



**Kisang v Judicial Service Commission (Employment and Labour Relations Cause E521 of 2020) [2023] KEELRC 2565 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2565 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E521 OF 2020**

**K OCHARO, J**

**OCTOBER 19, 2023**

**BETWEEN**

**PETER KIPKEMOI KISANG ..... CLAIMANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**RULING**

**Introduction**

1. Through a Notice of Motion Application dated 9<sup>th</sup> December 2022 expressed to be brought pursuant to Articles 26, 28, 41, 50, 159, and 162 of the Constitution of Kenya 2010, sections 12 and 13 of the Employment & Labour Relations Act, 2011, Rule 32 of the Employment & Labour Relations Court [Procedure] Rules, 2016, Order 22 [Rules 6, 7, 18, 19, 20, 31, 32, 33 and 34 of the Civil Procedure Rules, 2010, the Claimant/Applicant seeks the following orders:
  1. That this Application be certified urgent, its service dispensed with and the same be heard on a priority basis at the first instance.
  2. That this Application be heard before the forthcoming December Vacation.
  3. That a Notice to Show Cause is issued to the Honourable Ann A. Amadi being the Secretary to the Judicial Service Commission to explain why a Warrant of Arrest should not be issued against her for failure to comply with the Judgment and Decree of this Honourable Court.
  4. That a Warrant of Arrest is hereby issued against the Honourable Ann. A. Amadi being the Secretary to the Judicial Service Commission for failing to comply with the Judgment and Decree of this Honourable Court and shall be committed to civil jail until she fully complies with the said Judgment and Decree.
  5. That the Costs of the Application be awarded to the Claimant/Applicant.



2. The Application is grounded on the grounds set out on the face of the Application, and the supporting affidavit sworn by the Claimant/Applicant on the 9<sup>th</sup> December 2022.
3. The application was first placed before me on the 16<sup>th</sup> of January 2023 for hearing. Counsel for the Respondent asked for an adjournment to enable him to receive proper instructions from the Respondent Commission regarding a response to the same. The Court allowed the application and directed the Chief Registrar of the Judiciary to swear a response affidavit within 7 days of the date. The application got slated for hearing on the 24<sup>th</sup> of January 2023. As of the 24<sup>th</sup> of January 2023, the answering affidavit hadn't been filed. By consent of the parties, this Court granted a further leave of 14 days to the Respondent to have the affidavit filed. The application was consequently fixed for mention for the 16<sup>th</sup> March 2023 for purposes inter alia, to check on the parties' compliance with the directions on the filing of the response affidavit and written submissions.
4. On the 16<sup>th</sup> March 2023, Counsel for the Respondent informed this Court that it had not filed any affidavit as its application for stay of execution of the decree herein before the Court of Appeal was pending ruling. Unimpressed by the Counsel's reason for seeking further indulgence, this Court decided to reserve the application for ruling.
5. The Application was canvassed by way of written submissions. The Claimant consequently filed his submissions.

### **The Application**

6. The Affiant contends that this court rendered its judgment in the matter on the 29<sup>th</sup> of September 2022 in the presence of the Respondent's counsel. Flowing from the Judgment a decree was subsequently issued on 18<sup>th</sup> October 2022.
7. It is further contended that the Decree issued by the court directed the Respondent to reinstate the Claimant/Applicant into his service and pay all his unpaid salaries, allowances and benefits. However, the Respondent has declined and or failed to comply with the judgment and the Decree of this Court.
8. The Claimant/Applicant states further that through his Advocate on record he on the 27<sup>th</sup> of October 2022 wrote a letter to the Respondent imploring it to comply with the judgment and decree. The letter was ignored. It never elicited any response or action from the Respondent.
9. It is the affiant's position that he has been exposed to the vagaries of unemployment and continues to despite this court's decree for his reinstatement. He has been deprived of a source of livelihood. His family and he have been exposed to extreme hardship and suffering as a consequence. His school-going children are losing out on their education due to his inability to finance their education, arising from the offensive actions of the Respondent. Furthermore, they are staring at an imminent risk of being rendered destitute due to his inability to secure their basic needs considering that he was the sole breadwinner.
10. The Claimant/Applicant further contends that the Respondent's blatant disregard of the Judgment and Decree of this Honourable court is exposing our justice system and judicial processes to ridicule which eventually will lead to an affront to the Rule of Law. The intervention of this Court is therefore imperative.
11. In matters honouring the Rule of Law, the Respondent stands on a higher pedestal. Its non-compliance with a court decree will encourage disobedience of court orders and or decrees. The Respondent is setting a dangerous precedent.



