



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

MISC CIVIL APPLICATION NO. 6 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012

BETWEEN

REPUBLIC.....APPLICANT

v

COUNTY EXECUTIVE COMMITTEE,

FINANCE MIGORI COUNTY GOVERNMENT.....1st RESPONDENT

CHIEF FINANCE OFFICER, MIGORI COUNTY GOVERNMENT.....2nd RESPONDENT

THE GOVERNOR, MIGORI COUNTY GOVERNMENT.....3rd RESPONDENT

AND

EX PARTE APPLICANT KENYA COUNTY GOVERNMENT WORKERS UNION

RULING

1. The Kenya County Government Workers Union (the Union) sued the Migori County Government (the County Government) in Cause No. 370 of 2015, *Kenya County Government Workers Union v Migori County Government*, alleging breach of contract (failure to implement terms of a collective bargaining agreement).
2. The parties negotiated and entered a consent on 31 May 2016 to the effect that:
 - (1) The Respondent hereby agrees to settle the total outstanding salaries and loan arrears of the Claimants' members who were employed by the defunct local authorities and the now County Government of Migori within the succeeding two years with effect from the financial year beginning 2016-2017.
 - (2) That execution shall ensue in case of default.
 - (3) Each party to bear their own costs.
3. The Court adopted the consent on 5 July 2016.
4. On 17 October 2018, the County Government moved the Court to have the consent set aside (In a Ruling delivered on 10 December 2019, the Court dismissed the application for lack of merit).
5. The County Government did not fully settle the consent sum (only Kshs 28,000,000/- was paid), and the Union commenced these judicial

review proceedings on 21 March 2018 to enforce compliance.

6. On 11 March 2021, the Court delivered judgment and issued a final order in the following terms:

(a) An order of mandamus is issued compelling the Chief Officer, Finance, Migori County Government to settle the decree in Kisumu Employment and Labour Relations Court No. 370 of 2015, *Kenya County Government Workers Union v Migori County Government* in full.

(b) Costs to follow the event.

7. The County Government did not settle the judgment. On 17 August 2021, the Union moved to execute by filing a Notice to Show Cause why the Chief Officer, Finance County of Migori, should not be arrested and committed to civil jail for failing to comply with a decree of the Court issued on 11 March 2021.

8. When the Notice came up on 23 November 2021, the Court took brief oral submissions from the parties.

9. Because the County Government introduced factual matters in the oral submissions, it was directed to file and serve an affidavit.

10. The County Government caused the Chief Officer, Finance, to file a replying affidavit sworn on 8 December 2021 in opposition to the Notice.

11. The Court took further brief oral submissions on 9 December 2021.

12. The Court has considered the record, the Notice, the replying affidavit and the submissions.

13. The Union and the County Government entered a consent on or around 5 July 2016.

14. The County Government did not fully honour the consent terms within the 2-years it had committed to, and the Union called a strike.

15. The strike threat prompted the parties to enter into further negotiations, and they signed a Return to Work Agreement on or around 27 October 2016, including a term:

(3) The County Government of Migori shall unconditionally abide by the conditions of the consent order (order of the Court) under Cause No. 370 of 2015, whereby it was agreed that the outstanding amount of Kshs 134,743,591/60 shall be paid in two financial years, i.e. 67 million shall be provided in the supplementary budget thereof payable in January 2017 but before 30 June 2017 and 67,743,591/60 on or before 30 June 2018.

16. The County Government did not satisfy the terms of the Return-to-Work Agreement, and this must have led to the judicial review proceedings.

17. The Court considered the judicial review application and delivered the judgment on 11 March 2021.

18. The County Government did not comply with the mandamus's order, hence the Notice to Show Cause.

19. In the replying affidavit, the Chief Officer, Finance, deposed that the consent award could not be settled because funds had not been appropriated as required by the Public Finance Management Act, 2012.

20. It was also deposed in the affidavit that the County Government had taken deliberate steps within the existing legal framework to have monies appropriated to settle the consent, but the County Assembly had declined to approve or allocate the funds save for Kshs 36,970,000/- in July 2021 for settlement (of other pending bills).

21. According to the County Government, without approval or allocation of funds by the County Assembly, it would be illegal to utilise funds to settle the consent.

22. The County Government further averred that it intended to include the consent sum in the following budget estimates for appropriation.

23. The County Government urged the Court not to deprive the Chief Officer, Finance, of his liberty because the ingredients of civil contempt had not been proved and that factors beyond its control caused the failure to comply.

24. It is not in dispute that the Court issued an order of mandamus which the County Government has not complied with.

25. The Public Finance Management Act, 2012, which the County Government has primarily relied on, came into effect on 27 August 2012.

26. When the County Government entered the consent in 2016 to settle the arrears within two years, it was aware of the provisions of the Act. It, therefore, could not have committed to pay within two financial years without seeking the appropriate approvals as envisaged under the Act.

27. The County Government has not demonstrated that it made budgetary requests for the funds to satisfy the consent within the 2-years, 2016 or 2017 (or even in 2018 or 2019).
28. The County Government appears to have been prompted to act in 2021 when confronted with contempt proceedings.
29. The justification advanced by the County Government that it is the County Assembly that has not appropriated the funds is not, therefore, genuine. It committed to settling the consent in 2016 and 2017. It did not include the amount in the budget estimates.
30. The County Government has not demonstrated any attempt to get the approval of the County Assembly in the succeeding years. It only moved when the Union commenced execution proceedings.
31. The Court cannot find the justifications by the County Government convincing or reasonable. There is a whiff of deliberate unwillingness to comply with the consent and court judgment, tinged with unusual lethargy.
32. The Court is satisfied that this is a fit case to issue the orders sought in the Notice to Show Cause dated 17 August 2021.

Orders

33. The Court orders the Police County Commander, Migori and the Sub-County Police Commander, Migori, to arrest with dispatch and present before this Court the Chief Officer, Finance, County of Migori for further proceedings.
34. The Chief Officer, to be presented to the Court upon arrest and if not presented earlier, mention on 23 March 2022.
35. The Union to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 16TH DAY OF MARCH 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For applicant Otieno, Yogo, Ojuro & Co. Advocates

For Respondents Ngeri, Omiti Advocates, LLP

Court Assistant Chrispo Aura