



**Ogworu v The Governor Nyamira County & 2 others (Judicial Review
10 of 2021) [2022] KEELRC 1767 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1767 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW 10 OF 2021**

**CN BAARI, J
JULY 28, 2022**

BETWEEN

CLIVE NYAAGA OGWORA APPLICANT

AND

THE GOVERNOR NYAMIRA COUNTY 1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYAMIRA 2ND RESPONDENT

THE COUNTY ASSEMBLY OF NYAMIRA 3RD RESPONDENT

RULING

1. Before court is a notice of motion application dated April 1, 2022, brought pursuant to sections 1 & 3A of the *Civil Procedure Act*, order 40 rules 1, 2 & 3 and order 50 rule 1 of the *Civil Procedure Rules, 2010*. The applicant seeks orders that:
 - i. spent
 - ii. the honourable court be pleased to find the 1st and 2nd respondents in contempt of the court's judgment delivered on the March 24, 2022, and the subsequent decree/order emanating therefrom.
 - iii. That consequent to prayer 2 herein above being granted, the honourable court be pleased to issue warrants of arrest against the 1st respondent for committal to civil jail for a duration not exceeding six months for disobedience of court orders
 - iv. The hounarable court be pleased to order that the property of the 1st and 2nd respondent be attached, be sold, and out of the proceeds the court to award compensation and damages which shall be assessed to compensate the applicant.



- v. The honourable court be pleased to issue such other orders or further punitive orders in respect of the contempt as may be necessary for the ends of justice to be met.
 - vi. The honourable court be pleased to order the officer commanding Nyamira police station to provide security and assist in the implementation of the orders upon their issuance.
 - vii. The costs of the application be borne by the 1st & 2nd respondents.
2. The application is supported by the grounds on the face and the affidavit sworn by the applicant. The crux of the application is that the court in a judgment delivered on March 24, 2022, and served upon the respondents on March 25, 2022, ordered the appointment of the applicant to the position of Nyamira county executive committee member for environment, water, mining and natural resources. The applicant avers that despite the respondents acknowledging receipt of the orders, they have deliberately failed to honour or obey the orders.
 3. The respondents opposed the application vide a replying affidavit sworn by one Willis Nyamongo Nyagarama on July 5, 2022. The respondents aver that the instant application is premature as the substantive issues raised are in regard to an appeal pending in Kisumu Civil Appeal No E083 of 2022.
 4. The respondents aver that notice of the appeal was filed and directions in respect of the appeal given, and the hearing set for July 19, 2022.
 5. The respondents further avers that the Court of Appeal has certified the appeal as urgent and allowing this application will amount to the court concluding that the appeal is not arguable.
 6. The respondents submits that unless the court stays the proceedings, the appeal shall be rendered nugatory. It is their further submission that the court holds the application in abeyance as it affects the respondents right of appeal.
 7. It is submitted for the respondents that the applicant did not present himself to arrange for regularization or appointment. The respondents further denied service of court process.

Determination

8. I have considered the application, the affidavits, grounds and the oral submissions by counsel for both parties. The issue for determination is whether the respondents are liable for contempt of court.
9. The *Black's Law Dictionary* (ninth edition) defines contempt of court as:

“conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
10. The purpose of contempt proceedings is to safeguard the rule of law and not to install the dignity of the court. In *Johnson v Grant*, 1923 SC 789 at 790 Lord President Clyde stated:

“...The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.”



11. 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 ER (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....”

12. In *Samuel M N Mweru and other v National Land Commission & 2 others* [2020] eKLR, it was held that for a party to succeed in an application for contempt the party must satisfy the court on following four elements:

- i. That the terms of the order were clear, unambiguous and were binding on the defendant.
- ii. The defendants had knowledge of or proper notice of the terms of order
- iii. The defendant has acted in breach of the terms of the orders, and
- iv. The defendants conduct was deliberate.

13. The judgment/decree subject of these proceedings was rendered on March 24, 2022. The instant application is dated April 1, 2022. This confirms that the application herein was filed just six (6) days after the judgment was delivered.

14. The respondents through submissions by their counsel have told the court that they have not deliberately disobeyed the orders of the court, and instead, deny service of the subject judgment and the attendant decree.

15. As correctly submitted by counsel for the applicant, the judgment was delivered in open court in the presence of counsels for both parties and on a date that was given in the presence of the representatives of both the applicant and the respondents. Further an affidavit of service has been adduced as evidence of service of the both the judgment and the decree.

16. A look at the affidavit of service filed in the matter, indicates that service was effected upon the respondents through their respective secretaries, and this in itself casts doubt on whether the respondents had knowledge of or proper notice of the terms of judgment and the attendant decree.

17. 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. In *Gatharia K Mutikika v Babarini Farm Limited* [1985] KLR 227, the court stated:

“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.”

18. Bearing the quasi-criminal nature of applications such as the one before court in mind, I am hesitant to grant the orders sought at this point where the judgment and decree subject of the application were said have been served just six 6 days to the date of the application. The respondents were obviously not allowed time to compute the amount owed to the applicant, and/or make arrangements for the applicant’s appointment as ordered.
19. To this end, I arrive at the conclusion that the disobedience was not deliberate for reason that the appointment subject of the decree is one that requires gazettment and various other steps which could most definitely not be possible within a space of six days.
20. Secondly, the respondents have brought to the attention of this court the pendency of an appeal against the judgment/decree subject of this application before the Court of Appeal. In [*Law Society of Kenya v AG & another*](#) (2019) eKLR, the Supreme Court held that the High Court ought to have waited for the Supreme Court to pronounce itself and acknowledge the hierarchy of courts.
21. There is no doubt that the appeal herein will be rendered nugatory if the orders sought are granted at this juncture. I therefore decline to grant the prayers in this application for the reasons foregone.
22. The application is dismissed with no orders as to costs.
23. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28TH DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Godi h/b for Mr. Maloba for the Applicant.

Mr. Anyoka Present for the Respondents

Christine Omollo – C/A

