



**Kenya Medical Practitioners’ Pharmacists and Dentists Union & 2 others
v Registrar of Trade Unions & 2 others; Commissioner for Labour & 5
others (Interested Parties) (Appeal E087 of 2022 & Petition E194 of 2022
(Consolidated)) [2023] KEELRC 2742 (KLR) (3 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2742 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E087 OF 2022 & PETITION E194 OF 2022 (CONSOLIDATED)**

**B ONGAYA, J
NOVEMBER 3, 2023**

BETWEEN

**KENYA MEDICAL PRACTITIONERS’ PHARMACISTS AND DENTISTS
UNION APPELLANT**

AND

REGISTRAR OF TRADE UNIONS CONTEMNOR

AND

COMMISSIONER FOR LABOUR INTERESTED PARTY

STEPHEN OMONDI OLOO INTERESTED PARTY

MAGARE GIKENYI BENJAMIN INTERESTED PARTY

WILLIAM WATURU MURIUKI INTERESTED PARTY

KAUGIRIA ALEXANDER THURANIRA INTERESTED PARTY

AS CONSOLIDATED WITH

PETITION E194 OF 2022

BETWEEN

DR EDMOND NABUYIA 1ST PETITIONER

DR SIMON KIMANI WAWERU 2ND PETITIONER

AND

COMMISSIONER FOR LABOUR 1ST RESPONDENT



**KENYA MEDICAL PRACTITIONERS PHARMACISTS AND DENTISTS
UNION 2ND RESPONDENT**

AND

**REGISTRAR OF TRADE UNIONS INTERESTED PARTY
DR KAUGIRIA ALEXANDER THURANIRA INTERESTED PARTY
DR MAGARE GIKENYI BENJAMIN INTERESTED PARTY
DR STEPHEN OMONDI OLOO INTERESTED PARTY
DR WILLIAM WATURU MURIUKI INTERESTED PARTY**

RULING

1. This is an unfortunate situation in which a holder of a statutory and important public office of Registrar of Trade Unions has been found in contempt of Court for willfully disobeying the Court's order. The office is at the core of the realization of the right to fair labour practices provided for in Article 41 of *the Constitution*.
2. The Court on 04.08.2023 allowed the contempt application dated 06.03.2023 with orders:
 - a. The Registrar of Trade Unions one Ms. Beatrice Mathenge is hereby found in contempt of the Court's Order in the Judgment delivered herein on 10.02.2023 by the Honourable Justice Maureen Onyango requiring her to register the appellant's officials as set out in form Q submitted to her office for registration on 13.06.2022.
 - b. The Honourable Deputy Registrar to issue and cause service of summons forthwith today for the said Registrar of Trade Unions one Ms. Beatrice Mathenge to physically attend before the Recess Duty Judge on Wednesday 09.08.2023 at 9.00am or soon thereafter, at Milimani Commercial Court Building, as the matter will be called out before the recess Duty Judge to show cause why she should not be punished for acting in contempt of the Judgment delivered in this matter on 10.02.2023.
 - c. That costs of the application be paid personally by the contemnor. the holder of the office of the Registrar of Trade unions, one Ms. Beatrice Mathenge.
2. The proceedings to show cause took place and the contemnor made a sworn testimony in that regard. She also relied upon her supporting affidavit sworn on 25.10.2023, further affidavit sworn on 27.10.2023, and further affidavit sworn on 31.10.2023. The proceedings established as follows:
 - a. With respect to registration of the union officials herein after the elections in issue and subject of the orders in the judgment and the contempt proceedings, the contemnor testified thus, "I registered between 09.08.2023 and 28.08.2023."
 - b. She testified that on 01.03.2023 she received the letter dated 14.02.2023 from the Advocates for the trade union and the Judgment was attached. She perused the Judgment meaning she read the orders. Further, she testified that the Form Q in issue was resubmitted attached on the letter by the Advocates and seeking the registration of the officials.
 - c. As to why she did not comply with the orders to register the union officials per orders of the Court and the Form Q presented per the Judgment, she testified that she wished to appeal or



seek a review of the Judgment. The contemnor is substantively a Chief State Counsel deployed to the Ministry by the State Law Department and appointed by the Cabinet Secretary to Act as the Registrar of Trade Unions. In the circumstances, as an officer of the Court she knew that in absence of orders staying the implementation of the orders in the Judgment, she was bound to comply. In any event, the Court observes that no application for review was filed and no appeal was preferred. Thus, she testified, “When I read the Judgment, I saw I had not been heard. Without an order of stay the Judgment was in place.”

