



Kenya County Government Workers Union Bungoma County Branch v County Government Of Bungoma & another (Petition 1 of 2019) [2023] KEELRC 1699 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1699 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION 1 OF 2019**

JW KELI, J

JULY 7, 2023

ON NOTICE OF INTENTION TO ACT IN PERSON AND NOTICE OF WITHDRAWAL OF SUIT BOTH DATED 18TH APRIL 2023 IN THIS PETITION AND IN JR. NO. E001 OF 2022

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION BUNGOMA COUNTY BRANCH PETITIONER

AND

BUNGOMA COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA 2ND RESPONDENT

RULING

On Notice Of Intention To Act In Person And Notice Of Withdrawal Of Suit Both Dated 18th April 2023 In This Petition And In JR No. E001 Of 2022

1. A judgment in the petition was delivered on the 13th May 2020 in favour of the petitioner. The execution process is ongoing the respondents having failed to comply fully with the judgment and specifically with the order to place all the 463 casual employees on payroll and pay salary arrears as ordered.
2. The petitioner’s advocate on record was Robert Wamalwa. The petitioner through the advocate filed Notice of Motion application dated 19th December , December 2022 for contempt of court proceedings against the respondents. While the hearing of the contempt proceedings was ongoing the petitioner’s official filed notice of intention to act in person dated 18th April 2023 received in court on the 26th April 2023. Further petitioner officials filed Notice of withdraw of the suit of even date and received in court on the 15th June 2023.



3. Similar notices were filed in Bungoma JR No E001 of 2022. The JR suit sought to enforce the judgment in this petition. On the 3rd May 2023 Mr. Makokha Advocate for the respondents informed the court that the notices of intention to act in person and notice of withdraw of the suit had been filed. Mr. Wamalwa informed the court that he had not been served with the said notices. Mr. Makhokha informed the court the judicial review proceedings had been commenced by the Exparte Applicant, the union petitioner, who had now filed notice to act in person and notice to withdraw the suit JR No. E001 OF 2022. The court found the Kenya County Government Workers Union Bungoma County Branch had further filed notice of intention to act in person and notice of withdrawal of suit in Jr No e001 of 2022 both notices dated 18th April 2023 and filed on even date of 26th April 2023. The ruling is then on the notices to act in person and notices to withdraw suit in this petition and in JR E001 of 2022.
4. The notices were contested by the petitioner's / Exparte Applicants' Advocate Mr. Robert Wamalwa. The court summoned the parties to appear before the court on the 29th May 2023. On that date the union officials and the deponent of the petition supporting affidavit Moses Muyundi who told the court he was elected shop steward after retirement appeared. Mr. Mukhwanu one of the officials told the court that his signature on the notices was forged. The other official confirmed they signed the notices. Mr. Makhoha advocate told the court that all the officials signed the documents in his office. Forgery is a criminal issue that would require proof beyond reasonable doubt. There was no proof besides the allegations by Mr. Mukhwanu on forgery. The court had no basis to establish the claim by Mr. Mukhwanu and established the notices to be by the petitioner/Exparte applicant.
5. The court further directed Mr. Wamalwa to file and serve the documents produced at the oral proceedings and all the parties to file submissions for a ruling to issue on the notices. The documents were filed on 30th may 2023 and the parties also filed their submissions on the notices.
6. Submissions by officials of the Petitioner/ Exparte Applicant dated 29th June 2023 filed by Ms.Mary Murongoro(Chair of KCGWU Bungoma County Branch); Mr. Florian S. Nganga(Secretary of KCGWU Bungoma County Branch); Mr. Winslaus Puria(Treasurer of KCGWU Bungoma County Branch. They stated that they were the legitimate officials of the Exparte Applicant and submitted as follows:-⁶
 1. We are the legal and legitimate officials of the Kenya County Government Workers Union(KCGWU) Bungoma county Branch and were gazetted by the Registrar of Trade Unions in Nairobi.
 2. It is instructive to note that all the legitimate union officials appeared in person and made their presentation before this Honorable court on 29th May 2023.
 3. We are aware Of the petition no 1 OF 2019 that was ruled in favour of the alleged Grievants that was delivered on 13th may 2020 by the Employment and labour Relations Court.
 4. We are also aware of the Judicial Review Application FOR contempt OF court No. 001 of 2022 by the Deponent , Mr. Moses Maelo Muyundi against the County Public Service Board and the county government of Bungoma, without our authority and consent as the Bungoma county Branch officials of the Kenya County Government Workers Union.
 5. We wish to inform this Honourable court that the Deponent on Moses Maelo Muyundi in the Petition and Judicial Review Application is not a bona fide



