



Kenya County Government Workers' Union v Governor, County Government of Kiambu & 5 others (Cause 115 of 2006) [2023] KEELRC 2321 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2321 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 115 OF 2006
MN NDUMA, J
SEPTEMBER 21, 2023**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS' UNION CLAIMANT

AND

THE GOVERNOR, COUNTY GOVERNMENT OF KIAMBU 1ST RESPONDENT

**SECRETARY, PUBLIC SERVICE BOARD KIAMBU COUNTY 2ND
RESPONDENT**

COUNTY SECRETARY OF KIAMBU 3RD RESPONDENT

**THE PRINCIPAL SECRETARY, MINISTRY OF DEVOLUTION AND
PLANNING 4TH RESPONDENT**

**THE SUB-COUNTY ADMINISTRATOR, THIKA SUB COUNTY 5TH
RESPONDENT**

THE HON ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. In a judgment dated May 13, 2009, in this suit, Nairobi Industrial Cause No. 115 of 2006, the Court ordered the Municipal Council of Thika to:-
 - (1) Reinstate all the 86 dismissed/terminated employees to their jobs or posts from their dates of dismissal, without loss of their full salaries and all other allowances privileges and continuity of service.
 - (2) All the 86 dismissed/terminated employees minus the 4 senior officers named in the claimants list shall unconditionally report to their respective departments, of the Municipal Council of Thika, within fifteen days from date of award.



- (3) For those dismissed/terminated employees who have attained the mandatory retirement age of 55 years, their services be declared as “Normal Retirement” and therefore full retirement benefits be accorded to them by the Council.
2. The respondent did not appeal the judgment of the Court.
3. The claimant deposes that the aforesaid orders have only been complied with in part and the respondents being the Governor County Government of Kiambu, The Secretary Public Service Board – Kiambu County, The County Secretary, Kiambu County and the Sub-County Administrator Thika Sub-County are responsible and accountable in enforcing the aforesaid orders.
4. That despite demands from the claimants through their advocates, the Respondent have willfully failed/and or refused to honour the terms of the aforesaid judgment.
5. In the Chamber Summons application dated October 3, 2022, the claimants seek the following orders:-
 1. Spent.
 2. That the 1st, 2nd, 3rd and 4th respondents be committed to civil jail for failure to pay Kshs.90,897,878.
6. That the application is grounded on the facts set out in the Chamber Summons and the annexed affidavit of Peninnah Nduta Mungai which may be summarized as follows:-
 - a. That the respondents have defied the orders and award of this Court issued on May 13, 2009.
 - b. That the respondents have made it clear that they will not obey the orders of this Court.
 - c. That the respondents have been cited for contempt of Court in the application dated April 23, 2014.
 - d. That despite numerous correspondence between the claimant and the respondents, they are yet to comply with the orders and award.
7. That on April 13, 2017, the Court summoned the County Secretary of Kiambu County to appear in Court on June 20, 2017 to show cause why they should not be held in contempt of Court for disobeying Court orders.
8. That the County Secretary stated that they would comply and embarked on negotiations.
9. That following the negotiations, the respondents implemented part of item 2 of the orders and award that is; “All the 86 dismissed/terminated employees be reinstated to their jobs or posts from the date of dismissal” by writing reinstatement letters.
10. That however, the respondents have failed to implement part 2 of item 2 that is,

“without loss of their full salaries and all other allowances and privileges” by not paying remuneration arising from the illegal termination/dismissal.”
11. That the respondents have implemented part of item 4 of the order and Award that is;

“For those dismissed/terminated employees who have attained retirement age of 55 years, their services are hereby declared as “Normal retirement” by issuing retirement notices.