- d. In further explanation why, she did not comply with the order to register the union officials, the contemnor stated that she was the only officer at the office together with a clerical assistant and she was overwhelmed with the work. However, the contemnor did not by oral evidence or exhibits on her affidavits show the assigned duties that overwhelmed her between 01.03.2023 and, to between 09.08.2023 and 28.08.2023, when she registered the National and the Branch union officials. The Court therefore finds that for a long period of time, the contemnor knew about the Court orders but failed, refused or neglected to implement the same.
- e. The contemnor produced her letter dated 22.05.2023 addressed to the Attorney General. The letter was drawn upon the contemnor being served the application for contempt herein dated 10.02.2023. Further, the appeal papers had been served on 07.07.2022 at a time there was no holder of the office of Registrar of Trade Unions. Learned Deputy Chief Litigation Counsel Mr. Daniel O. Oure wrote on 25.07.2022 seeking detailed instructions to enable the Attorney General to prepare detailed pleadings in the appeal. The office of Registrar of Trade Unions being vacant, no instructions were forwarded as requested. It was in September 2022 that the Solicitor General posted her to act as Registrar of Trade Unions pending the appointment of a substantive office holder. She then reported on duty on 19.09.2022 but the matter was not brought to her attention until 14.02.2023 when the appellant’s Advocate wrote seeking that the union officials be registered per judgment by the Court dated 10.02.2023. Further, the contemnor wrote, “Consequently, no instructions were provided to your Office for purposes of representation.” The contemnor testified that her advocate in the matter, the learned Deputy Chief Litigation Counsel Mr. Daniel O. Oure, was not co-operative and she had filed a complaint with the Attorney General. However, the Court finds that by her own letter dated 22.05.2023, she confirmed that on 25.07.2022 Mr. Oure wrote seeking instructions but no instructions were given because there was no holder of the office of Registrar of Trade Unions in office. Further it was on 14.02.2023 that the appellant wrote seeking registration per Form Q in issue and per the Judgment dated 10.02.2023. The contemnor does not state in the letter the action taken between 14.02.2023 and until 06.03.2023 when she was served with the notice of motion dated 06.03.2023 being the application for contempt. She does not also explain action taken to give instructions to Mr. Oure as had been requested and for the period between 19.09.2022 (when she reported on duty) until 14.02.2023, when she received appellant’s request for registration per the Judgment. Upon material on record, the Court finds that Mr. Oure performed his duties as required by writing the letter dated 25.07.2022 requesting for instructions. Upon reporting on 19.09.2022 the contemnor took no action upon that request. On the second chance, she took no action on 14.02.2023 when the appellant prompted her with the request to register the officials per Form Q and the Judgment. Indeed, the Court considers that she therefore failed to act diligently to provide the Attorney General the necessary instructions and her failures cannot be visited upon Mr. Oure. It appears to the Court that upon the material on record, it was the contemnor who in fact failed to co-operate with the office of the Attorney General by not providing the needed instructions to be properly represented in the appeal. The contemnor confirms her



mix-up, failures, and misapprehension of the issue when she stated in her said letter dated 22.05.2023 thus, “From the Judgment at page 7 paragraphs 11-31 it seems that the matter came up in Court on 20/07/2022, 27/7/2022, 13/10/2022, 7/11/2022, 15/11/2022, 17/11/2022, 21/11/2022, 7/12/2022 and 10/12/2023. However, your Office did not inform us that the matter was coming up on those dates although the judgment shows that your Mr.Oure had been appearing on our behalf. This is despite the fact that we had not even forwarded the pleadings and instructions to your Office for effective representation in the matter. Your Office is also yet to convey the decision of the Court given on 10/02/2023.” By that assertion, it should be obvious that while Mr. Oure was on record, the Contemnor had failed to give instructions as had earlier been requested for. Thus, in the contemnor’s own understanding, it is obvious that Mr. Oure would not have represented the Registrar of Trade Unions effectively due to want of full and proper instructions and which the contemnor concedes she had failed to provide. The Court returns that in such circumstances, the contemnor has failed to establish the allegation that Mr. Oure was uncooperative as a mitigating factor in the current sentencing proceedings. While making that finding, the Court considers that having failed to act, cooperate and provide the needed detailed instructions, the contemnor’s position that she wanted to protect public interest (by appealing or seeking review of the Judgment) so that she declined to obey the order to register the union officials per the Judgment and the Form Q cannot hold and is completely unsustainable.