member and/or official of KCGWU Bungoma County branch in accordance with Article 4 of the Union Constitution , 2016 and therefore not authorised to transact any business on its behalf.

6. That the deponent retired from the County public service in April 2016 and has no legitimacy to file a suit in any court of law on behalf of the KCGWU Bungoma County branch as stipulated in article 4(4) of our Union constitution, 2016.
7. That as a Branch of KCGWU we are opposed to the contempt Application because the legitimate officials were not involved or consulted by the deponent before filing the said petition and judicial Review Application.
8. That there was no KCGWU Bungoma Branch County Branch Minute resolution that granted consent or power of attorney to Moses Maelo Muyundi to file any suit in the Employment and labour Relations County at Bungoma.
9. That the advocate on record for the Deponent Mr. Robert Wamalwa was not given instructions or hired by the KCGWU Bungoma County Branch. That is why the Union officials appeared in person.
10. The reason why we resolved to withdraw from the Contempt application by the deponent through his advocate on record Robert Wamalwa because there were two conflicting list of grievant (430 and 660), which could not be verified and authenticated without the intervention and direction of this Honourable Court.
11. We are opposed to the contempt of court application because of the political goodwill, positive gesture and willingness of the Respondents herein(i.e., County public Service board and the County Executive of Bungoma) through various Tripartite Consultative meetings with the Branch officials of the Union.
12. We wish to inform the Honourable court that the alleged Grievants in Petition No. 1 of 2019 are not registered members of Bungoma County Branch of the Kenya County Government Workers' Union. They are only eligible to join the union after being employed and /or confirmed on permanent and pensionable terms of the county government of Bungoma and upon payment of requisite registration fee and subscription fees stipulated in Article 4(2)b of our union Constitution, 2016.
13. That is all we can submit as the legitimate and lawful officials of KCGWU Bungoma County Branch representing the Ex parte applicant.”

Submissions by Robert Wamalwa Advocate

On whether the notice of intention to act in person dated 18/4/2023 had any legal effect

8. The counsel submits that the law is very clear on a party deciding to act in person (Order 9, rule 9.) change to be effected by order of court or consent of parties. ‘9.when there is a change of advocate , or when a party decides to act in person having previously engaged an advocate, after judgement has been passed , such change or intention to cat in person shall not be effected by order of court-(a) upon an



application with notice to all parties ; or(b) upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be...”

9. That there is judgment on record on judicial review which was delivered on 7/7/2022. The officials of ex parte applicant ought to have obtained leave of the court by consent and or through application. This was not the case in this case. In the case of *James Ndonyu Njogu Vs Muriuki Macharia* 2020 eKLR the court stated as Follows as page 2 a7 3 paragraphs 4,5& 6.

“ 4. pursuant to the Respondent having raised the grounds of opposition dated 22nd January 2020, to the effect that the Application was fatally defective as it contravened the provisions of order 9 rule 9(a) of the Civil Procedure rules, The court notes that the applicant then filed a consent dated the 6th February 2020 in which the firm of M/S Nyiha, Mukoma & Company Advocates purported to come on record for the Applicant in place of M/S Magua & Mbathe Advocates who had previously been on record for the Applicant. The consent, according to the Court’s record has not been adopted as an order of the court.

