



Republic v Lake Basin Development Authority; Chere (Exparte Applicant) (Judicial Review E015 of 2022) [2023] KEELRC 3210 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3210 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E015 OF 2022
CN BAARI, J
DECEMBER 7, 2023

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS
IN THE NATURE OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF ARTICLE 23(F), 41 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW
REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF SECTION 69 AND 71 OF THE PUBLIC SERVICE COMMISSION ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE
RULES AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

REPUBLIC APPLICANT

AND

LAKE BASIN DEVELOPMENT AUTHORITY RESPONDENT

AND

FREDRICK ONYANGO CHERE EXPARTE APPLICANT



RULING

1. Before Court is the *ex-parte* applicant's application dated April 27, 2023, premised on a judgment of this Court delivered on 16th March, 2023. The Court in that judgment, issued orders of *mandamus*, *certiorari* and prohibition against the Respondent, and which orders the applicant submits were not complied with, hence necessitating this contempt motion. The Applicant prays that: -
 - i. Spent.
 - ii. Spent.
 - iii. The Court be pleased to issue a permanent injunction against the Respondent, either by itself or through its forces, from initiating a disciplinary process against the *ex parte* Applicant.
 - iv. The Acting Managing Director of of the Respondent, one CPA Wycliffe Ochiaga be held in contempt for willful disobedience of the court orders issued on March 16, 2023.
 - v. Upon being held in contempt, the said officer be jailed for a period of 6 months for disobeying Court orders, or for such other period as this Court may deem just and appropriate.
 - vi. In the alternative to prayer 5, this Court be pleased to mete out such punishments as it may deem appropriate to the contemnors and the officer be ordered to purge the contempt.
 - vii. The Respondent herein, be ordered to bear the costs of this application.
2. The application is supported by the grounds on the face of the motion and the affidavit sworn by the applicant on April 27, 2023. The applicant contends that his effort to have the orders complied with have been thwarted by the respondent, and the dues supposed to have been paid, have to date not been paid.
3. The Applicant avers that the Respondent's assertion that the motion is *sub judice* does not hold, and further states that the orders for payment of withheld salaries in JRE002 of 2022, related to salaries withheld in the period 2019 and 2022, when the Applicant and others were under suspension before their acquittal, while the order for payment made in this matter relates to the period after reinstatement.
4. It is the Applicant's further contention that the issues dealt with by Justice Radido in JRE002 of 2022, are different from those dealt with by this Court in the judgment delivered on 16th March, 2023.
5. The *ex parte* Applicant prays that this Court finds one CPA Wycliffe Ochiaga in contempt of Court, and that he be ordered to comply with the judgment of 16th March, 2023 by reinstating the Applicant.
6. The Respondent opposed the application *vide* grounds of opposition, a replying affidavit sworn on June 19, 2023, and a further affidavit sworn on October 31, 2023.
7. It is the Respondent's assertion that there is no contempt on the part of the Respondent, as salaries have been paid and a consent agreement filed in JRE002/2022 is produced in evidence.
8. It is the Respondent's contention that under the said consent agreement, salaries were to be paid within six months from 25th September, 2023, and that the six months are not over yet. The Respondent further states that it is for this reason that they contend that the instant motion is *sub judice*.



9. The Respondent for submits that according to the judgment of 16th March, 2023, disciplinary action against the Applicant could not proceed for reason that the Respondent had no Board in place, and which it now does. It states that the Court in its judgment stated that disciplinary action could continue once the Respondent has a Board in place.
10. The Respondent states that accusations against the Applicant have not been discharged and hence the reason it opted to restart the disciplinary process a fresh. Its states that a clear reading of the judgment indicates that the Court gave a window within which the Respondent could initiate the disciplinary proceedings.
11. It is the Respondent's submission that the prayer for permanent injunction is untenable since no Court can grant such a blanket order. It further states that the Applicant's salary having been paid, and the disciplinary process having been restarted within the law, the Respondent is not guilty of non-compliance with the court orders.
12. The Respondent finally submits that the instant motion does not meet the threshold for grant of the orders sought and prays that it be dismissed with costs.
13. Parties urged the motion orally on 1st November, 2023, where they reiterated their pleadings.

Determination

14. The *Black's Law Dictionary* (Ninth Edition) defines contempt of Court as:

“Conduct that defies the authority or dignity of a court, and because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
15. In *Samuel M. N. Mweru & others v National Land Commission & 2 others* [2020] eKLR, the Court held that to succeed in an application for contempt, an Applicant must prove that the terms of the order were clear, unambiguous and were binding on the defendant, the defendant had knowledge of or proper notice of the terms of the order, the defendant has acted in breach of the terms of the order and the defendant's conduct was deliberate.
16. Again, in *Kenya Tea Growers Association v Francis Atwoli and 5 others* [2012] eKLR Lenaola J cited with approval the case of *Clarke and others v Chadburn & others* [1985] 1All E.R (PC), 211 where the court stated:

“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal...”
17. The *Contempt of Court Act*, 2016 was declared unconstitutional by the High Court in the case of *Kenya Human Rights Commission v Attorney General & another*, [2018] eKLR, which decision, then means that the applicable law on contempt proceedings remains section 5 of the *Judicature Act*. The Section states thus: -

“(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.”



