fide. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt.
32. In the case of *Samuel M. N. Mweru & others v National Land Commission & 2 others* [2020] eKLR the court addressed these principles as follows;
- It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove
- i. The terms of the order,
 - ii. Knowledge of these terms by the Respondent,
 - iii. Failure by the Respondent to comply with the terms of the order.
33. In this case, the orders issued on 1st April 2022 cited above, the disciplinary proceedings against the claimant were stayed to allow him to report back to the office on full pay and to allow him access typed proceedings and to move the Court of Appeal by 29 April 2022 failure to which the stay orders would lapse.
34. What the claimant did on or before 29 April 2022 is crucial and important with regard to the instant application.
35. In his Supporting Affidavit dated 17 May 2022 the claimant aver that he reported back to work on 2 May 2022 and was denied access to his pale of work. He however acknowledges that on 1st May 2022, a Sunday he was issued with notice requiring him to attend before disciplinary hearing on 4 May 2022. These are matters post 29 April 2022.
- Did the claimant report to work after April 1, 2022?
36. Did the claimant file his appeal before 29 April 2022 as directed by the court?
37. Crucial to contempt of court proceedings, an applicant must demonstrate the deliberate disobedience of the stated court Order of April 1, 2022.
38. The court also directed that where the conditions under clause (i)(a) and (b) were not met, parties were to revert to the judgment of the court and which allowed parties to comply with the judgment, the claimant to subject himself to the disciplinary process of the respondents.
39. In this regard, the respondents invited the claimant to a hearing on 4 May 2022 but he failed to attend. Indeed the claimant was invited again through notice dated 13 May 2022 for the 15 May 2022 but he indicated through his advocates that he was attending to a matter at the High Court and therefore he could not attend. However, the claimant did not explain how such matter at the High Court related



to his employment whereas he had just requested for leave days, which ordinarily should be used to attend to personal matters and not time allocated for the employer.

The claimant therefore failed to attend as required by the employer.

40. In the case of *BIFU v Barclays Bank of Kenya* Cause 1660 of 2013 the court held that the employer cannot be faulted when an employee invited to a disciplinary hearing fails to attend without any justifiable cause.

41. In *Redlands Roses Limited v Kenya Plantations and Agricultural Workers Union* [2020]eKLR the court affirmed this position and held that;

The court finds that at all material time the employer set out to comply with the notice and hearing of the grievants per section 41 of the *Employment Act*, 2007. Those of the grievants that refused or failed to attend and participate in the disciplinary process cannot fault the employer and on a balance of probabilities, the procedure invoked by the employer in terminating the grievants' employment was not unfair on the tests in sections 41 and 45 of the *Employment Act*, 2007. As submitted for the employer, all the concerned employees had a

duty to take steps to attend the disciplinary hearings and if in doubt, take active steps to find out the next course of action.

42. In *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust* [2017] eKLR the court held that where an employee squanders the opportunity granted for a fair hearing, the employer is justified to terminate employment for gross misconduct as envisaged under section 44 of the *Employment Act*, 2007. The court held;

Where the employee has the right to a hearing, the employer has the right to terminate the employee upon following due process. Where an employee squanders the chance to be heard the employer cannot be found to have acted unfairly where great effort was taken and is demonstrated to have been applied to have the employee heard but such employee remained adamant and made irrational demands to avoid a hearing.

43. The claimant was granted an opportunity to go through the motions of the orders issued on April 1, 2022, the alternative was to subject himself to the disciplinary proceedings and when invited to attend, he opted to attend to other matters unrelated to his employment and service. He cannot blame the respondents for his in attendance and cite them for contempt of court. That would defeat the very justice the claimant is seeking to enforce in these proceedings.

44. An employee facing disciplinary action cannot be allowed to hold their employer to ransom by taking the position that they will only attend disciplinary proceedings at their convenience.

45. In these proceedings, the court has examined the facts and circumstances of this case and is satisfied that the respondent afforded adequate opportunity to the claimant to defend himself but he threw away the opportunity.

46. There can be no contempt on the part of the respondents as currently constituted or even as before constituted.

47. Application dated 17 May 2022 must fail and is hereby dismissed with costs to the respondents.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27 DAY OF JULY 2023.

In the presence of:



Court Assistant: Japhet Muthaine

M. MBARŪ JUDGE

..... **and**