5. Order 9 Rule 9 of the Civil Procedure rules, 2010 provides for change of Advocates to be effected by order of court or consent of parties to wit:

When there Is a change of Advocate, or when a party decides to act in person having previously engaged and advocate, after judgement has been passed, such change or intention to act in person shall not be effects without an order of the court-

- a. upon an application with notice to all the parties; or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”

10. That the provision of order 9 Rule 9 of the *Civil Procedure Rules* make it to mandatory that for any change of Advocates after judgement has been entered to be effected , then there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of *S.K.Tarwadi vs Veronica Mueblmann*(2019) eKLR where the judges observed as follows:

“in my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him.....” In the case of *Lalji Bhimji Shangani Builders & Contractors – vs- County Council of Nairobi* (2012)eKLR the court held as follows:-

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of procedure the court as may well be entitled to conclude that failure to comply therewith was deliberate.” The court went further to quote with approval the holding by Hon. Sitati Judge, in *Monicah Moraa -vs- Kenindia Assurance Co. Ltd*(200)eKLR where the court held as follows;

“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s advocates intent to come on record after delivery



of judgment. There are specific provisions governing such change of advocates. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co has not complied with the Rules but instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issues of representation is vital component of the Civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached....”

11. Counsel submitted further that equally in the case of *Julieta Marigu Njagi -vs- Virginia Njoki Mwangi* (2022) eKLR at page 6 &7 the court stated as follows:-

“24. I have looked at the case of Florence Hare relied upon by counsel for the plaintiff. The said case did not in any way determine that non-compliance with the provisions of Order 9 rule 9 of the Civil Procedure Rules was a procedural technicality. If anything, the court expunged from its record the application filed by counsel who had failed to comply with such provisions and rendered all proceedings emanating from the said counsel as irregular. In that case of Florence Hare Mkaha V Pwani Tawakal Min Coach & Another(2014) eKLR the court held as follows:

“in both those occasions the two advocates did not obtain an order of the court to take over the conduct of plaintiff's case. Much more Shikely advocate was not properly on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff's case. In this regard I am in agreement with finding of the Court in the case John Langat vs Kipkemoi Terer & 2 others (2013)eKLR where Justice Justice A.O. Muchelule faced with similar circumstances stated.

“there was no application made to change advocates. In the replying affidavits, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgement. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important , the consent could not effect the change of advocates “without an order of the court.”

No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.” It follows that the execution application filed by MR. Kinyua Njagi & Co. Advocates was therefore filed by a firm not on record and that application is therefore hereby expunged from the record.

It follows that execution that flowed from that execution application was irregular and without legal basis. The court will order the costs of the auctioneer be paid by the firm of Kinyua Njagi & Co. Advocates”.

25. the case of Florence Hare can be distinguished from the case before me in that the advocate who granted consent was not the advocate on record pre judgment. There is also the case of John Langat which had similar circumstances as the one before me. I will however rely on the reasoning I both cases to the extent that despite obtaining consent from the previous counsel,



the provisions of order 9 Rule 9 of the Civil Procedure Rules require that there must be leave of court when coming on record post judgment.”

12. The counsel submits that basing on the above provisions of the law and cited cases it is not in doubt that the notice of intention to act in person dated 18/4/2023 is baseless and has no legal effect on litmus paper and the same should be expunged from the court file.
13. Submissions of the 1st, 3rd, 4th 5th & 6th respondent’s written submissions dated 28th June 2023 filed by Makokha Wattang’a & Luyali Associates. The court noted the submissions were on the contempt proceedings and on the notices to withdraw and not on notice of intention to act in person. The court had earlier directed parties to file submissions on the contempt application following the hearing of the case inter partes and before the issue of the notices came up. For procedural neatness it was necessary to dispose of the issues under the notices first. The ruling on the contempt was held in abeyance.

