



**Mbugua v National Cohesion and Integration Commission; Kobia & 4 others (Contemnor)  
(Judicial Review E003 of 2023) [2023] KEELRC 2677 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2677 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
JUDICIAL REVIEW E003 OF 2023  
HS WASILWA, J  
OCTOBER 31, 2023**

**BETWEEN**

**DR SKITTER WANGECI MBUGUA ..... APPLICANT**

**AND**

**NATIONAL COHESION AND INTEGRATION COMMISSION . RESPONDENT**

**AND**

**REV (DR) SAMUEL KOBIA ..... CONTEMNOR**

**WAMBUI NYUTU ..... CONTEMNOR**

**ABDULAZIZ ALI FARAH ..... CONTEMNOR**

**DR DANVAS MAKORI ..... CONTEMNOR**

**DORCAS KEDOGO ..... CONTEMNOR**

**RULING**

1. This Ruling is in respect of the Respondent/ Applicant's Notice of motion dated 11<sup>th</sup> October, 2023, brought pursuant to section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, and all other enabling provisions of the Law, seeking for the following orders; -
  1. That pending hearing and determination of the intended appeal, this Honourable Court be pleased to issue an order staying the implementation and/or enforcement of the ruling and order issued by the Learned Honourable Justice Wasilwa on 5<sup>th</sup> October 2023 which held that the cited Contemnors were guilty of being in contempt of the Orders of the Court issued on the 20<sup>th</sup> day of February 2023.
  2. That pending hearing and determination of the intended appeal, this Honourable Court be pleased to stay the implementation and/or enforcement of the orders issued on 5<sup>th</sup> October



2023 requiring that the cited Contemnors attend the Employment & Labour Relations Court at Nakuru on 26<sup>th</sup> October 2023 or any other day thereafter for sentencing.

3. That the costs of this application be in the cause.
2. The application is based on the grounds on the face of the application and the supporting affidavit sworn on 11<sup>th</sup> October, 2023 by Rev (DR) Samuel Kobia, the Chairperson of the Respondent and the 1<sup>st</sup> Contemnor.
3. The affiant state that the Learned Honourable Justice Wasilwa vide a Ruling delivered on 5<sup>th</sup> October 2023, held that the cited Contemnors were guilty of contempt as prayed in the Applicant/ Respondent's application dated 11<sup>th</sup> April 2023. Consequently, the Court reserved the sentencing of the cited Contemnors for the 26<sup>th</sup> day of October 2023.
4. He stated that the cited Contemnors are greatly aggrieved by the entire Ruling and Orders of this Court and intend to appeal against the entire Ruling and Orders therein and have since filed a Notice of Appeal dated 9<sup>th</sup> October 2023.
5. He contends that the intended appeal raises triable and arguable issues with high chance of success as demonstrated in the draft Memorandum of Appeal dated 11<sup>th</sup> October 2023.
6. That the contemnors, through their advocates have on 9<sup>th</sup> October, 2023 requested for typed copies of the proceedings in order to prepare the record of Appeal.
7. The affiant states that it is in the best interest of justice that this Honourable Court be pleased to issue an order staying the implementation and/or enforcement of the Ruling and Orders issued on 5<sup>th</sup> October 2023.
8. He states that the cited Contemnors are apprehensive that if the Orders sought herein are not granted, they shall be sentenced to serve a custodial sentence thereby rendering the intended appeal nugatory.
9. It is their case that if the Contemnors are sentenced to serve a jail term for even one day, the deprivation of their fundamental rights and liberties cannot be undone and they shall suffer irreparable harm which will render their appeal nugatory in the event it succeeds.
10. The Application is opposed by the Applicant/ Respondent, Skitter Wangeci Mbugua, by her replying affidavit sworn on 17<sup>th</sup> October, 2023. Ms. Skitter stated that on 5<sup>th</sup> October 2023, this court found Rev. (Dr) Samuel Kobia, Wambui Nyutu, Abdulaziz Ali Farah, Dr. Danvas Makori, Sam Kona and Dorcas Kedogo, the Chairperson and Commissioners of the respondent guilty of contempt for breaching this court's orders of 20<sup>th</sup> February 2023. That the said cited contemnors were due to appear in court on 26<sup>th</sup> October 2023 for mitigation and sentencing.
11. It is averred that despite seeking to stop the sentencing and mitigation scheduled for 26<sup>th</sup> October 2023, the contemnors have continued to act in total disregard of the courts orders of 20<sup>th</sup> February 2023 as set out below:
  - a. That she is informed by Mr. Ezra Makori, a partner at Hamilton Harrison & Mathews, her advocates on record that on 5<sup>th</sup> October 2023, the respondent was represented in court as such was aware of the orders of the Court. Further that no stay of execution was sought or granted. Therefore, that the cited contemnors continue to be in contempt as they have refused to lift the suspension letter dated 5<sup>th</sup> April 2023 to allow her report back to work.
  - b. She states that by a letter of 11<sup>th</sup> October 2023, her advocates wrote to the Chairperson of the respondent and the respondents advocates and informed them that she was ready report



