



**Kenya Union of Clinical Officers (KUCO) v Baringo County & 46 others;
Council of Governors (Interested Party) (Employment and Labour Relations
Petition 211 of 2019) [2023] KEELRC 1641 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1641 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION 211 OF 2019
MA ONYANGO, J
JULY 6, 2023**

BETWEEN

KENYA UNION OF CLINICAL OFFICERS (KUCO) PETITIONER

AND

BARINGO COUNTY & 46 OTHERS RESPONDENT

AND

COUNCIL OF GOVERNORS INTERESTED PARTY

RULING

1. There are two applications before me for determination. The application dated May 18, 2021 and the one dated July 16, 2021.
2. The application dated May 18, 2021 has been brought by the 27th Respondent/ Application seeking for orders that;
 - i. Spent;
 - ii. That this Honourable Court be pleased to discharge, vacate and /or set aside the orders issued by the Honourable Justice James Rika on December 16, 2020 specifically Order 3 thereof;
 - iii. That the costs of this Application be in the cause.
3. The application is supported by grounds on its face and the supporting affidavit of Mativo Mang'era, the 27th Respondent's County Attorney. The grounds upon which this application is made are that, this court issued orders dated December 16, 2020, inter alia directing the 27th Respondent/Applicant to pay the workers their November and December, 2019 salaries; that the order was issued following a



hearing of the Notice of Motion Application dated October 27, 2020 on December 10, 2020. That the 27th Respondent /Applicant was neither served with the Petition nor the impugned Notice of Motion Application dated October 27, 2020 as required and therefore was not afforded an opportunity to be heard; that the proceedings in this matter leading to the aforesaid order took place in the absence of the 27th Respondent /Applicant; that the 27th Respondent/Applicant only learnt of this matter on December 17, 2020 upon receipt of the order issued on December 16, 2020 from counsel for the Petitioner; that the 27th Respondent was condemned unheard contrary to Article 50 of the Constitution and the rules of natural Justice.

4. The Petitioner opposed this application and filed a Replying Affidavit sworn by George Gibore, its Secretary General on July 15, 2021. According to him, the strike of November 1, 2019, the events that led to it and the Petition herein, the orders made on December 16, 2019, the calling off of that strike and resumption of duty by the Petitioners' members were matters of public knowledge and interest and it was dishonest for the Applicant to claim that it was not aware of the proceedings. Mr Gibore avers that as a matter of fact, the initial orders of December 16, 2019 were made in the presence of the Counsel of the Council of Governors who must be taken to represent all counties. That the counsel for the Council of Governors did not object to the oral application and all the other County Governments except the 27th Respondent complied with the orders of the court of December 16, 2019.
5. The court was urged not to entertain the 27th Respondent until it complied with the orders of this court like the other Counties.
6. The second application dated July 16, 2021 was filed by the Petitioner/Applicant seeking for orders that;
 - i. Spent,
 - ii. That the Court be pleased to declare and hold that, having been served / being aware of the orders made by this court on December 16, 2020, Migori County Government, the 27th Respondent herein, its County Secretary Christopher Odhiambo Rusana, its County Attorney, Matiko Mang'era, its Secretary and Chief Executive Officer of the County Public Service Board, Martin Arondo Shikuku and the entire board members, have disobeyed those orders and hence in civil contempt of court.
 - iii. That the said 27th Respondent, its County Secretary Christopher Odhiambo Rusana, its County Attorney, Matiko Mang'era, its Secretary and Chief Executive Officer of the County Public Service Board, Martin Arondo Shikuku and the entire board members be sanctioned as this court may deem fit and appropriate including committing to civil jail for a period of 6 months, of the said Christopher Odhiambo Rusana, Martin Arondo Shikuku, Mativo Mang'era and all the members of the County Service Board.
 - iv. The Contemnors herein be denied audience by this Honourable Court and any other Employment and Labour Relations court including on their motion dated May 18, 2021, until they purge the Contempt of court which has impeded and continues to impede the course of justice in this matter.
 - v. The costs of this application be borne personally, jointly and severally by the contemnors, on full indemnity basis.



