



Union of Kenya Civil Servants ((Suing on Behalf of the 1st - 46th Claimants as per the Attached List of Claimants)) v County Government of Bungoma & another (Petition E002 of 2022) [2022] KEELRC 1577 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1577 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E002 OF 2022**

**JW KELL, J
JULY 29, 2022**

BETWEEN

**UNION OF KENYA CIVIL SERVANTS PETITIONER
(SUING ON BEHALF OF THE 1ST - 46TH CLAIMANTS AS PER THE
ATTACHED LIST OF CLAIMANTS)**

AND

**COUNTY GOVERNMENT OF BUNGOMA 1ST RESPONDENT
COUNTY PUBLIC SERVICE BOARD – BUNGOMA 2ND RESPONDENT**

RULING

1. The applicant/petitioner herein brought a contempt of court motion application dated June 2, 2022 against the respondents expressed to be brought under Order 40 rules 3 Order 50 rule 1 of the [Civil Procedure Rules 2010](#), Sections 1A,1B, and 63(A),(C)and (E) of the [Civil Procedure Act](#) (CAP 21 laws of Kenya) and other enabling provisions of law seeking for the respondents to be cited in contempt through their representative(s) and or agent(s) for disobeying the honourable court orders of April 28, 2022. The applicant further sought for warrant arrest directed to the Officer Commanding Station of the nearest police station to execute the warrant against the respondents through their representative (s)or agent (s) and cause their appearance in court and that they be committed and detained in jail for a period not exceeding 6 months for contempt of the orders of the honourable court of April 28, 2022.
2. The application is supported by the affidavit of Hon Tom Odege, the secretary general of the petitioner, sworn on the 2nd June 2022 and averring that the respondents are in contempt of order of the court issued on the March 9, 2022 for *status quo* to be maintained up to judgment date('HTO1' is a copy of the order). That the *status quo* meant that the respondents would not interfere with the claimant's



employment negatively pending determination of both the petition and the application directed to be heard together.

3. That during the pendency of the suit and orders issued herein the defendants in total disrespect and defiance of the said orders had proceeded to remove the claimants from the payroll of the month ending April 31, 2022 (MMN2 is extract of the payroll).
4. That act of striking out the claimants from the payroll is that the claimants continue to suffer due to defiance of the court order by the respondents and they should be punished.
5. Counsel submitted that the claimants were working and not getting paid as they had been struck off the payroll.
6. When the application was placed before me I directed service on the respondents who filed their response through replying affidavit of Joseph Wakoli Wambati sworn on July 15, 2022.
7. On the July 18, 2022 the application was canvassed orally by counsel for the parties. The applicant was represented by Ms Mikuru of M Owenga & Co Advocates. The Respondent was represented by Ms Malaka holding brief for Mr Cyril Wanyong'o the County Attorney.
8. The applicant's counsel relied on the supporting affidavit of Hon Tom Odege and further submitted that the claimants were working and not getting salary as they had been struck off the payroll contrary to the court order.
9. Counsel of the applicant to buttress the application for citation of the respondents for contempt relied on the decision of the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* (2018) where the Supreme Court upheld several authorities on contempt of court as follows:-

“[24] In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & Another* Civil Application No 39 of 1990 (unreported), where the Court of Appeal stated as follows: “It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In *Hadkinson v Hadkinson* (1952) 2 All ER 567, it was held that: ‘It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.’”

[25] In *Att-Gen v Times Newspapers Ltd* [1974] AC 273, Lord Diplock stated: “.....There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.”

[27] Ojwang, J (as he then was) in *B v Attorney General* [2004] 1 KLR 431 that: “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.”

10. The court upholds the decision of the Supreme Court in *Ahmad Abolfathi Mohammed & Another* (supra) and the endorsed decisions therein on the necessity and importance of contempt orders of the court. The counsel for the applicant also relied on the High Court Decision in *Kenya Human Rights*



Commission v Attorney General & Another (2018)Eklr in which decision the court had cited paper by Mahomed J ‘Role of the Judiciary in a constitutional stated- address in the first orientation course of judges (1998) 11 SALJ 11 AT 112 where the author noted that the ultimate power of court rests on the esteem with which the judiciary is held within the psyche and soul of a nation. That esteem must substantially depend on the court’s independence and integrity. The court agrees with the sentiments expressed by the author.

