



Mberia & 3 others v County Secretary, County Government of Meru & 2 others; Kwiriga & 4 others (Interested Parties) (Petition 1 of 2022) [2023] KEELRC 2310 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2310 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
PETITION 1 OF 2022
ON MAKAU, J
SEPTEMBER 29, 2023

A. THAT THE RESPONDENTS ARE HEREBY CITED FOR CONTEMPT OF THIS COURT’S ORDER ISSUED ON 7TH OCTOBER, 2022 BY FAILING TO ALLOW THE APPLICANTS BACK TO THEIR OFFICES AND FURTHER BY WITHHOLDING THEIR SALARY FOR NOVEMBER, 2022 TO FEBRUARY,2023.

B. THE FIRST RESPONDENT MR. RUFUS MIRITI OR HIS SUCCESSOR IN TITLE IS HEREBY SUMMONED TO ATTEND VIRTUAL COURT PERSONALLY ON 12TH OCTOBER, 2023 AT 9.00 AM, TO SHOW CAUSE WHY THE RESPONDENTS SHOULD NOT BE PUNISHED FOR CONTEMPT OF COURT.

C. UNTIL THE CONTEMPT IS PURGED THE RESPONDENT WILL HAVE NO AUDIENCE BEFORE THIS COURT.

D. THE APPLICANTS ARE AWARDED COSTS OF THE APPLICATION.

BETWEEN

JOSEPH KITHURE MBERIA 1ST PETITIONER
PAUL MWAKI ARIMI 2ND PETITIONER
DR JOHN NTOITI 3RD PETITIONER
KENNETH KIMATHI MBAE 4TH PETITIONER

AND

COUNTY SECRETARY, COUNTY GOVERNMENT OF MERU 1ST RESPONDENT
MERU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT
THE GOVERNOR, COUNTY GOVERNMENT OF MERU 3RD RESPONDENT

AND



PATRICK MUGENDI KWIRIGA INTERESTED PARTY
TONY KIRIMA ANONDO INTERESTED PARTY
FRANCIS MUNGAI INTERESTED PARTY
DANIEL MUTHURI KIMATHI INTERESTED PARTY
MUREGA BAICHU INTERESTED PARTY

RULING

1. On 7th October 2022, Marete J granted conservatory order restraining the respondents, their servants and/or agents from implementing the impugned decision contained in the letters to the petitioners dated 28th August 2022, 6th September 2022 and 7th September 2022, which sent the petitioners to compulsory leave and further appointed other persons to act as Chief Administrative Officers in place of the petitioners. The order was to remain in force until the application dated 4th October 2022 was heard and determined.
2. The petitioners brought the instant Notice of Motion dated 11th April, 2023 seeking the following orders:-
 - a. That the application be certified urgent and be heard ex-parte and service thereof be dispensed with in the first instance.
 - b. That the respondents be denied audience of the court until they purge the contempt;
 - c. That summons to issue against the Respondents in person before the Honourable Court and show cause why they should not be committed to civil jail for such terms as the court may deem fit for contempt of court orders issued on the 7th October, 2022 by Hon. Justice D.K.Njagi Marete;
 - d. That the respondents be cited for contempt of court and be committed to civil jail for a term of 6 months until they purge the contempt and comply with the Orders of this Honourable Court issued on the 7.10.2022.
 - e. That this Honourable Court be pleased to grant any other order that it deems fit to ends of justice.
 - f. Cost of this application be provided for.
3. The application is premised on the grounds set out in the body of the Motion and the Supporting Affidavit sworn by the 1st Petitioner on 11th April 2022. In brief the applicant contended that on 7th October 2022 the court granted conservatory orders stopping implementation of the letters sending the petitioners to compulsory leave and also barring other persons from carrying on with duties or acting in the place of the petitioners; that the order was served upon the respondents but they have blatantly failed or refused to allow the applicants back to their offices and instead changed the door locks and positioned armed goons to prevent the 3rd petitioner from accessing his office ; that the respondents have further appointed other persons in acting capacities to carry on the duties of the petitioners including attending a workshop in Naivasha; and that they have deliberately disrespected the said court orders and publicly declared that the court orders are irrelevant to them.