7. The Application is opposed by the 27th Respondent vide the Replying Affidavits sworn by Christopher Odhiambo Rusana on February 18, 2021(sic), Mativo Mang'era sworn on February 18, 2021(sic), Martin Arondo Shikuku sworn on February 18, 2021(sic). The said affidavits are dated February 18, 2021 way before the application was filed and I would assume that this was a clerical error.
8. Be that as it may, the deponents reiterate the same issues in those Replying Affidavits in opposition of their committal to civil jail for being in contempt of the court orders. It is averred that the Petitioner seeks to unfairly subject the 27th Respondent and its cited officers to committal proceedings and that the same has been brought in bad faith.
9. The 27th Respondent contended that it is in the interest of justice that the 27th Respondent be heard first on its application to set aside the impugned orders before the parties can be heard on the application for Contempt.
10. On November 17, 2021, the court directed that the applications be canvassed by way of written submissions. I have perused the record and the submissions of both parties with regards to the two applications.

DETERMINATION

11. From the two applications before me, the rival affidavits and the submissions thereon, it would appear that the only issue that fall for my determination is a consideration on whether the orders sought in the two applications are mentioned.
12. As mentioned, the 27th Respondent in its application dated May 18, 2018 is seeking to set aside the orders of the court delivered on December 16, 2020. However, from the record, the matter was not in court on the said date and no such orders were issued.
13. The correct position is that the orders that the 27th Respondent is seeking to set aside, which are the same orders that the Petitioner is seeking to have the 27th Respondent's officers cited for contempt and committed to civil jail disobeying orders made on December 10, 2020 in open court by my brother Rika J. The orders were as follows;
 - i. The Petitioner is directed to serve, or serve again, the Amended Petition on all the Respondents
 - ii. The Respondent shall within 14 days of receiving Amended Petition, file their respective replies.
 - iii. Migori County Government is ordered to pay the workers their November and December 2019 salaries, like the other County Governments have done in compliance with the orders of the court.
 - iv. The Petition shall be mentioned on January 27, 2021.
14. The 27th Respondent sought that the said orders be discharged, vacated or set aside on the grounds that they were neither served with the Petition nor the impugned application, dated October 27, 2020 which gave rise to the said ruling.
15. The Petitioner on the other hand has argued that counsel for the interested party was in court during the pendency of the proceedings which culminated to the said ruling and as such, it was common knowledge that he would communicate the same to all the Respondents, the 27th Respondent included, on the orders that the court had made.



16. It is evident from the record that the 27th Respondent was not represented in court on the day the orders were granted and may not have been aware of the proceedings by the petitioner in court against it.
17. From the 27th Respondent's application dated May 18, 2021, the question that comes to mind is what purpose the orders sought by the 27th Respondent will serve considering the circumstances of this case.
18. As was stated by the court at the time of issuing the orders, all county governments had complied with the court orders to pay the salaries of staff whose salaries had been stopped during the period they were on strike in November and December 2019 as ordered by the court on December 16, 2019.
19. It is my view that even if the court was to grant the orders sought by the 27th Respondent, considering the fact that the cause of action affected Petitioners and all the County Governments herein, the 27th respondent will eventually still have to comply with those orders in the interest of justice, that is if it has not already complied. This was an action against all the county governments and the 27th Respondent cannot expect to be treated differently even if it was not in court as the same circumstances applied to all the county governments.
20. On the application to commit the officers of the 27th Respondent to civil jail for non-compliance with the court orders, the Petitioner in the Replying affidavit conceded that there was no service of the court orders upon the alleged contemnors. It is also common ground that the 27th Respondent was not represented in court on the date the orders were made. A person cannot be punished for disobeying an order that has not been served upon him or proved to have been brought to his attention by some other acceptable means. I find that the Petitioner has not proved that the alleged contemnors deliberately disobeyed court orders as alleged by the Petitioner.
21. Based on the foregoing, I make the following orders;
 - a. The applications dated May 18, 2021 and July 16, 2021 are hereby dismissed with no orders as to costs.
 - b. The 27th Respondent is hereby directed to comply with the court orders of December 10, 2020 if it has not already done so, within 90 days from today.

DATED, SIGNED AND DELIVERED VIRTUALLY

AT ELDORET ON THIS 6TH DAY OF JULY, 2023

MAUREEN ONYANGO

JUDGE

