



REPUBLIC OF KENYA



**Nguti & 196 others v Kenya Railways Corporation (Cause 803 of 2013)
[2023] KEELRC 3008 (KLR) (27 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3008 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 803 OF 2013
B ONGAYA, J
NOVEMBER 27, 2023**

BETWEEN

THOMAS M. NGUTI & 196 OTHERS CLAIMANT

AND

KENYA RAILWAYS CORPORATION RESPONDENT

RULING

1. The claimant filed the application by the notice of motion dated 21.06.2023 through Kinoti & Kibe Company Advocates. The application is under sections 12, 23, 16 and 20 of the [Employment and Labour Relations Court Act](#) and rules 31, 32, and 33 of the [Employment and Labour Relations Court \(Procedure\) Rules](#). The applicants prayed for orders as follows:
 - a. (spent).
 - b. That pursuant to the decree of the Honourable Court dated 06.11.2020 the Court be pleased to enter judgment in the case in the sum of Kshs.175,304,730.83.
 - c. (spent).
 - d. That the Honourable Court be pleased to find that the respondent's non-compliance with the dated 06.11.2020 constitutes wilful disobedience and contempt of Court.
 - e. That the Managing Director of the respondent be summoned to the Honourable Court to explain the respondent's non-compliance with the order dated 06.11.2020.
 - f. That costs of the application be borne by the respondent.
2. The application was based on the annexed supporting affidavit of James Macharia Mwangi and upon the following grounds:



- a. By the final judgment delivered on 05.11.2020 the Court, *inter alia*, ordered the respondent to tabulate the amount payable and forward to the claimant's counsel for approval within 30-days from the date of Judgment.
 - b. Subsequent to the judgment the respondent and claimants have taken steps to tabulate the amount payable to the claimants, there has been no concurrence on the same hence the making of the current application.
 - c. By letter dated 21.09.2022 the claimants' counsel forwarded to the respondent's counsel a tabulation of the amount payable indicating the amount due as Kshs.918,889,646.63 as at the date of that tabulation. The respondent has failed to respond to the demand for payment of the stated amount.
 - d. The failure by the respondent to tabulate the amount payable to the claimants constitute wilful disobedience and contempt of the order given on 06.11.2020. There is no justifiable reason for that failure by the respondent.
 - e. The claimants urge the Court to determine that the amount payable to the claimants is Kshs.918,889, 646.63 as set out in the tabulation by their expert Ms. Jonnels & Company Certified Public Accountants.
 - f. It is in the interest of justice that the application is allowed to mitigate the claimants' continued suffering for the respondent's failure to comply with the order to tabulate.gh
3. The respondent opposed the application by filing the replying affidavit of Stanley Gitari *Ag.* General Manager, Legal Services and Corporation Secretary, sworn on 24.07.2023 and filed through Oraro & Company Advocates. The application was opposed upon the following grounds:
- a. The applicants have failed to invoke section 5 of the [Judicature Act](#) providing for contempt of court as prayed for.
 - b. The applicants seek an order for payment of Kshs.175,304,730.83 without compliance with the mandatory provisions of section 87 of the [Kenya Railways Corporation Act](#) requiring service of a statutory notice upon the Managing Director.
 - c. The applicants have invoked rule 33 of the [Court's Rules](#) and section 16 of the [Act](#) establishing the Court whereas there is a pending appeal at the Court of Appeal against the decision by the Court.
 - d. The application seeks to reopen and re-litigate matters decided by the Court in the Judgment delivered on 06.11.2020 by the Court.
 - e. The residual jurisdiction of the Court can only be invoked where the decision in issue has occasioned injustice or a miscarriage of justice; the injustice or miscarriage of justice has eroded public confidence in the administration of justice; and, no appeal lies against the decision in issue.
 - f. The Court is *functus officio* after judgment of 12.08.2020 and final judgment of 06.11.2020.
 - g. The pending appeal is Kenya Railways Corporation -Versus- Thomas M. Nguti and 196 Others Civil Appeal No. E026 of 2023 at Nairobi. It is against the final judgment delivered on 06.11.2020. Residual jurisdiction does not therefore lie in view of the pending appeal.