4. The applicants further contended that every person, against whom an order has been made by a court of competent jurisdiction has plain and unqualified obligation to obey it unless and until the order is discharged. Consequently, the applicants urged the court to punish the Respondents for contempt of court to safeguard the authority of the court, sanctity of court orders and the rule of law, which is fundamental in the administration of justice.
5. The Respondents opposed the application vide a Replying Affidavit sworn on 2nd May, 2023 by Ms Virginia Kawira Nkoroi, the Acting Chief Executive Officer of 2nd respondent. In brief, she deposed that the petitioners are still employees of the County Government of Meru serving in their respective Boards and they are drawing their full employment benefits; that upon issuance of the conservatory order, the impugned letters were automatically revoked and the applicants were invited to resume work but they declined to do so; that the respondents cannot compel the petitioners to work; that the respondents hold judiciary and this court in high esteem and they would not disobey directions issued by court; that no door locks were changed and goons deployed to bar the petitioners entry to their offices; that the photos filed as evidence lack authenticity and probative value and one cannot comprehend which door locks are being referred to; and that there is no nexus between the alleged actions the respondents as they were by independent persons with capacity to make their own decisions without the control or instructions from the respondents. Consequently, they prayed for the application to be dismissed with costs.

Submission

6. The applicants filed written submission on 8th May 2023. In brief, it was submitted for the applicants that the respondents have disobeyed the court orders issued on 7th October 2022 reinstating the applicants to their respective jobs. It was further submitted that there is proof of service of the order being Affidavit of service filed in court. It was also submitted that the photos and the video clips in flash disc annexed to the supporting Affidavit are evidence that the door locks were changed and armed goons were hired to prevent the applicants from accessing their offices.
7. It was further submitted that the work ticket annexed to the Supporting Affidavit as an exhibit is proof that the persons appointed to in place of the applicants are still office in contempt of the court orders. Further, Mr Kirima who was previously acting was redeployed and Mr. Mbaabu Muguna was appointed to act in contempt of the said court orders.
8. As regards payment of salary, it was submitted that the applicants' salary for November 2022 to February 2023 was never paid and that is why the respondents have not annexed the payslips for the period before March 2023.
9. It was submitted that there is a valid or unambiguous court order issued against the respondents; that the respondents have been served with the order and/or they are aware of the same; and that they have disobeyed it. Consequently, the court was urged to find that the respondents and the interested parties are guilty of contempt of court order made on 7th October 2022, and punish them by sending them to prison for six months.
10. To fortify the above submissions, the petitioners cited several authorities including Moses P N Njoroge & others v Reverend Musa Njuguna & another but did not avail copies to the court. They further submitted that the power to punish for contempt of court is provided under Section 5 of the *Judicature Act*.
11. On the other hand, the respondents filed submissions on 12th May 2023. In brief, it was submitted for the respondents that the evidence tendered by the applicants lack any probative value. Specifically, it



was argued that the photos marked JKM-4, the screenshots extracts marked JKM- 5 and the video clips marked JKM-6&7 lack probative value and authenticity as they are not accompanied by any certificate of electronic evidence and certificate of translation. Further, it was submitted that there is no evidence to prove that the goons in the said clips were in the 3rd respondent's office or that they were acting on the instructions of the respondents.

12. It was argued that the standard of proof in contempt of court proceedings is higher proof on balance of probabilities as held in *Mutitika v Bahari Farm limited* [1985] KLR 229. It was submitted that the allegations against the respondents have not been substantiated to the required standards since the evidence presented through the supporting affidavit lacks authenticity and the necessary certificate required under section 106B (2) and (4) of the *Evidence Act*.
13. For emphasis, reliance was placed on *Aggrey Wafula v Public Service Commission & 5 others* [2022] eKLR where the court dismissed contempt proceedings for failure to adduce evidence of probative value to demonstrate the manner in which the court orders were disregarded. Further reliance was placed on *Stephen K Sang & another v Chebii Boiyo & another* [2021] eKLR where the court disregarded photographic evidence used to prove contempt of court.
14. It was further submitted that the applicants have not demonstrated the manner in which, the respondents disregarded the court orders. It was argued that the applicants have just made allegations without any scintilla of evidence to substantiate. It was submitted that the respondents have filed pay-slips to prove that the applicants are still in employment as Chief Administrative Officers with full pay. Consequently, it was argued that the applicants have the burden of proving that they are still on compulsory leave.
15. For emphasis, reliance was placed on the case of *Kenya National Union of Nurses v County Government of Meru & another* [2022] eKLR where Marete J dismissed contempt proceedings for lack of evidence to disobedience of court order by the respondent. Consequently, the respondents urged this court to, likewise, dismiss the application for want of proof of the alleged disobedience.

Determination

16. Having considered the motion, affidavits and the submission by counsel, the main issues for determination are:-
 - a. Whether the application has met the legal threshold for content of court proceedings.
 - b. Whether the respondents should be cited for contempt of court for disobeying the order issued on 7th October 2022.
 - c. Whether the respondents should be summoned to court to show cause why they should not be punished for contempt of court.