to work and inquired on when the withheld dues would be remitted. This letter was not responded to.

- c. However, on 13<sup>th</sup> October 2023, she received two letters dated 9<sup>th</sup> October 2023, informing her that the Respondent would not be renewing her contract and the letter of 12<sup>th</sup> October 2023 alleged that the respondent had unsuccessfully tried to reach her, which is far from the truth because the Respondent has all her contact details.
  - d. By a letter dated 16<sup>th</sup> October 2023, her advocates responded to these letter and informed the Respondent that the purported termination of her 5-year contract of employment was illegal and in furtherance of the contempt of court's orders of 20<sup>th</sup> February 2023. Instead of purging the contempt, the Respondent went ahead and appointed one Mr. Harrison Kariuki to act in her position despite the orders of 20<sup>th</sup> February 2023 being in force.
12. She maintained that she was employed as the Chief Executive Officer (CEO) of the respondent vide employment contract dated 6<sup>th</sup> November 2020 for a term of five (5) years. Therefore, that the notice of termination issued by the respondent is unlawful as it purports to terminate her contract before it lapses.
  13. She contends that the move made by the Respondent to terminate her contract is in further contempt as the position taken in the letter of 9<sup>th</sup> October, 2023 is the same position that the respondent took in its response to the contempt application which the court has already decided on.
  14. The Affiant states that the respondent has concealed material fact from this court as set out above as such is underserving of the prayers sought in the application. Moreover, that the application is not founded on the proper provisions of the law, therefore amounts to abuse of court process.
  15. It is stated further that any party seeking for stay of execution must, first demonstrate substantial loss that it will suffer, which the Applicant has failed and secondly provide security for due performance which has not be provided either.
  16. She stated that she continues to suffer loss while on suspension and the subsequent termination has totally shut the doors for her as she is unable to earn any income.
  17. The Affiant stated that since the Respondent have refused to purge the contempt, they are not deserving of the Orders sought.
  18. In a rejoinder, the Respondent filed a further Affidavit, depose upon by Rev(DR) Samuel Kobia on 23<sup>rd</sup> October, 2023. The Affiant denied being in contempt of Court Orders and stated the orders of 20<sup>th</sup> February 2023 only barred the Commission from proceeding with the disciplinary action commenced vide Notice to Show Cause dated 10<sup>th</sup> November 2022. He explained that the notice dated 9<sup>th</sup> October 2023 was to inform the Applicant/Respondent that her contract dated 6<sup>th</sup> November 2020 shall not be renewed upon its expiry on 30<sup>th</sup> November 2023, which notice cannot be termed as a disciplinary action as purported by the Respondent/Applicant.
  19. He states that the Applicant's Judicial Review Application dated 28<sup>th</sup> February 2023 invited this Honourable Court to grant the Applicant protection vide an Order of Certiorari and Prohibition against the Commission from proceeding with the disciplinary action commenced by the Notice to Show Cause dated 10<sup>th</sup> November 2022 but not an interpretation and/or determination of the validity and/or legality of the conflicting letters of employment both dated 6<sup>th</sup> November 2020.
  20. The affiant maintained that the Respondent/ Applicant herein denounced the letter of employment adduced by the Applicant for being a complete forgery and maintained that the Applicant's letter of