12. That the respondents have failed to implement part 2 of Item 4 that is “and therefore full retirement benefits be accorded to them by the respondents/Council” by not according the retirees the retirement benefits which stand at Kshs.90,897,878 calculated as per the annexed schedule marked PNM 4.
13. That the claimants have written to the County Secretary, Kiambu County seeking payment of the aforesaid arrears and the County Government has failed to respond to the letter and reminder attached to the application.
14. That the respondents be held in contempt of Court Orders and to serve jail for a period not exceeding six (6) months.
15. The respondents filed a replying affidavit dated February 16, 2023 sworn to by Waithira Waiyaki in which the respondent raises technical issues including that the application dated October 3, 2022 is fatally defective in that:-
 - (a) The claimant’s advocates are not properly on record since the firm of M/s Waithira & Company Advocates is the one properly on record and there has been no change of advocates to-date to allow Waithira Mwangi & Co. Advocates to file this application.
 - (b) That the application has been brought under Order 40, rule 1 and 2 and Order 51 rule 1 of the Civil Procedure Rules and Section 1A 1B 3A and Order 3 (e) of the Civil Procedure Act, 2010. That the application ought to have been brought in terms of the Employment & Labour Relations Court (ELRC) (Procedure) Rules, 2016 citing the decision in Prisca Jepng’etich –vs- Generation Career Readiness Social Initiative Limited [2021] eKLR, where the Court held:-

“The Employment and Labour Relations Court is a specialized rather than a civil jurisdiction. The Civil Procedure Act applies to proceedings in the High Court, and subject to the magistrates’ Court Act and proceedings in the subordinate Courts..... Parties must avoid citing the Civil Procedure Act on all procedure matters before the E & LRC. These are different jurisdictions, as established in Supreme Court of Kenya decision, Republic -vs- Karisa Chengo & 2 Others [2017] eKLR.

The Procedure Act applies to proceedings of the E &LRC only as may be specifically allowed under the E & LRC (Procedure, Rules 2016, such as applies in Rule 32(2), which states:-

“Rules on execution of an Order or decree shall be enforceable in accordance with the Civil Procedure Rules.” That this application is therefore incompetent and it be dismissed.
 - (c) That the respondents are not in willful disobedience of orders issued by this Court on May 13, 2009. That in Wambui Kiragu (suing as Administrator of the Estate of the late Samuel Kiragu Michuki) –vs- Governor – Nairobi City County and Another [2018] the Court found that there are four essential elements that, must be proved to make out a case for Civil Contempt. That the applicant must prove to the required standard (in civil contempt cases which is higher than civil case) that:-
 - (a) the terms of the order (or injunction or undertakings were clear and unambiguous and were binding on the defendant.
 - (b) the defendant had knowledge of or proper notice of the terms of the order.
 - (c) the defendant has acted in breach of the terms of the order; an



- d. The defendant's conduct was deliberate.
16. That the applicant has not satisfied the aforesaid conditions in that there is no clear order directing the respondents to pay the sum of Kshs.90,897,878 as alluded to by the applicant. That in paragraph 7 of the applicant's supporting affidavit the applicant simply deposes that:-
- “That the Respondents have failed to implement part 2 of item 2 that is “without loss of their full salaries and all other allowances and privileges” by not paying remuneration arising from illegal termination/dismissal.
17. That in the case of Wang'ondy -vs- Nairobi City Commission, CA No. 95 of 1988, the Court cited the case of Jihan Freighters Limited -vs- Hardware & General Stores Limited [2015] eKLR and held that the Court will only punish for contempt when it is satisfied that the terms of the injunction are clear and unambiguous. The appeal therefore succeeded.
18. The respondents further cites the case of Ochino and Another -vs- Okombo and 4 Others [1989] KLR where the Court of Appeal per R. Gachuhi, Masime and Kwach, JJA held inter alia that:-
1. “As a general rule, no order of Court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.”
 2. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served and if, he disobeys the order is liable to the process of execution to compel him to obey it.
 3. The Court will only punish as contempt, a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous.
 4. The defendants had proper notice of the terms and the breach of the injunction must be proved beyond reasonable doubts.
 5. The proper procedure for bringing the application for contempt, must be followed to the letter.
19. The respondent states in the replying affidavit, in any event, that the orders of the Court have been obeyed as follows:-
- (a) On February 19, 2018, 33 workers were reinstated in the various departments; 35 others were issued with retirement letters and others have unfortunately passed on.
 - (b) A taskforce ascertained the amount in arrears to be cleared at Kshs.384,674,370.
 - (c) A without prejudice proposal of 5,000,000 per month was offered to the claimant's previous Advocates M/s Kinuthia Wandaka & Company Advocates which was rejected at that time.
20. That accordingly there is no deliberate failure to comply with orders of the Court.
21. That settlement of County debts is not dependent on an individual but on limited resources governed by the County budgets which require planning by the new administration in order to settle any dues to the claimants. The amounts claimed cannot therefore be paid without undertaking the necessary approvals and budgetary plans as payment of the said sums would financially cripple the respondents.
22. The respondents rely on the case of Wachira Nderitu, Ngugi & Company Advocates -vs- The Town Clerk, City Council of Nairobi, Miscellaneous Application No. 354 of 2012 in which the case of



