



**Republic v County Government of Kilifi; Dena (Exparte); Mwinga & another (Contemnor)
(Judicial Review E001 of 2021) [2023] KEELRC 2649 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2649 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
JUDICIAL REVIEW E001 OF 2021**

**AK NZEI, J
OCTOBER 26, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF KILIFI RESPONDENT

AND

ALFRED SIFA DENA EXPARTE

AND

WILBERFORCE MWINGA CONTEMNOR

JARVIS MWAHENDO CONTEMNOR

RULING

1. According to the Court’s record herein, the Ex-parte Applicant herein above-named (hereinafter referred to as the Applicant), instituted the Judicial Review proceedings herein challenging the lawfulness of the suspension handed to him on 9/11/2020 by the Respondent through its Chief Officer, Department of Finance. The Applicant also challenged the legality of the prolonged disciplinary process then taken against him by the Respondent, which he contended violated Article 47 of *the Constitution* of Kenya and the applicable legislation, and stood on the way of his career progression.
2. Having heard and considered the matter, the Court (B.O.M. Manani, J) delivered a judgment on 29th July 2022 and made the following edicts:-
 - a. an order of certiorari to bring forth and quash the Respondent’s decision of 9th January 2020 purporting to suspend the Ex-Parte Applicant from work.



- b. an order of certiorari to bring forth and quash the disciplinary proceedings by the Respondent against the Ex-Parte Applicant for being illegal, unprocedural and therefore null and void.
 - c. an order of mandamus to compel the Respondent to unconditionally terminate the disciplinary proceedings against the Ex-Parte Applicant based on the suspension letter of 9th January 2020.
 - d. an order of certiorari to bring forth and quash the Respondent's decision to re-deploy the Ex-Parte Applicant to the position of Head of Statistics, Economic Planning Division. The consequences of the order is that the Ex-Parte Applicant is restored to the position he occupied prior to the irregular deployment.
 - e. an order to compel the Respondent to pay the Ex-parte Applicant any outstanding salary and allowances as a result of the unlawful suspension aforesaid.
 - f. an order of prohibition against the Respondent barring the Respondent from instituting fresh disciplinary proceedings against the Ex-Parte Applicant on the basis of the same set of facts informing the current dispute.
 - g. an award of costs of the motion to the Ex-Parte Applicant.
3. The ex-parte Applicant has come back to Court vide an amended application (Notice of Motion) dated 13th December 2022, whereby he is seeking orders:-
- a. that an order of committal be made against the Ag. Chief Officer Finance and Economic Planning Kilifi County Government, Wilberforce Mwinga, and Former Ag. Director Revenue Management Jarvis Mwachendo to prison for such period as the Court may deem fit and just for having disobeyed the part of this Court's order made on 29th July 2022 restoring the Applicant to the position he occupied prior to the irregular deployment and the duties thereon, and payment of outstanding allowances.
 - b. that costs of the application be provided for.
4. The application sets out on its face the grounds upon which it is brought. Those grounds are replicated in the Applicant's supplementary affidavit sworn on 13th December 2022 in support of the amended application. It is stated and deponed by the Applicant:-
- a. that on 4th November 2022, the County Secretary and Head of Public Service deployed the Applicant from the position of Head of Statistics back to the position of Director Revenue Management in fulfilment of the Court order dated 29th July 2022, and copied the same to the Ag. Chief Officer Finance and Economic Planning Kilifi County Government, Wilberforce Mwinga, for execution.
 - b. that despite several emails and one on one meetings with the said Wilberforce Mwinga, the Head of Treasury has refused to allocate duties and responsibilities to the Applicant, and has chosen to have those duties executed by the Former Ag. Director Revenue Management, Jarvis Mwachendo, despite the Applicant reporting to work every day. That the Applicant is without duties and responsibilities.
 - c. that the said Wilberforce Mwinga has continued to ensure that no hand-over is done by the said Former Ag. Director of Revenue Management, Jarvis Mwachendo, ignoring the substantive Director Revenue Management and having him without responsibilities.