- employment dated 6<sup>th</sup> November 2020 was for a contractual term of three years with effect from 1<sup>st</sup> December 2020.
21. He expounded on the circumstances surrounding the validity of the said contract and stated that on 1<sup>st</sup> June 2019, the office of the Chairperson & Chief Executive Officer of the Commission fell vacant after the three (3) year contract awarded to the previous Chief Executive Officer, Mr. Hassan Sheikh Mohammed expired. Contrary to the allegations by the Applicant, Mr. Hassan Sheikh Mohammed had served the Commission for three consecutive terms of three (3) years each with effect from 2<sup>nd</sup> June 2010.
  22. That pursuant to Section 20 of the National Cohesion & Integration Act and the Commission's Human Resource Manual, the Commission through the Human Resource Department published an advertisement on various public platforms i.e. online resources, the Commission's website and Newspaper advertisements, calling for applications from suitable candidates to apply for the vacancy of Commission Secretary/ Chief Executive Officer of the Respondent for a contractual term of three (3) years. Subsequently, the Applicant tendered her application vide a letter dated 13<sup>th</sup> February 2020 and annexed a comprehensive and impressive 55-page Curriculum Vitae evidencing her suitability for the position.
  23. After a rigorous and competitive interview process, the Applicant emerged successful and was awarded employment vide letter dated 6<sup>th</sup> November 2020 for a contractual term of three (3) years with effect from 1<sup>st</sup> November 2020, in compliance with the Mwongozo Code that governs the appointment terms of Chief Executive Officers in State corporations.
  24. He states that a comparative analysis between the conflicting letters of employment establishes the following glaring disparities: The Letter of Employment adduced by the Applicant omits clause 5 which provides that the contract of employment shall be subject to a probationary period of six (6) months. Further that the letter captures the Respondent's mission statement as, "To promote national unity, equity and the elimination of all forms of ethnic discrimination by facilitating equality of opportunities, peaceful resolution of conflicts and respect for diversity among Kenyan communities." which mission statement was adopted by the Commission on 15<sup>th</sup> April 2021 well past the appointment date of the Applicant.
  25. Also that the letter of Employment adduced by the Applicant Captures M/S Wambui Nyutu as the Vice Chairperson whereas, the sitting vice chairperson at the time of the Applicant's appointment was M/S Fatuma Suleiman Tabwara (deceased). The current vice chairperson, M/S Wambui Nyutu, was appointed on the 19<sup>th</sup> February 2021 after the demise of M/S Fatuma Suleiman Tabwara on 29<sup>th</sup> December 2019.
  26. Based on the foregoing, the affiant stated that the Notice dated 9<sup>th</sup> October 2023 is not a Termination Notice as purported by the Applicant but a Notice of Non-Renewal of the Applicant's Contract of Employment scheduled to expire on 30<sup>th</sup> November 2023 and an roles well within the administrative powers of the Respondent.
  27. The Respondent denies any allegations that it has concealed material facts and is therefore undeserving of the prayers sought. Instead, he states that he demonstrated that should this Honourable Court proceed with the sentencing of the Contemnors, they stand to suffer irreparable and/or substantial loss that cannot be compensated by way of damages. Needless to say, that the Contemnors face an imminent risk of imprisonment and other penal consequences.
  28. On the claim for security, the affiant states that the orders that the Respondent seeks to stay are not monetary in nature and the same cannot be quantified or liquidated to warrant a security deposit. In



any case that deposit of security is discretionary and should this Honourable Court be inclined to direct that the same be deposited in court, the Respondent would be obliged.