12. Lastly it is the Claimant/Applicant's contention that the Honourable Ann. A. Amadi is the Secretary and the Chief Executive Officer to the Respondent and by virtue of the said position she is mandated to effectuate the Judgment and the Decree of this Court. Therefore, she is liable for the non-compliance specifically for failing to issue him with a letter of reinstatement to enable him to resume employment and failing to authorize his payment for unpaid salaries, allowances and benefits and for him to be reinstated into the Respondent's Payroll.

### **Analysis and determination**

13. Before I delve further into considering the application, it is imperative to emphasize that the objective underlying contempt proceedings is the preservation of the court's authority by ensuring that its orders and decrees are complied with.
14. In relation to the objective of contempt proceedings, the Constitutional Court of South Africa in *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018[1]SA 1[CC], stated;  

“..... To ensure that the Court's authority is effective s 165[5] of the Constitution makes orders of court binding on “all persons and organs of state to which it applies. The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. Discernibly, continual non-compliance with court orders imperils judicial authority.”
15. I have carefully read the orders sought in the Claimant's/ Applicant's application. A preliminary point emerges which I must dispose of first, whether the orders sought are prematurely sought. In my view, contempt proceedings are sequential. The process leading to the conviction, sentencing, and committal to civil jail or fining of the contemnor, and where necessary having him or her arrested follows a logical order.
16. The Applicant must specifically ask and successfully urge the Court to find the Contemnor guilty of disobedience of the subject order or decree. It is after this that the court shall have to call upon the Contemnor to show cause why he or she shouldn't be committed to civil jail or fined for the contempt. At this stage, the contemnor in essence renders a mitigation. The Court will then use its judicious discretion to penalize him or her. A warrant of arrest can be issued against the contemnor if on the day of sentencing, he or she is not present in court and the Court has decided to commit him or her to civil jail. The warrant of arrest shall therefore be for the purpose of aiding to facilitate his or her conveyance to civil jail.
17. With great respect, the Applicant has literally jumped the gun. He has not sought that this court finds that the Respondent is guilty of contempt of the decree herein. He goes straight to ask the Court to issue a show cause notice against the Secretary to the Judicial Service Commission to appear and explain why a warrant of arrest should not be issued against her for failure to comply with the judgment and Decree of this Court. In contempt proceedings, a contemnor is only called upon to explain to the Court why the Court shouldn't penalize him or her in one or more of those manners contemplated by law, not to explain why warrants of arrest should not be issued against him or her. To say the least, this prayer makes no sense, it is too ambiguous.
18. Equally the prayer for the issuance of warrants of arrest and committal to civil jail cannot be issued in a situation where the contemnor hasn't been convicted of the contempt and for one reason or the other is not in court to be conveyed to prison to serve her civil jail.



19. The application assumes that the only sanction this Court can place on a contemnor is committal to civil jail. This is far from the truth. In fact, committal to civil jail should be the last penalty a court can dispense in a constitutional dispensation as is ours where individuals' liberty is one of those premier rights.
20. By reason of the foregoing, I find the prayers in the Claimant's/Applicant's application prematurely sought and or improperly sought. The application is hereby struck out.
21. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

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**OCHARO KEBIRA**

**JUDGE**

**In presence of:**

Ms. Kenei for the Claimant/Applicant

Mr. Ocharo for Respondent.

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO KEBIRA**

**JUDGE**