- d. that the said Jarvis Mwachendo has refused, declined and/or neglected to hand over to the Applicant, who is the substantive Director Revenue Management, thereby frustrating the deployment.
 - e. that the said Wilberforce Mwinga and Jarvis Mwachendo have continued to ensure that the Applicant, who is the substantive Director Revenue Management, does not have access rights to the Revenue Management System, hence leaving him in the dark on the directorate's operations at all material times.
 - f. that Wilberforce Mwinga has continued to ensure that there is no communication from the Revenue Officers to the substantive Director Revenue Management (the Applicant) and has continued to bypass the substantive Director Revenue Management (the Applicant) and communicated to Revenue Officers through Jarvis Mwachendo.
 - g. that the foregoing acts by Wilberforce Mwinga are geared towards ensuring that the Applicant reports to work every day without duties and responsibilities, and point to a scheme to declare the Applicant a ghost worker.
 - h. that the foregoing acts of Wilberforce Mwinga depict that he is not ready to ensure that the Applicant is restored to the position he occupied prior to the irregular deployment and assume his duties and responsibilities.
 - i. that the said Chief Officer Finance and Economic Planning has not paid the Applicant Travel Allowances amounting to Ksh. 292,019 and Airtime Allowance amounting to Ksh. 260,000.
 - j. that the conduct of the Contemnors, Wilberforce Mwinga and Jarvis Mwachendo, has expressly sought to undermine Judicial authority; and the Court's dignity is now under peril; and that the two should be compelled to take a stand in Court for having disobeyed this Court's orders dated 29th July 2022.
5. The application is opposed by the said Wilberforce Mwinga and Jarvis Mwachendo, the named contemnors, vide their respective replying affidavits sworn on 6th February 2023.
 6. Although the two cited contemnors lament that committal orders have been sought against them without giving them an opportunity to show cause, the two have not denied being Officers of the Respondent County government which is the Applicant's employer, and have not disputed having been served with the application herein. Their detailed responses to the application signify and confirm service of the application on themselves. They have responded to the application in exercise of their right to be heard, and have deponed to matters which they believe the Court ought to take into consideration in determining the application before it.
 7. None of the two cited contemnors has denied knowledge of this Court's orders contained in the judgement dated 29th July 2022.
 8. Wilberforce Mwinga, (hereinafter referred to as the 1st contemnor) further deponed, inter-alia:-
 - a. that the application violates the Mandatory provisions of Section 2(1) – (4) of the *Government Proceedings Act* which provides an elaborate procedure for execution of Court decrees.
 - b. that following the August 2022 elections, the 1st Contemnor served as the Acting Chief Officer Finance and Economic Planning, Kilifi County, from the month of September to December 2022, after which substantive Chief Officers were appointed in December 2022.



- c. that the 1st Contemnor served as the Applicant’s Supervisor for 3 months, which was in acting capacity, and therefore limited in the scope of functions to be performed.
 - d. that the Applicant was redeployed back to the position of Director Revenue Management vide the County Secretary’s letter dated 4th November 2022, and that he resumed his normal duties.
 - e. that the 1st contemnor has not refused to allocate the Applicant duties.
 - f. that the only outstanding payment of the Applicant’s accrued allowances are those regarding travelling and airtime, and that the same are under review.
9. The 2nd Contemnor, Jarvis Mwahendo, on the other hand deponed, inter-alia:-
- a. that he is a Revenue Officer of the Respondent, and that the Applicant’s application violates Section 2(1)-(4) of *Government Proceedings Act*, and is an abuse of the Court’s process.
 - b. that the 2nd Contemnor was serving as the Acting Director Revenue Management until 4th November 2022 when the Applicant was deployed back to the position of Director Revenue Management pursuant to this Court’s Orders.
 - c. that the 2nd Contemnor is not an appointing authority within the employment matrix of the Respondent, and cannot be held responsible for any of the complaints by the Applicant.
 - d. that the 2nd Contemnor has been performing duties and responsibilities as per his letter of appointment as well as performing duties assigned to him by his superiors; and cannot be faulted for performing his duties.
10. It is to be noted that this Court’s judgment in issue was delivered on 29th July 2022, and that one of the documents exhibited herein by both the Applicant and the 1st Contemnor is a letter by the Respondent’s County Secretary dated 4th November 2022, addressed to the Applicant and copied to CECM – Finance and Economic Planning, Kilifi County. The 1st Contemnor admits to having been the Acting Chief Officer Finance and Economic Planning, Kilifi County, as at 4th November 2022. The County Secretary’s said letter states in part:-
- “The office refers to the County Solicitor’s letter reference number CG/KLF/LEG/509B/V.1 dated 1st October 2022, as well as the Judgement on your case, which was issued on 29th July 2022 and the Order issued on 3rd August 2022. Pursuant to Section 72(2) of the County Government Act 2012:
- (2) The power to deploy a County Public Officer from one Department to another shall vest in the Head of County Public Service.”
- Consequently.....
- By a copy of this letter, the Ag. Chief Officer for Finance and Economic Planning is requested to allocate you duties pursuant to Section 72(1) of the County Government Act, 2012....”
11. The 1st Contemnor has not denied having received the aforesaid letter. Indeed, he has confirmed having received it by exhibiting a copy thereof in these contempt proceedings. Further, the 1st contemnor has not demonstrated that he complied with the Court’s orders by acting as requested vide the County Secretary’s aforesaid letter; and neither has he demonstrated that he sought stay of this Court’s orders



dated 29th July 2022 if, for any reason, there was need for more time before full implementation of the orders.