Legal threshold for contempt of court

17. The power to punish for contempt of court ought to be exercised carefully because of its potential to cost a person his/her liberty. Consequently, certain thresholds have been established by courts to give guidance while dealing with contempt of court proceeding. They include: -
 - a. Proof of personal service or knowledge of the decision, decree or order of the court on the part of the contemnor;
 - b. Proof of violation of the decision, decree or order of the court by the contemnor; and,



- c. Proof that the violation of the decision, decree or order was deliberate.

Proof of personal service or knowledge

18. In Kenya, contempt proceedings are governed by the law of procedure applicable in England at the time the proceedings are instituted. Rule 81.5 of the English Civil Procedure (Amendment No.2) Rules 2012 provides that a Judgment/Order of the Court must be served upon the person required to do the act in question. However, the Court can dispense with such personal service under Rule 81.8 of the Rules which provides:
- “(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—
- (a) by being present when the judgment or order was given or made;
or
- (b) by being notified of its terms by telephone, email or otherwise.”
19. The foregoing position has been embraced by courts in this country in a plethora of cases. In *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, the Court of Appeal held:
- “Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client’s case.” [Emphasis Added]
20. Again, in *Basil Criticos v Attorney General & 4 others* [2012] e-KLR Lenaola J (as he then was) held that:
- “... the law has changed and so as it stands today, knowledge supersedes personal service and for good reason... where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that service must be proved is rendered unnecessary.”
21. In *Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waitbaka* [2019] eKLR the Court held:
- “It is also notable in this regard that the counsel for the Respondent did appear in Court to defend the said application for contempt of court, and did seek time to pay the decretal sum. It is therefore evident from the pleadings and submissions made that the Respondent was aware of the orders of this Court of 13th July 2016.”
22. In this case, there is no dispute that the orders of the court issued on 7th October 2022 were served upon the respondents. That fact has been admitted by the respondent in the replying Affidavit and the written submissions. Consequently, I find and hold the respondents were at all material times served



and in deed aware of the said court orders. The order were not ambiguous and it gave the following clear commands: -

- “ 1. Thatconservatory orders be and are hereby issued restraining the respondent, whether by themselves, their officers, their servants, agents or whosoever from implementing the impugned decision contained in the letters dated 6/9/2022. 6/9/2022, 29/8/2022 and 7/9/2022 sending the 1st to 4th claimants respectively on compulsory leave and further the impugned appointment of other personnel as acting chief administrative officers in the place of the 1st to 4th claimant until this application is heard and determined inter-parties.
2. Thatthis application and orders of the court be served unto the respondent forthwith and in any event by the close of the day today.
3. Thatthe respondent be and is hereby granted fourteen days to make, file and serve or reply/response to the application.
4. Thathearing inter-parties on 26.10.2022 at 9.00am.“

Proof of violation of the Court orders

23. The applicants contended that the respondent’s disobeyed the court orders issued on 7th October 2022 by failing to withdraw their compulsory leave letters and reinstate them to their respective positions. Instead, the respondent put other persons to act in the applicants’ positions and instructed them to bar the applicants, especially the 1st applicant, from accessing their respective offices. They also withheld the applicants’ salary from November 2022 to February 2023, but started paying the salaries from March 2023. They were further accused of changing the office door locks and positioned armed goons to bar the applicants from accessing their offices. To prove the said allegations, the applicants have relied on the Affidavit sworn by the 1st applicant in support of the motion herein. The affidavit annexes photographs, video clips contained in a flash disk and other documents to prove that they were barred from resuming work and other persons appointed to act in their positions.
24. The respondents have, however maintained that they fully complied with the court orders by allowing the applicants to report back to work but the applicants opted to stay away. They relied on the replying Affidavit sworn by the Acting CEO of the 2nd respondent which annexes among others documents to prove that the applicants are still in employment and they are receiving their full salary even without rendering any services to the county government. Further they submitted that the electronic evidence adduced by the applicants in the form of photographs, screenshot extracts and the video clips are of no probative value due to lack of Certificates required under section 106B of the *Evidence Act*. They maintained that the authenticity of the said evidence was disputed.
25. I have carefully considered the material presented before the court. I agree with the respondents that the standard of proof in contempt of court proceedings is higher proof on balance of probabilities. In *Mutitika v Babari Farm limited* [1985] KLR 229 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt.”
26. The reason for such a higher standard of proof is because the liberty of a person is at risk. Accordingly, the evidence adduced in support of the alleged contempt must be sufficient to satisfy any reasonable court directing its mind to the dispute and the nature of the orders issued, to find that indeed the party concerned did not comply with the orders. The evidence is not sufficient if it lacks probative value.



