



REPUBLIC OF KENYA



KENYA LAW
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**Dzila v Kwale County Assembly Service Board & 6 others (Cause
21 of 2020) [2022] KEELRC 1401 (KLR) (17 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1401 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 21 OF 2020
B ONGAYA, J
JUNE 17, 2022

BETWEEN

HAMISI BWENI DZILA CLAIMANT

AND

KWALE COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

COUNTY ASSEMBLY OF KWALE 2ND RESPONDENT

SAMMY NYAMAWI RUWA 3RD RESPONDENT

OMAR KITENGELE 4TH RESPONDENT

ANTONY YAMA 5TH RESPONDENT

MWAKARIBU HAMISI 6TH RESPONDENT

CELINE LUSWETI 7TH RESPONDENT

RULING

1 The Court delivered the ruling (erroneously titled ‘judgment’ as now noted by the Court and amenable to rectification) on 01.04.2022 in the claimant’s application by the notice of motion dated 10.03.2022 and filed on the same 10.03.2022 - which was determined with orders:

1. The disciplinary proceedings against the applicant initiated by the respondents be and are hereby temporarily stayed upon the conditions that:
 - a. the applicant to retain full remuneration without reporting at the office;
 - b. the deputy registrar to cause the typed and certified proceedings in the case to be expeditiously ready and not later than 08.04.2022 so as to facilitate parties to move the Court of Appeal as soon as possible and not later than 29.04.2022; and,



- c. in any event, the stay of execution orders now granted herein to lapse upon close of 29.04.2022 and subject to the outcome as may be ordered by the Court of Appeal, parties to otherwise comply with the judgment.
 2. Parties to bear own costs of the application.
2. The claimant has subsequently filed on 19.05.2022 an application dated 17.05.2022 by a notice of motion through Aboubakar Mwanakatina & Company Advocates and brought under section 12 (3) (iii) (viii) and 13 of the Employment and [Labour Relations Act](#), section 1A, B and 1A, 63(a) (c) of the [Civil Procedure Act](#) and all enabling provisions. The claimant prayed for orders:
 1. (spent).
 2. The Honourable Court do issue an injunction against the respondent herein from proceeding with the disciplinary process until such time that they comply with the orders of this Court issued on 01.04.2022.
 3. The Honourable Court do punish the respondents herein for contempt of Court by committing the respondents to civil jail for breach of the orders of this Court made on 01.01.2022.
 4. Costs of the application be borne by the respondent.
3. The claimant's case is that in compliance with the orders in the judgment and per ruling of 01.04.2022 he reported at work on 02.05.2022 but he was denied access to his official office and not assigned duties as the Board Secretary. On its part on 01.05.2022 the 1st respondent summoned the claimant to attend disciplinary proceedings on 04.05.2022. The claimant had also filed on 21.04.2022 an application for stay pending appeal and which was pending hearing and determination before the Court of Appeal. The claimant urged that the Board had breached the Court's order requiring it to allow the claimant to access office and to continue working.
4. The respondents filed a notice of preliminary objection on 24.05.2022 and against the application; through Muturi Gakuo & Kibara Advocates. The grounds of preliminary objection were as follows:
 1. The Court lacks jurisdiction to hear and determine the application because it has made a final pronouncement in the matter by way of a judgment; and the claimant has filed an application in the Court of Appeal fixed for hearing on 06.06.2022 and the Court of Appeal is the proper forum and this Court's interference would be contrary to doctrine of judicial hierarchy and upsets the established juridical order.
 2. The application is liable for striking out as is res judicata under section 7 of the [Civil Procedure Act](#) which provides thus, "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."
 3. The application is therefore incurably defective, bad in law and is incompetent and ought to be struck out with costs.
5. Parties filed their respective submissions on the preliminary objection. The Court has considered the grounds in the notice of the preliminary objection, the submissions and finds as follows.