Republic -vs- Principal Secretary, Ministry of defence Ex-parte George Kariuki Waitaha [2018] eKLR was cited in which the Court took judicial notice that local authorities were reeling under the weight of debts accrued by their predecessors and that were trying to find their footings in the current dispensation.

Determination

23. It is common cause that the respondents have through the County Secretary undertaken to comply with the Court orders and indeed proceeded to reinstate the 88 dismissed/terminated employees and to formally retire others. The unfulfilled part of the judgment is the full payment of due salaries and all other allowances and privileges acknowledged as due and owing to the claimant by the respondents in the ensuing negotiations for settlement.
24. The applicant contends that the arrears due stands at Kshs.90,897,879 which sum arises from computation done by the applicant and not expressly reflected in the judgment of the Court. This being the case, the respondent states that the orders sought to be enforced are not express and unambiguous.
25. It is also clear from the application before Court that the applicant has not cited any individuals by their names. The Court does not as a matter of fact know from the face of the application before it the particulars of persons sought to be punished for contempt of Court and there are no facts set out before Court in this application stating what any named person has done in deliberate defiance of the cited Court orders.
26. It is common cause that officials of County Governments change after every five (5) years upon conduct of general elections.
27. The judgment of the Court sought to be enforced was delivered on May 13, 2009. Todate, we are in the year 2023.
28. The Court appreciates the demonstrated efforts in this matter towards obeying the Court orders.
29. It is important that deliberate plans be put in place and demonstrated by the respondents towards settlement of the monetary aspect of the judgment of the Court.
30. Employees have been reinstated and others retired in part settlement of the Court Order. This conduct is far from that of persons in willful disobedience of the judgment of the Court.
31. By the mere fact that no particular person has been specifically named in the application to be in willful defiance of the Court orders, the application has outrightly failed the test in the Wambui Kiragu case (supra). The Court does not in fact know to whom any orders it may issue pursuant to this application would be directed.
32. Accordingly, the applicant has not only failed to demonstrate that any known person is in willful defiance of the Court orders, but the applicant has also not presented any such persons, who have been properly served and presented with opportunity to defend themselves against the very serious allegations of contempt of Court generally and ambiguously presented against the County Government of Kiambu.
33. Accordingly, the application is fatally defective and also lacking in merit and is dismissed. Having said that the parties are encouraged to put in place a payment plan to the reinstated and retired officers in satisfaction of the judgment of the Court which has remained, not fully satisfied for a long time. The Court need not deal with other preliminary issues raised by the respondent in their response to the application.



34. Each party to meet their costs of the application.

Dated and delivered at Nairobi (*virtually*) this 21st day of September, 2023.

Mathews N. Nduma

Judge

Appearance

Mr. Mwangi for claimant/Applicant

Mr. Oketch for Respondents

Ekale: Court Assistant

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