3. In mitigation, learned Counsel Ms. Mbilo for the contemnor urged the Court to consider that the contemnor had complied with the Court orders per the Judgment and the Court should be lenient. Further, she had been fairly new in the office of the acting Registrar of Trade Unions and she was a first-time contemnor.
4. Learned Counsel Mr. Julius Juma for the appellant Trade Union and Mr. Oure for the 1st Interested Party, the Commissioner for Labour, relied on the material on record without need to file submissions.
5. The contemnor had filed an application by way of a notice of motion dated 25.10.2023. The prayer that the order given on 25.10.2023 that the warrants of arrest of the contemnor issue will be set aside because the contemnor has since voluntarily submitted to the Court’s Jurisdiction. The other prayer was for setting aside of the order given on 04.08.2023 finding the Acting Registrar of Trade Unions Ms. Beatrice Mathenge in contempt of Court for failing to comply with the Judgment and orders issued on 10.02.2023. It is urged that after the order of 04.08.2023 the Acting Registrar of Trade Unions attended Court on 09.08.2023 when the Court ordered thus, “The Acting Registrar to comply with the Court order of 10th February 2023. Parties to appear before trial Court on 25.09.2023.” The order in the Judgment given on 10.02.2023 was worded thus, “The Respondent is accordingly directed to register the appellants officials as set out in form Q submitted to the office for registration on 13th June 2022” By her affidavits, the Acting Registrar of Trade Unions has shown that she has since complied with the order to register per order in the Judgment delivered on 10.02.2023.
6. While the contemnor has since complied, the compliance only came after the ruling on the contempt application. As per the replying affidavit of Dr. Davji Ouma Atela sworn on 30.10.2023, the registration was effected after the finding of contempt in circumstances that the contemnor had failed to comply. The Court has carefully considered the terms of the order in the judgment which did not set timelines for compliance but was imperative that the registration was to be undertaken but which was not complied with. The Court has also considered that the contemnor was in an acting capacity with no other or sufficient staff to assist her discharge her mandate. In the circumstance that the contemnor has since complied. The Court has found there is no established reason to set aside the finding of



contempt. In any event the prayer for setting aside is in the nature of a review and no known grounds for review have been established in the instant case.

7. In sentencing the contemnor, the Court may exercise considerable lenience in view of the reasons advanced by counsel for the contemnor for leniency as well as taking into account all the circumstances of the case. Of particular concern is that throughout the proceedings the contemnor has not tendered an unconditional apology. Instead the contemnor has raised excuses and pointed unjustified accusations at Mr. Oure who was assigned by the Attorney General to be on record and to act for the office of the Registrar of Trade Unions in the matter - but the contemnor failed to provide due instruction.
8. A genuine unconditional apology by the contemnor would go to show the contemnor's deep ethical self-examination, self-punishment and willingness to correct one-self. In the instant case, nothing close to such unconditional apology has been suggested or made by or for the contemnor. The Court is alert that public and state officers are partners with Courts in sustaining the integrity of the Judiciary and our Courts. The Court will, in appropriate cases, sparingly impose punishment for contempt against a public or state officer who tenders unconditional apology at the earliest possible time in contempt proceedings or any other eventuality of even remotest conduct suggesting appearance of undermining the administration of justice. What would a public or state officer want the Court to do if the officer is found in contempt of Court, like in the instant case, and the officer is not unconditionally apologetic, boldly asks the Court not to punish for the contempt, but instead urges that the Court should, for no good reason established, set aside the finding of contempt? The Court wonders whatever would be the result, if without even an unconditional apology, such an officer having already been found to be in contempt is allowed to go scot-free. The Court considers that our justice system would be brought to a great disrepute and the trust or confidence of the citizens would wane, that the Courts, are the beacons of justice being the true shield and defender of the people.
9. In the instant case, the contemnor by herself or by her counsel has not tendered an unconditional apology. The Court considers that even if an apology had been so tendered unconditionally, unqualified and bona fide, it would not be automatic that the Court accepts it. The Court would have to evaluate the contemnor's conduct and the seriousness of its impact to the dignity and image of the Courts, the likely attrition of public trust and confidence in the Courts, if the apology were to be accepted and, the Court would then decide to accept or reject the apology. The Court has warned itself not to show kindness when non-compliance with an order by the Court is with impunity and consciousness.
10. The record in the matter shows as follows. On 07.03.2023 the Court certified the application for contempt as urgent for inter-partes hearing on 15.03.2023 and ordered the parties to consider a compromise with a view of recording a consent at the inter-partes hearing. On 15.03.2023 it was confirmed the contemnor had been served and by her testimony the contemnor has confirmed as much. Learned Counsel Ms. Oyugi for the State Law office was present in Court having seen the matter on the cause list (but with no instructions from the contemnor) and parties were again directed and encouraged to compromise the application. The contemnor failed, in her testimony, to explain why she failed to attend Court on 15.03.2023. The application was mentioned on 09.05.2023 and the contemnor was again absent and Mr. Juma Advocate for the applicant confirmed service upon all the parties. Next the matter came up on 31.05.2023 and Mr. Oure informed Court that the Contemnor ought to have attended Court to give her position on the contempt application. On 04.08.2023 the ruling on the contempt application was subsequently delivered in circumstances that, as the contemnor confirmed in her testimony, that she had all along been aware of the judgment and the application for contempt but despite being the Acting Registrar of Trade Unions and substantively a Chief State