18. The judgment subject of this motion was rendered on 16th March, 2023, in the presence of both parties. It is therefore not disputed that the Respondent through counsel was aware of the decision of the court.
19. The Respondent in their replying affidavit, further affidavit and counsel's oral submissions, did not at any stage deny knowledge of the order/judgment of the Court, and their only issue is that a consent agreement had been entered into on how and when the salaries subject of the judgment would be settled.
20. The Court notes that the judgment/decreed subject of the consent agreement, was entered into in Judicial Review Cause No. E002/2022, which is a judgment rendered by Justice Radido in a different matter between the same parties.
21. The Applicant's contention is that the issues in Judicial Review Cause No. E002/2022, are different from those in the judgment rendered in this matter, and the salaries subject of the consent agreement relate to the period 2019 - 2022, when the Applicant served on suspension while facing criminal proceedings.
22. It is indeed apparent from the record that JR E002/2022 related to salaries withheld at the time the Applicant was on suspension (2019 -2022), while in this suit, the issue concerned the legality of the Applicant's dismissal after resuming duty upon his acquittal.
23. In the premise, the respondent's assertion that the instant motion is sub judice does not hold, and so does the contention that the salary subject of this application has been paid or that a payment modality has been reached pursuant to a consent agreement entered in JR E002/2022.
24. The Respondent's further argument in relation with the compliance of the judgment of this Court, is that the Court in that judgment had allowed the Respondent to initiate disciplinary proceedings when they have a Board in place and thus in their opinion, the disciplinary proceedings were re-started within the law on the basis firstly, that the Respondent now has a fully constituted Board of Directors, and secondly, on the basis that the accusations against the Applicant have not been discharged.
25. In *Republic v Attorney General & another Ex Parte Mike Maina Kamau* (2020) eKLR, Mativo J had this to say on contempt: -

“Court orders must be obeyed at all times in order to maintain the Rule of Law and good order. This of course means that the authority and dignity of courts must be upheld at all times and this differentiates civilized societies from those applying the law of the jungle. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors. The court does not, and ought not to be seen to make orders in vain; otherwise, the court would be exposed to ridicule and no agency of the constitutional order would then be left in place to serve as a guarantee for legality and for the rights of all people.

A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. It is a crime to unlawfully and intentionally disobey a court order.”

26. Both the Court record and the submissions by both parties, are prove that the Respondent was aware of the Court orders; that the orders were clear and unambiguous, and that the orders were binding. It is also true that the orders were clearly not honoured by the Respondent.
27. Contempt of Court is in the nature of criminal proceedings and proof of a case against a contemnor is higher than that of balance of probability. This is informed by the fact that the liberty of the subject



is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed.

28. In *Gatharia K. Mutikika v Babarini Farm Limited* [1985] KLR 227, the court held thus:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily ... It must be higher than proof on a balance of probabilities ... almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge ...

Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject ... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

29. The judgment of this Court had a total of four orders, the fourth one being on costs. The Respondent conveniently chose to pick order number three as the one it was willing to comply with. The order stated as follows: -

“That an order of judicial review by way of Prohibition be and is hereby issued restraining the Respondent from purporting to hear, review and determine the disciplinary proceedings involving the parties herein, in the manner that it did, and as complained of by the Applicant, unless it complies with all the applicable laws and principles relating to such an exercise, if at all, it should be found necessary to hear and determine the same after these proceedings.”

30. The first order in the judgment was an order of certiorari quashing the Respondent’s letter dismissing the Applicant, while the second order was an order of mandamus that expressly stated thus: -

“That an order of judicial review by way of Mandamus be and is hereby issued compelling the Respondent, its agents or any other person acting pursuant to the decision to dismiss the Applicant, to reinstate the Applicant to the previous position held before the letter dismissing him from employment was issued, and to compute and release the ex parte Applicant’s salary which was unlawfully withheld between March 15, 2022, being the date he was placed on suspension with no pay and September 9, 2022, being the date of his summary dismissal.”

31. The order was clear on what the respondent is required to do, but it instead, deemed it convenient to cling on previous orders that related to a different matter, and issues all together.

32. This Court dismissed a similar application against the Respondent earlier, premised on failure by the Applicant to prove that the disobedience was deliberate. In the instant motion, by the Respondent clinging on orders from a different suit on unrelated issues, and thereby claiming compliance with



this order, is in my view demonstration of bad faith and a deliberate disobedience of the orders of this Court.

33. In the premise, I find and hold that the *ex parte* Applicant's notice of motion is merited and orders granted as follows: -
- a. That the respondent's acting managing director CPA Wycliffe Ochiaga is hereby found guilty of contempt of Court for willful disobedience of the Court orders issued on 16th March, 2023.
 - b. The respondent's acting managing director CPA Wycliffe Ochiaga, having been found to be in contempt of court, is allowed 30 days to purge the contempt by complying with the orders of this court issued on 16th March, 2023.
 - c. That notice to show cause be and is hereby issued to the said CPA Wycliffe Ochiaga to personally appear before this court on February 7, 2024, to show cause why he should not be committed to civil jail for contempt of court, should order (c) above not be complied with.
 - d. The costs of the application shall be borne by the respondent.

34. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 7TH DAY OF DECEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Okello present for the Ex-Parte Applicant.

Mr. Yogo present for the Respondent

