



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. E032 OF 2021**

**IN THE MATTER OF APPLICATION BY AYUB GIKONYO MATHENGE, MBUSIRO CHRISTINE DOROTHY AND ROBINSON KIPKORIR CHERUIYOT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI MANDAMUS AND DECLARATION**

**AND**

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27, 41, 47, 48, 50(1), 75, 159, 160, 162(2), 232, 243, 244, 246, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 10, 11(e) & 12 OF THE NATIONAL POLICE SERVICE COMMISSION ACT, SECTION 8, 10, 23, 46, 57(2), 48 & 83 OF THE NATIONAL POLICE SERVICE ACT; SECTIONS 4 & 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT; SECTION 5(2) (3), (6), 17(10), 19(6) AND 25(1) OF THE EMPLOYMENT ACT**

**AND**

**IN THE MATTER OF SECTIONS 3, 4, 7, 8, 9, 10 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015; ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, RULES 7 & 9 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**BETWEEN**

AYUB GIKONYO MATHENGE.....1<sup>ST</sup> APPLICANT

MBUSIRO CHRISTINE DOROTHY.....2<sup>ND</sup> APPLICANT

ROBINSON KIPKORIR CHERUIYOT.....3<sup>RD</sup> APPLICANT

**AND**

INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> RESPONDENT

NATIONAL POLICE SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT

ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

**RULING**

1. By a Notice of Motion Application dated 7<sup>th</sup> February, 2022, the Exparte applicants seek the following orders:

1. Spent

2. THAT **Hillary Mutyambai**, the 1<sup>st</sup> Respondent herein and **Eliud N. Kinuthia** the Chairperson of the 2<sup>nd</sup> Respondent herein be summoned to this Honourable Court for cross-examination on the compliance with the Order of Stay issued by this Court on 15<sup>th</sup> December, 2021.

3. **THAT Hillary Mutyambai** the 1<sup>st</sup> Respondent herein and Eliud Kinuthia the Chairperson of the 2<sup>nd</sup> Respondent herein, be cited for contempt of Court for disobeying the Order of stay issued by this Court on 15<sup>th</sup> December, 2021.

4. **THAT** in default of prayers 2 and 3 above, warrants of arrest do issue against **Hillary Mutyambai** the 1<sup>st</sup> Respondent herein and **Eliud Kinuthia** the Chairperson of the 2<sup>nd</sup> Respondent herein and that they be committed to jail for six months or any other sanction as this Honourable Court may deem fit and appropriate.

5. **THAT** in default of prayers 2 and 3 above, sequestration and/or attachment of the properties of **Hillary Mutyambai** the 1<sup>st</sup> Respondent herein and **Eliud Kinuthia** the Chairperson of the 2<sup>nd</sup> Respondent herein and the same be attached for the amount to be determined by this Honourable Court.

6. **THAT** this Honourable Court hereby issues an Order restraining the Respondents from any act of retaliation against the Applicants including transfer, redeployment, suspension, disciplinary action or any other adverse action or instructions arising from or in any way connected to the institution of this case.

7. **THAT** this Honourable Court be pleased to grant any further orders as it may deem fit to further the ends of justice.

8. **THAT** the costs of and occasioned by the contempt of Court proceedings herein be borne by the Respondents and in default thereof execution to issue forthwith.

2. The application is premised on grounds (a) to (n) on the face of the application and buttressed in the supporting Affidavit of **Ayub Gikonyo Mathenge**, the 1<sup>st</sup> Applicant.

3. The nub of the application is that the named persons are in willful defiance of the interim orders issued by the Court on 15<sup>th</sup> December, 2021. That the Court directed the respondents herein to maintain the status quo with respect to the remuneration of the Exparte applicants which remuneration was reduced vide a letter by the Deputy Inspector General, dated 17<sup>th</sup> November, 2021 from that of Job Group J enjoyed by the Exparte applicants to that of Job Group F now being paid to the Exparte applicants to their loss and detriment.

4. That the orders of 15<sup>th</sup> December, 2021 were issued by the Court in the presence of the Advocates for the respondents. That the respondents have in the month of December, 2021, and January, 2022 failed to revert the remuneration of the Exparte applicants to that which they previously enjoyed and under Job Group J, the Job Group to which they were lawfully recruited as Graduate officers and in which they continue to serve.

5. That the orders issued by the Court *are* compulsive, peremptory and expressly binding.

6. That by a letter dated 21<sup>st</sup> January, 2022, the applicants wrote to the respondents encouraging them to abide by the said Court orders. That the disregard of the Court orders by the respondents is contemptuous and arbitrary and is in itself a threat to the rule of law.

7. That the respondents regardless of their might cannot be allowed to disregard lawful Court orders. That indeed the respondents are the primary enforcers of the rule of law and cannot have the liberty of choosing which Court orders to obey and which not to obey.

8. That the respondents are bound by Article 10 of the Constitution which provides for the National Values and Principles of governance which enjoins the State organs and State officers including the respondents, herein to observe in order to uphold the rule of law and human rights in exercise of their functions.

9. That the application be granted.

10. The respondents have filed replying affidavits to the main JR application on the merits and arguments on the merits are set for 14<sup>th</sup> June, 2022.