Counsel (duly re-designated by Public Service Commission effective 05.05.2022), she had failed to comply with the order in the Judgment as directed at her and failed to attend Court on the contempt application. The Court found her in contempt of Court. The Court has taken into account all the circumstances of the case and imposes a sentence of payment of a fine of Kshs.100,000.00 forthwith and in default, the contemnor be imprisoned for a term of 30-days.

11. Parties spent considerable time submitting on the establishment of the office of the Registrar of Trade Unions and that there are no officers appointed and deployed to serve as expected. It was confirmed by the contemnor and Mr. James Mwenda, the Chief State Counsel deployed at the Ministry of Labour and Social Protection, that the establishment of the office of the Registrar of Trade Unions was all inclusive for 9 officers at various ranks and all of which are not in-post. It was also Mr. Mwenda's submission that the practice whereby the Attorney General's office deployed a State Counsel of appropriate rank for the Cabinet Secretary to appoint as Registrar of Trade Unions was superseded with the promulgation of *the Constitution* of Kenya 2010 under which competitive and meritorious recruitment and appointment for the Registrar should be undertaken by the Public Service Commission for appointment by the Cabinet Secretary per Articles 10, 232, 234 and Chapter 6 of *the Constitution* and the relevant provisions of the *Labour Relations Act*, 2007. It would also appear that the acting appointments, if any, should be for a tenure prescribed in law per section 34 (3) of the *Public Service Commission Act*, 2017 being for not less than 30-days and not more than 6-months. Thus, in *Nicholas Karimi Muna -Versus- John Mark Wambugu and 6 Others ELRC Petition No. E058 of 2022 at Nairobi Judgment delivered on 25.05.2023*, the Court held, "(a) The undisputed evidence on record is that the 1st respondent has been acting for a long time as Chief Executive officer of the Fund contrary to provisions of the *Public Service Commission Act*, 2017 requiring acting appointments to be for at least 30 days and at most 6 months. The petitioner has established that the respondents have indeed violated the cited values and principles of national governance in Article 10(2) of *the Constitution*. The petition should succeed upon that finding."
12. The appellant shall serve this ruling, today, upon the Public Service Commission and the Cabinet Secretary at the Ministry of Labour and Social Protection to consider substantive recruitment and appointment for the 9 vacancies said to be the approved establishment at various grades in the office of the Registrar of Trade Unions. The recruitment and appointment shall be undertaken in accordance with the applicable provisions of *the Constitution*, statutes, and, the policy career progression guidelines or schemes of service. It has been established in the instant proceedings that the recruitment and appointments of the public officers for the office of the Registrar of Trade Unions should be prioritized and undertaken expeditiously towards the efficient, ethical and effective delivery of the statutory and other functions or duties vested in that important statutory office. As it was submitted by Mr. Mwenda for the Ministry, the office of the Registrar of Trade Unions is at the core of assuring industrial peace and harmony at the workplaces - which is a prerequisite for national development and prosperity.
13. The Court has considered the nature of the proceedings and each party to bear own costs of the sentencing proceedings and the application that was filed for the contemnor.

In conclusion the contemnor's application dated 25.10.2023 and the sentencing proceedings flowing from the earlier order of contempt of Court are hereby determined with orders:

- a. The contemnor shall forthwith pay a fine of Kshs.100,000.00 and in default to forthwith serve imprisonment term of 30 days.
- b. The Deputy Registrar of the Court and the Officer – In – Charge of the Langata Women Prison as may be assisted by the Officer Commanding Capital-Hill Police Station to implement the default order (a) above, as may and if, it falls due.



- c. The order given on 25.10.2023 that the warrants of arrest of the contemnor issue is hereby set aside as superfluous in the prevailing circumstances that the contemnor has submitted to voluntary personal presence in view of the proceedings herein.
- d. The appellant to serve this ruling upon the Cabinet Secretary and the Public Service Commission today.
- e. Each party to bear own costs of the proceedings subject of the instant ruling.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 03RD NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