Decision on Notice to act in person

14. The applicable law is order 9 rule 8 and 9 of the Civil Procedure Rules to wit:- ‘8. Notice of intention to act in person [Order 9, rule 8.] (1) Where a party, after having sued or defended by an advocate, intends to act in person in the cause or matter, he shall give a notice stating his intention to act in person and giving an address for service within the jurisdiction of the court in which the cause or matter is proceeding, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of intention to act in person, with the necessary modifications. (2) The address for service given under subrule (1) shall comply with Order 6, rule 3. 9. Change to be effected by order of court or consent of parties [Order 9, rule 9.] When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.’
15. The court agreed with authorities cited by the applicant above on the jurisprudence on notice of change of advocates after judgment. Article 159 (2)d) of the constitution States, ‘justice shall be administered without undue regard to procedural technicalities;’ Under order 9 (9) of the Civil Procedure Rules the court has power to grant order of change of advocates on notice to all parties. The notice of change was filed though not under application and the parties were heard orally on the notice. The court holds that the advocate cannot force themselves into a case or give themselves instructions. The mischief sought to be addressed under order 9 rule 9 of the Civil Procedure Rules was declared in S.K.Tarwadi vs Veronica Muehlmann (2019) eKLR where the judges observed as follows:

“.....in my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him.....” Mr. Robert Wamalwa Advocate did not state his fees had not been settled. The court finds that the advocate will suffer no prejudice if leave is granted to the petitioner/exparte applicant to act in person as his only claim would be to legal fees of which a procedure for recovery against client exists under the Advocates Remuneration Order as gazetted by the Chief Justice from time to time.
16. In the upshot the court finds it tantamount to servitude to force an advocate on a client and further the mischief of costs as stated in was covered. The court grants leave to the exparte applicant/petitioner to act in person and the notices of intention to act in person in both this petition and the JR Suit No. E001 of 2022 of even date of 18th April 2023 are deemed as duly filed. Mr. Robert Wamalwa is relieved of any duties to the court as officer of the court in the instant case and in JR No. E001 of 2022.



Notice to withdraw suit.

17. The parties were heard orally and filed submissions . The notices filed to withdraws the suit and the Jr suit no. E001 of 2022 were all dated 18th April 2023 and signed by the officials of Petitioner/ Exparte Applicant. The notice had same content and the notice filed in JR E001 OF 2022 states as follows:- ‘ Notice Of Withdraw Of Suit. Take Notice that the Exparte Applicant the Kenya County Government Workers Union Bungoma Branch herein has unconditionally and voluntarily withdrawn this case against the interested parties herein in its entirety.’ The court did not understand the purpose of this notice as there was no case by the exparte applicant against interested parties. The suit was against the 1st and 6th respondents.
18. In notice to withdraw filed in this Petition, the contents were as follows:- ‘notice Of Withdraw Of Suit. Take Notice that the Exparte Applicant the Kenya County Government Workers Union Bungoma Branch herein has unconditionally and voluntarily withdrawn this case against the interested parties herein in its entirety.’ The court did not understand the purpose of this notice as there was no case by the exparte applicant against interested parties. The suit was against the 1st and 6th respondents.
19. The exparte applicants at the hearing were emphatic that they were not withdrawing the suit but wished to negotiate. In their written submissions they submit:- ‘The reason why we resolved to withdraw from the Contempt application by the deponent through his advocate on record Robert Wamalwa was because there were two conflicting list of grievant (430 and 660), which could not be verified and authenticated without the intervention and direction of this Honourable Court. We are opposed to the contempt of court application because of the political goodwill, positive gesture and willingness of the Respondents herein(i.e., County public Service board and the County Executive of Bungoma) through various Tripartite Consultative meetings with the Branch officials of the Union.’
20. The court finds that the intention of the petitioner/exparte applicant was not to withdraw the instant petition or the JR E001 of 2022 but the contempt proceedings to enable tripartite negotiations. The court did appreciate the submissions of the Counsel Mr. Wamalwa on the issue of court being *functus officio* as follows:- ‘This court is *functus officio* just the way the Doctor is *functus office* to recommend abortion to a woman who has already given birth. In this case of [HMI = VS = KBH](#)(2022)eKLR at page 5 & 6 Paragraph 16,17 & 18 stated as follows:-