12. The 1st Contemnor is shown to have ignored this Court's orders and continued with the situation as obtaining prior to pronouncement of the same.
13. It matters not that the 1st Contemnor was moved to a different position in December 2022 as he alleges in his replying affidavit. He refused to implement the Court's orders even when requested to do so by the County Secretary upon being advised by the County Solicitor as stated in the said letter of 4th November 2022. The 1st Contemnor still carries the liability and/or guilt of contempt that attached to him in November 2022 when he disobeyed this Court's orders. If the person who currently occupies the office that was occupied by the 1st Contemnor as at 4th November 2022 or any other office under which implementation of this Court's orders in issue currently falls continues with the contempt, then that person may be cited in subsequent contempt proceedings. Buck passing can never be entertained by the Courts where obedience of and implementation of Court orders is concerned.
14. On his part, the 2nd Contemnor has not denied performing and continuing to perform duties meant to be performed by the Director Revenue Management, and has not denied having refused to hand over to the Applicant. Indeed, he deponed that he has been performing duties as per his letter of appointment "as well as performing duties assigned to him by his superiors, and cannot be faulted for performing his duties."
15. It has not been denied by the contemnors that though restored back to his position by the County Secretary vide the letter dated 4th November 2022, the Applicant remained, and still remains without duties and responsibilities. Restoration to a position of employment cannot be complete without assignment of the duties and responsibilities attached to that position. The applicant, a Director of Revenue Management, has been sitting in his office doing nothing while the duties that fall under his senior office are said to be performed by the 2nd Contemnor, who deponed that he is a Revenue Officer. What is the motivation and motive behind all these? What happened to ethics and integrity in the Public Service? A Director incharge of a whole directorate has been made to sit in his office since 4th November 2022 doing nothing, and drawing a salary from public coffers at the end of every month. Indeed, the Applicant told the Court during the hearing of the application herein that he only sits in his office and reads newspapers.
16. All the foregoing, in my view, is a well-orchestrated scheme by the Contemnors to defeat not only this Court's orders in issue but the course of justice. This Court cannot sit back and watch as systematic and brazen disobedience of its orders unfolds.
17. I find and hold that the 1st and the 2nd Contemnors are in contempt of this Court's orders dated 29th July 2022. I recently stated as follows in this Court's Judicial Review Application No. E003 of 2022 (*Republic v Principal Secretary Ministry of Lands and Physical Planning & 2 Others; Rachel Muthu Ndambuki (Ex-parte Applicant)*) [2023] eKLR:-

"Court orders are legal pronouncements and commands that have the force of the law and are enforceable in law. They vest rights in parties. The Court made specific orders, pronouncements and commands in Mombasa ELRC Constitutional Petition No. 2 of 2019 on 6th October 2019. The Respondent disobeyed those orders and continues to do so....

The culture of impunity in all its shapes and shades has no place in a civilized society like ours, and must come to an end. One cannot talk about the Rule of Law without talking



about obedience of Court Orders. Disobedience of Court Orders is a vice that, if not checked, can eat into the fabrics that hold a society together.”

18. The Court of Appeal stated as follows in *Shimmers Plaza Limited v National Bank Of Kenya Limited* [2015] eKLR:

“unfortunately, what we have now is persons, both ordinary mortals and persons in authority treating Court order with unbridled contempt, with blatant impunity.....

We must depreciate in the strongest terms possible, the worrying trend in this County where Court orders are treated with tremendous contempt by persons and institutions which think, wrongly of course, that they are above the law.

We reiterate here that Court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a Court order or not. For as Theodore Roosevelt, the 26th President of the United States of America, once said:-

“No man is above the law and no man is below it; nor do we ask any man’s permissions to obey it. Obedience to the law is demanded as a right, not as a favour.”

The Courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and center. This would amount to abdication of our sacrosanct duty bestowed on us by *the Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished lest they lead us to a state of anarchy. We think we have said enough to send this important message across.”

19. It is to be noted that the contempt of Court Act was invalidated in its entirety by the High Court for lack of public participation in the case of *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR Section 5 of the *Judicature Act*, however, provides as follows:-

“(1) the High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate Courts.

(2) An order of the High Court made by way of punishment for contempt of Court shall be appealable as if it were a conviction and sentence made in the exercise of the original criminal Jurisdiction of the High Court.”

20. By dint of Article 162(2) (a) of *the Constitution* of Kenya 2010, this Court is a Court of equal status with the High Court, and therefore has power and jurisdiction to punish for contempt of its orders, and to thus uphold its dignity and process. It was held as follows in *Carry-vs- Leiken* [2015] SCC17: -

“Contempt of Court rests on the power of the Court to uphold its dignity and process. The rule of law is directly depended on the ability of the Courts to enforce their process and maintain their dignity and respect.”

21. It is my finding that the 1st and 2nd Contemnors, Wilberforce Mwinga and Jarvis Mwachendo, are guilty of contempt of Court, and that they must be punished accordingly.



22. The two Contemnors shall personally appear in open Court at the ELRC Mombasa on 7th November 2023 at 11.30 am for mitigation and sentencing.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH OCTOBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

**This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....**for Applicant**

..... **Respondent**