11. Meanwhile arguments were proffered by advocates for both parties with respect to this application. Mr. Odukenya for the respondents submitted to the Court that the order issued by the Court on 15<sup>th</sup> December, 2021 is incapable of implementation and the replying affidavit filed by the respondents give in details the reason why the respondents cannot comply with the Court orders.

12. In short, Counsel for the respondent informs the Court that they shall and will not obey the Court order issued on 15<sup>th</sup> December, 2021 and in the same vein demand to be given a full hearing on the merits. It is trite that a party who is aggrieved by a Court order must file an appeal against the impugned order and/or apply to have it set aside. That unless an order for stay of execution of the order of the Court is granted, the respondents are bound to obey it.

13. The respondents in the present matter have not moved this Court and/or the Court of Appeal for stay of execution of the interim orders pending the hearing and determination of the suit on the merits.

14. The respondents have instead opted to take the law into their own hands and contemptuously submit before Court that the orders granted on 15<sup>th</sup> December, 2021 are incapable of being complied with and so they will not comply with them.

15. The orders issued by the Court on 15<sup>th</sup> December, 2021 are aimed at the maintenance of the status quo ante.
16. The Court require the respondents to pay to the Exparte applicants the remuneration they have paid them since they were employed in the year 2013 under Job Group J, being Graduate Officers, pending the hearing and determination of the suit.
17. The Court in granting those interim orders was satisfied that the applicants had satisfied the requirements for grant of interim orders set out under the case of Gielle –vs- Cassman Brown Ltd. [1978] EA being that:

(a) *they had demonstrated a prima facie case;*

(b) *that the Exparte applicants would suffer irreparable harm if their employment and remuneration status is not restored pending the hearing and determination of this suit;*

and

(c) *The balance of convenience favours the grant of the said interim orders.*

18. The Court notes that the scenario in this case is unlike that described by the Court of Appeal, in Court of Appeal Civil Application No. 253 of 2019 (UR 232)/(2019) – Attorney General and 2 Others –vs- Evans Muriuki Muthuri and (4) Others in which the Court of Appeal delivered a ruling on 24<sup>th</sup> April, 2020 and granted stay orders sought by the Police Service in respect of remuneration orders granted by this Court.

20. In the present case, the Exparte applicants have been denied remuneration they were paid by the Police Service since their recruitment and appointment in Job Group J as graduate police officers whereas the police officers in the former case before Employment and Labour Relations Court and Court of Appeal were seeking to be promoted from Job Group F to Job Group J having been employed and remunerated at a lower job group than their counter part, graduate officers appointed under Job Group J.

21. It has been stated time and again as in Kudheha Workers –vs- Director Riara Group of Schools 92021) eKLR per Maureen Onyango J. and by the Court of Appeal in Christine Wangari Gachigi –vs- Elizabeth Wanjiru Evans and 11 Others [2014] eKLR per Nambuye, Ouko and J. Mohammed JJA, that: -

***“A Court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open the door. If one is dissatisfied with an Order of the Court, the avenues for challenging it are also set out in the law. Defiance is not an option.” (Emphasis Added)***

22. This Court is not prepared to engage in flexing of muscles between itself and the ever endowed executive, on which the Court relies on to have its orders implemented. If the interim orders of the Court are openly and blatantly defied, there cannot be any useful purpose for the Court to give audience to a party who is only prepared to obey the Court orders if they are made in its favour. The Court must be steadfast in ensuring that the low and the mighty give deference to its orders and obey them without exception.

***“This is not done to uphold the integrity of the Judiciary or the Court or even the personal ego of the Presiding Judge. Neither is it about preserving and safeguarding the rule of law. A party who walks through the justice door with a Court order in his hand must be assured that the order will be obeyed by those to whom it is directed.” (Emphasis Added)***

23. Accordingly, this Court finds in view of the submissions by the respondents before Court that the 2<sup>nd</sup> respondent in particular is in open, blatant and willful defiance of the Court orders issued on 15<sup>th</sup> December, 2021 by this Court by failing to withdraw the letter it had issued reducing the grade and remuneration of Exparte applicants.

24. The Court therefore makes the following orders: -

(a) *That the Court will not grant any further audience to the respondents in this matter on the merits of this case until the Respondents comply with the Court orders issued on 15<sup>th</sup> December, 2021. To this end, in the event the respondents fail to comply with the said Court orders this suit shall proceed Exparte on 14<sup>th</sup> June, 2022 on the merits of the suit.*

(b) *That the Chairperson of the 2<sup>nd</sup> Respondent, Eliud N. Kinuthia is hereby summoned to this Court on a date to be determined by the Court to show cause why he should not be cited for contempt of Court and punished for disobeying the Oder of stay issued by this Court on 15<sup>th</sup> December, 2021.*

(c) *Costs to follow the event.* Dated and delivered at Nairobi this 28<sup>th</sup> day of April, 2022

**MATHEWS N. NDUMA**

**JUDGE**

## **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, this ruling has been delivered to the parties online with their consent. 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 18 of the Civil 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.

**MATHEWS N. NDUMA**

**JUDGE**

### **Appearances**

Mr. Kanjama and Danstan Omari for Exparte/Applicants

Mr. Odukenya for respondents

Mr. Chadenya for Interested party