11. The applicant’s counsel further submitted that the system is operated by persons hence the removal of the claimants from the payroll was by an individual.
12. Counsel for the respondent, relies on the replying affidavit of Joseph Wambati of July 15, 2022 and submits that they are not in contempt as the order of April 28, 2022 No 3 ordered that *status quo* be maintained upto judgment date. That prior to this order no other orders had been granted by the court and therefore they took it things would flow naturally the way they were until judgment. That according to their system the contracts of the 46 claimants were coming to an end in the month of April and the claimants earned upto April after which the system automatically ejected them from the payroll. That due to the court order they could not take any other action including negotiating for renewal of the contracts under same terms or varied terms. That it is their view they are not in contempt and are complying with the court order. That without express orders it is not right to assume contracts were renewed. The claimants did not ask the court to have contracts extended until judgment is delivered since they knew contracts were coming to an end.
13. The counsel for the respondent denied the claimants were reporting to duty or assigned duties and further submitted the respondent’s premises is a public place and like all other citizens they have access.

Determination

14. It is true that currently, and regrettably so, we do not have our own legislation dealing with contempt of court. This is so because in Kenya Human Rights Commission v Attorney General & Another [2018] eKLR, Mwita, J declared that the entire Contempt of Court Act No 46 of 2016 is invalid for lack of public participation as required by articles 10 and 118(b) of the Constitution and found that the said Act as enacted encroached upon the independence of the judiciary. The decision is law for now.
15. Consequently, the court is of the opinion that the law with respect to the procedure for institution of contempt of court proceedings in this country was and therefore is section 5 of the Judicature Act (Cap 8 Laws of Kenya). That section provides:
 - ‘(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.
 - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.’
16. Therefore, the court finds that the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed is as held by Justice Odunga in Alfred Mutua v Boniface Mwangi [2022] eKLR at paragraph 14 where the court upheld the decision of the Court of Appeal in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014] eKLR, Where the court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the Judicature Act. The court upholds the decision by Justice Odunga.



17. The Supreme court in the decision cited by the counsel for the applicant in [*Republic v Ahmad Abolfathi Mohammed & Another*](#) (2018) upheld the standard of proof of contempt as per the decision in the case of [*Mutitika v Baharini Farm Limited \[1985\] KLR 229, 234*](#) where the Court of Appeal held that: “In our view, the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”(para 28)
18. The Supreme Court in paragraph 29 of the foregoing decision explained the rationale of the test as follows:-

‘The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the court order’.(Emphasis given)
19. The court is satisfied with the explanation given by the respondents as to why the claimants were removed from the payroll despite the *status quo* order. Indeed, the said court order maintains the things as they are. The court agrees with counsel for the respondent that the applicant ought to have sought for extension of the contracts pending hearing and judgment in the claim as they knew their contracts were coming to an end shortly. The applicant does not deny the contracts of the 46 were coming to an end.
20. Applying the Supreme Court decision in [*Republic v Ahmad Abolfathi Mohammed & Another*](#) (2018) (supra) the court finds that prayer sought is for committal to jail. The liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the applicant to establish that the alleged contemnor’s conduct was deliberate, in the sense that they or their agents wilfully acted in a manner that flouted the court order.
21. The court finds there was no wilful disobedience of the court order as the contracts had near expiry dates when the impugned order was made. The court order was made on March 9, 2022 and contracts were set to expire end April 2022. The court finds that the claimants’ removal from the payroll was a natural consequence of the expiry of employment contracts. It was not a wilful and deliberate act of disobedience of the court order by the respondents.
22. Consequently, the court finds and determines that the application does not meet the test for contempt court where the burden of proof is higher than that of civil cases’ burden of proof and less than that of beyond reasonable doubt, the offence being quasi criminal. The notice of motion application dated June 2, 2022 is dismissed.
23. No Order as to costs.

Further Order

24. The court noted from the response and submissions of the respondents that they are amenable to negotiations. The court then stays the matter and refers the dispute to the Ministry of Labour and Social Protection for appointment of a conciliator in the dispute under the [*Labour Relations Act*](#). The



parties to appear before the conciliator for the conciliation process. The conciliator to file a report in court within 60 days of this order. This order to be extracted and served at the Kakamega Ministry of Labour Office by the claimant.

25. Mention on September 29, 2022 to receive report of the conciliator and for further directions.

26. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF JULY, 2022 IN OPEN COURT AT BUNGOMA.

J. W. KELI,

JUDGE.

In the presence of :-

Court Assistant -Brenda Wesonga

For Claimant :- Ms. Mikuru

For Respondent:- Mr. Cyril Wanyongó and Ms. Walaka