- h. The willful and deliberate disobedience is demonstrated by paragraph 10(v) of replying affidavit which states that the computation is in abeyance in view of the pending appeal.
 - i. It is contemptuous that the respondent puts satisfaction of the decree in abeyance whereas there is no stay of execution orders on record. The Court should ensure compliance with the order for justice to be served. The Court should order partial settlement in the interim to the extent admitted by the respondent.
5. To answer the 1st issue, the Court finds that it has jurisdiction to entertain and determine the application. The plain issue in dispute is whether the respondent has complied with the order in the final judgment thus, “5. The respondent is directed to tabulate the amount payable and forward to the Claimants’ Counsel for approval within 30 days from the date of judgment.” While the applicants have invoked the provisions on review, the prayers are essentially not for review but whether the cited order has been complied with. Thus, while appeal is undisputedly pending, there being no stay order, it appears that nothing stops the parties from perfecting the terms of the order as was made. Such perfection of the order by computing the amount per terms of the order appears to the Court to be within the Court’s jurisdiction per section 13 of the *Employment and Labour Relations Court Act*. The section on enforcement of Court Orders provides that a judgment, award, order or decree of the Court shall be enforceable in accordance with the rules made under the *Civil Procedure Act*. Rule 32 (2) of the *Court’s rules of procedure* are in like terms. As submitted for the applicants, matters of satisfaction of decrees go to the court which passed the decree per section 34 of the *Civil Procedure Act*. Further, Order 22 rule 6 is imperative that where a decree holder desires to execute it, he shall apply to the court which passed the decree.
6. To answer the 2nd issue, while the respondent substantially complied with the order in the final judgment that the payable dues be tabulated within 30 days from 06.11.2020, the same appears to have been done and complied with by letter of respondent’s counsel dated 02.12.2020. The 30 days were lapsing on 06.12.2020. While the respondent complied, it is the applicants who failed to approve within 30 days. The reason should be obvious that looking at the number of claimants, considerable time would be required for the approval. The order appears not to deal with what would happen if the approval was not granted within 30-days. But between parties, they engaged ending in the respondent’s final tabulation at Kshs.175, 304,730.83 forwarded to the claimant’s counsel by letter dated 25.06.2021; and, the claimant’s tabulation by Certified Accountant forwarded to the respondent’s counsel by the letter dated 21.09.2022 for a sum of Kshs.918, 889, 646.63. Thus, the tabulation has been done by the respondent but the parties have a stalemate for want of the approval by the claimants who are disputing the tabulations by the respondent. The parties may agree or move the Court on how to break the stalemate. As things stand, the decree remains not perfected.
7. To answer the 3rd issue, the decree not having been perfected, there appears to be no decree for proper satisfaction. The parties have not suggested to the Court the points of divergent for an informed decision on whether Kshs.175, 304,730.83 as tabulated by the respondent would properly fall as a partial payment. It is that in absence of any other material, the parties are to get the amount payable tabulated by the respondent and approved by the claimants or until appropriate orders by the Court are obtained to break the dispute on the due amounts. By their conduct the time for the respondent to tabulate and the claimants to approve is deemed extended until parties agree on the tabulation or obtain the Court’s intervention in that regard.
8. To answer the 8th issue, the Court returns that the respondent has not been shown to have wilfully and deliberately disobeyed the order to tabulate the amounts payable within thirty days from the date of the final judgment and prayers in application will collapse.



In conclusion, the application dated 21.06.2023 filed for claimants is hereby determined with orders:

- a. By parties' conduct, the time for tabulation of the amount payable and approval by the claimants in order 5 given on 06.11.2022 is deemed extended until parties agree on the figure of the amount payable or until they obtain the Court's intervention on such figure as may be necessary and just.
- b. Parties to bear own costs of the application.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 27TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