“ 16. The supreme court in the case of Raila Odinga & 2 others V independent Electoral & Boundaries Commission & 3 others (2013) eKLR while discussing the doctrine of *functus officio* had this to say ;

“we therefore , have to consider the concept of “*functus officio*” as understood in law. Daniel Malan Pretorius, in “The origins of the *functus officio* Doctrine, with specific reference to its Application in Administrative Law ,” (2005) 122 SALJ 832, has thus explicated this concept:

“the *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.....the (principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision - maker.”



21. The Court of Appeal in the case of *Telkom Kenya Limited V John Ochanda(Suing on his own Behalf And On Behalf Of 996 Former Employees Of Telkom Kenya Limited)* (2014) eKLR state thus:-“Functus official is an enduring principle of law that prevents the reopening of a matter before a court that rendered the final decision thereon.” Similar position was held in the case of *John Gilbert Ouma v Kenya Ferry Services Limited* (2021)eKLR where the court stated that:-

“it is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein.”

22. The respondents submissions on the notice to withdraw were as follows: - ‘The officials of the Ex Parte Applicant who appeared before this court on 29th may 2023 and pursuant to the Notice of Withdrawal of suit dated 18th April 2023 and filed in court on 26th April 2023 stated at no time or at all did they instruct the deponent one Moses Maelo Muyundi to file the contempt proceedings against the Respondents. The Ex Parte Officials also stated that the said Moses Maelo Muyundi dd not have their authority and or consent as the official of the Kenya County government of Workers union to file the Judicial Review and the Contempt proceedings against the Respondents herein.

a. That during the cross examination of the said Moses Maelo Muyundi, he admitted that he had retired from the Bungoma county Public Service in April 2016 and therefore as per the constitution of the Kenya County government of Workers union he could not file nor represent people who are not members of the union as stipulated in Article 4(4)(iii)of the *constitution*. The officials of the Ex parte Applicant stated that they had not given any instructions to Robert Wamalwa & Co Advocates to file any contempt proceedings against the Respondents herein.”

23. The court holds that the rights for the beneficiaries of the judgment dated 13th May 2020 under the petition crystalized. That the court is *functus officio* as held in Court of Appeal in the case of *Telkom Kenya Limited V John Ochanda(Suing on his own Behalf And On Behalf Of 996 Former Employees Of Telkom Kenya Limited)* (2014) eKLR state thus:-

“Functus office is an enduring principle of law that prevents the reopening of a matter before a court that rendered the final decision thereon.”

24. The court holds there is no suit to be withdrawn. The notice of withdrawal dated 18th April 2023 in this petition and as file din JR No E001 of 2022 is struck out.

25. The court suspends the contempt application for 60 days in view of the exparte applicants wish to negotiate tripartite as stated at oral hearing and in the submissions.

26. Parties to take directions on other outstanding applications in this petition and in the JR Suit No. E001 of 2022.

27. Each party to bear own costs

PARA 28.

It is so ordered.

DATED, SIGNED AND DELIVRED IN OPEN COURT AT KAKAMEGA THIS 7TH DAY OF JULY 2023

JEMIMAH KELI



JUDGE

In The Presence of:

Mr. Makokha for the respondents

Exparte applicant- Robert Wamalwa

Mr. Wamalwa

I seek leave to appeal and for typed and certified proceedings.

Mr. Makokha.

No issue.

Court Order

Mr. Robert Wamalwa is granted leave to appeal against the ruling on the notice to act in person. To be availed typed and certified proceedings on application.

It is so ordered.

JEMIMAH KELI

JUDGE

July 7, 2023