- 6 On the issue of functus officio, the respondents submit that the Court has already dealt with the issue of injunction and therefore it is functus officio. It is submitted that the Court rendered its final judgment in the suit. For the claimant it is submitted the Court enjoys post-judgment jurisdiction such as review jurisdiction as provided in section 16 of the Employment and *Labour Relations Act*, 2011. Further, the Court also had jurisdiction to enforce its decrees and orders per section 13 of the Act. As held by Mativo J in *Samuel M.N. Mweru & Others –Versus- National Land Commission & 2 Others* [2020]eKLR an application for contempt to enforce a decree or order by the Court is within valid post-judgment jurisdiction. The Court finds that indeed, it has jurisdiction to enforce its judgment, award, order or decree in accordance with the Civil Procedure Rules and as per section 13 of the Act. The submissions made for the claimant in that regard are upheld.
- 7 On the issue of res judicata it is submitted for the respondents that the Court decided the claimant’s application for injunction to restrain the respondents from proceeding with the disciplinary process and as per the Court orders given on 01.04.2022 and with elaborate conditions in that regard. There were no submissions made for the claimant on this ground. As submitted for the respondent, the injunction order was given by the Court on 01.04.2022 pending the moving of the Court of Appeal as parties deemed appropriate. The order on 01.04.2022 was clear in its terms that any further injunctive considerations would be by the Court of Appeal. The terms of that injunctive order given by this Court on 01.04.2022 having not been reviewed at all, prayer 2 in the notice of motion is trapped by the doctrine of res judicata as is as well trapped by the doctrine of judicial order through hierarchy of courts. As submitted for the respondent, indeed the order of injunction given on 01.04.2022 had a proviso thus, “c. in any event, the stay of execution orders now granted herein to lapse upon close of 29.04.2022 and subject to the outcome as may be ordered by the Court of Appeal, parties to otherwise comply with the judgment.” The terms of the order were that the matters in that regard moved to the Court of Appeal and both parties are in agreement that indeed the claimant had filed the relevant application in the Court of Appeal. The respondents’ Counsel has drawn the Court’s attention to page 212 of the respondents’ bundle of the replying affidavit of Sammy Nyamawi Ruwa filed on 10.06.2022 which exhibits the ruling dated 06.06.2022 by the Court of Appeal (Gatembu, Nyamweya & Lessit, JJ. A) in *Hamisi Bweni Dzila –Versus- Kwale County Assembly Service Board and 6 others*, Civil Application No E022 of 2022 at Mombasa. The ruling shows that Counsel for the applicant informed the Court that the application had been overtaken by events as the applicant has since been dismissed from office and Counsel applied for withdrawal of the application with no objection by Mr. Kibara Advocate for the respondents. The application was then marked as withdrawn under rule 52 of the Court of Appeal Rules, 2010. In view of that ruling, this Court finds that indeed and in any event, prayer 2 for injunction is as well overtaken.
- 8 In conclusion, the preliminary objection will partially succeed and partially fail with orders:
1. The ruling delivered herein on 01.04.2022 but erroneously titled “judgment” is corrected and duly rectified by deleting “judgment” in the title and inserting thereof “Ruling” and parties to note the correction accordingly.
 2. Ground 1 in the notice of preliminary objection fails as the Court enjoys jurisdiction to consider and determine the application on prayer 3 on alleged contempt within post-judgment jurisdiction for enforcement and satisfaction of the Court’s judgment, award, decree, or order as appropriate.
 3. Ground 2 in the notice of preliminary objection is upheld that prayer 2 in the application for an injunction is chained by the doctrine of res judicata and is as well overtaken by reason of the ruling by the Court of Appeal given on 06.06.2022 in *Hamisi Bweni Dzila –Versus-*



Kwale County Assembly Service Board and 6 others, Civil Application No E022 of 2022 at Mombasa.

4. The parties at liberty to compromise the residual prayer 3 in the claimant's application dated 17.05.2022 and filed on 19.05.2022 with a view of recording appropriate consent or directions as may be necessary.
5. Each party to bear own costs of the preliminary objection.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 17TH JUNE, 2022.

BYRAM ONGAYA

JUDGE