27. In this case the applicants have adduced a photograph of a door and video clips which have no explanation of the place where and date when it was taken. The person who took the same is unknown and there is no certificate by him to give authenticity to the said electronic evidence as required by section 106B of the *Evidence Act*. Sub-section (4) provides that a certificate of electronic evidence shall identify the electronic record containing the information; give particulars of the device involved in the production of the electronic record; and other conditions set out in subsection (2) including the condition of the device used and the time when recording was done. The said electronic evidence adduced by the applicants is not admissible without the required statutory certificate to authenticate the same. However, that is not the only evidence for consideration.
28. The applicants filed an affidavit in support of the motion explaining how they reported back to office but they found door locks changed and armed goons deployed there to bar them access to the office. Further that, they were not paid their salary for November 2022 to February 2023. The respondents have not denied the alleged withholding of salaries and they have indeed produced document showing payment of applicants' salaries from March 2023. No justification has been given for the failure to pay the salaries for November 2022 to February 2023.
29. Having carefully considered the rival contentions, I find the respondents failure to pay the said salaries to be inconsistent with the court order issued by the court on 7th October 2022. Had the respondents fully complied with said orders, they would have reinstated the applicants to their positions and paid their benefits as if the impugned letters for the compulsory leave had not been issued. Further, if at all the applicants failed to resume work, the respondent could have written show cause letters to them and notified them of stoppage of salaries.
30. I find the explanation by the respondents not convincing because the applicants cannot have obtained court orders to report back to work and then deploy goons to their workplace to stop them from returning their offices. It is only the party opposing the return of the applicants to office who could have changed the door locks and deployed goons to bar the applicants from accessing their offices.

Whether the failure to comply was deliberate

31. In *Republic v Ahmad Abolfathi Mohammed & another* [2018] e KLR the Supreme Court held that:
- “This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.” [Emphasis Added]
32. I have already made a finding of fact that no reason was given for the withholding the salary for the said four months. The respondents have deliberately failed allow the applicants back to their office and withheld their said salaries for four months. The failure to pay the said salaries after the said court orders corroborates the applicants' case that the respondents had refused to comply with the said court orders. In the case of *Teachers Service Commission v Kenya Union of Teachers & another* [2013] eKLR Ndolo J held that:
- “Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly.”



33. Further in the case of *Refrigerator & Kitchen utensils Ltd v Gulabchand Shah & others* Civil Application No. Nai 39 of 1990 the Court of Appeal held that:

“It was plain clear and unqualified obligation of every person against or in respect of whom an order was made by the court of competent jurisdiction to obey it until that order was discharged, and disobedience of such order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he purged his contempt. A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular... he should apply to the court that it might be discharged. As long as it exists, it must not be disobeyed.”

34. In view of the matters and findings made herein above it is clear that all the three thresholds for contempt of court have been proved by evidence, and to the required standard. Consequently, I must cite the respondents for contempt of court for disobeying the order issued by Marete J on 7th October 2022. The County Secretary, Mr. Rufus Miriti, is the Head of County Public Service and he is the one who wrote the impugned compulsory leave letters. Therefore, he was the proper person to ensure that the court orders were complied with by ensuring that the applicants are allowed back to their offices and that all their salaries were duly paid.

35. The applicants want the respondents committed to civil jail for six months for the said contempt of court. The reason for punishing for contempt has been stated in a legion of judicial pronouncements. In *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR the Court of Appeal held:

“When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who decides to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”

36. I have considered the request by the applicants and appreciated the need for swift and severe punishment to persons acting in disobedience to court orders. However, before passing sentence against the respondents, the respondents are invited to attend this court through the County Secretary Mr. Rufus Miriti or his successor in title to show cause why the court should not punish them for disobeying the court orders issued on 7th October 2022.

Conclusion and disposition

37. On the basis of material presented to the court by the parties, observations, reasons and findings I allow the application and makes the following orders: -



- a. That the respondents are hereby cited for contempt of this court's order issued on 7th October, 2022 by failing to allow the applicants back to their offices and further by withholding their salary for November, 2022 to February, 2023.
- b. The First Respondent Mr. Rufus Miriti or his successor in title is hereby summoned to attend virtual Court personally on 12th October, 2023 at 9.00 AM, to show cause why the respondents should not be punished for contempt of court.
- c. Until the contempt is purged the Respondent will have no audience before this court.
- d. The applicants are awarded costs of the application.

DATED, SIGNED AND DELIVERED AT NYERI THIS 29TH DAY OF SEPTEMBER, 2023.

ONESMUS N MAKAU

JUDGE

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