29. It is the Respondent case that it would be unconstitutional and a gross miscarriage of justice for this Honourable Court to deny the Respondent's herein the right of audience on grounds that it has not purged the contempt as the issues set for determination before the Appellate Court arise from the impugned contempt orders.
30. In the premise, the Respondent states that it is in the best interest of justice for this Honourable Court to allow the Respondent's Application herein and issue an order staying the implementation and/or enforcement of the ruling and order issued on 5<sup>th</sup> October 2023 pending hearing a determination of the intended Appeal.
31. The Application was canvassed orally by the advocates for the parties on the 26<sup>th</sup> October, 2023

#### **Applicant's Submissions.**

32. Mr. Muthomi Advocates, appearing for the Applicant submitted that under the English Civil Procedure Rules, paragraph 81 gives a court that issues warrant powers to stay execution of those warrants. He argued that contempt is in the realms of criminal and Civil domain of the law and above the import of the Article 50(2)(g) of *the Constitution*. He argued that anyone found guilty has to seek review of a higher court, as such that they have filed a Notice and Memorandum of Appeal. This he argued is a confirmation that they are not frivolous. He maintained that they have an arguable case given the potential of penal consequences that is likely to cause damage that cannot be undone.
33. Counsel urged this Court to allow the Application herein and undertook to file their record of appeal at the earliest opportunity.

#### **Respondent's Submissions.**

34. Mr. Makori Advocates, appearing for the Respondent herein, argued that the application has been filed on the wrong provisions of the law, because applications that seek for stay of execution are brought under Section 42 Rule 5 of the Civil Procedure Rules. He argued further that the application has filed cannot be brought under Rule 5(2)(b) of the Court of Appeal Rules because the text being submitted on arguability of the Appeal cannot be an issue for determination before this Court. Conversely, that the Applicant is only tasked at this stage to demonstrate that they filed their application timeously and raise any prejudice it will suffer if the stay is not allowed.
35. With regard to the analysis made in the further affidavit regarding the legality of the employment contract exhibited by the applicant/ Respondent herein, Counsel argued that these issues have already been analyzed by this Court in its previous ruling at paragraph 8, 9,10, 11, 12,113,14, 15 and 16 and the Court made a finding at paragraph 58 and 59, therefore that to ask the court to re-look at the said issues, would be asking the Court to sit on Appeal of its own ruling.
36. It was submitted that contrary to the averment by the contemnors that they will suffer if sentenced, the Applicant, is in fact already suffering due to their actions. Therefore that the only way out is for the contemnors to purge the contempt as was held in EAM v PAA[2017] eklr .
37. Counsel, submitted that instead of purging the contempt, the Respondent/ Applicant has instead issued notice for termination of the contract.
38. Based on the foregoing, Counsel urged this Court to dismiss the application for stay while relying on their case digest filed on 17<sup>th</sup> October, 2023.



39. Mr. Muthomi Advocate in a rejoinder submitted that they are not asking this court to sit on appeal of its ruling, rather that they are praying for stay of execution because the orders sought against the Contemnors are grave, with effect of limiting the contemnors rights. He added that the matter in issue is an employment contract that is redeemable in case the Applicant succeeds, unlike a prison sentence that cannot be undone. Based on that, he beseeched this Court to consider its application and allow it as prayed.
40. I have examined all the averments and submissions of the parties herein.
41. The applicants filed this application seeking stay of enforcement of the ruling of this court which found the applicant contemnours guilty of contempt of court. The applicants indeed have a right to seek appeal as they have indicated. The appeal is predicated on orders already granted by this court which in this case will be their conviction for contempt. The court having already pronounced itself on the guilt of the contemnor, the court is functus officio and there is nothing to stay.
42. As concerns the sentencing on account of contempt, this court has not pronounced itself on the sentence which is pending before it. In the circumstances, this court cannot stay what is non-existent.
43. That notwithstanding, stay orders are discretionally and equitable in nature. He who comes to equity must come with clean hands. In order for the applicants to attract the sympathy of this court, they must demonstrate that they have purged the contempt. This, the applicants have not done and therefore this court cannot exercise its discretion in their favour nor even extend any further audience to them.
44. The prudent order in the circumstances would be to allow the contemnors time to seek orders from a court of higher jurisdiction if they so wish but in the intervening period, this court will proceed to execute the sentencing of the contemnors as to be scheduled.
45. Costs in the petition.

**RULING DELIVERED VIRTUALLY THIS 31ST DAY OF OCTOBER, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

**Muthomi with Judy Mbugua for Applicant – present**

**Makori for respondent – present**

**Court Assistant - present**

