



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Muhezi & 11 others v Vihiga County Public Service Board (Employment and Labour Relations Claim 64 of 2021) [2022] KEELRC 1329 (KLR) (14 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1329 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CLAIM 64 OF 2021**

JW KELI, J

JULY 14, 2022

(FORMERLY KSM NO. 390 OF 2015)

BETWEEN

KICHAM LITTEN MUHEZI & 11 OTHERS CLAIMANT

AND

VIHIGA COUNTY PUBLIC SERVICE BOARD RESPONDENT

RULING

1. The Ruling is on two Applications. The Application dated 16th August 2021 by the Respondent filed in court on the 18th August 2021 and the Application dated 3rd August 2021 by the Claimant and filed in court in Kisumu on 18th August 2021 (also bears court stamp of receipt on 3rd August 2021)

Application dated 16th August, 2021

2. The Applicant by way of Notice of Motion dated 16th August 2021 brought under Certificate of urgency on the 18th August 2021 seeks the following substantive orders:-
 - a) The Honourable court reviews the Judgment dated 1st December 2020 and set it aside.
 - b) The Applicant be granted further leave to file and serve defense to the claim within 15 days of the order or such period as the Honourable court shall direct and to that extend, the time for so doing be extended accordingly.
 - c) Cost abide the outcome prayers 1 to 5 are overtaken by events.
3. This Application is premised on the grounds stated thereunder and in summary being that, the impugned judgment followed exparte hearing, the County Government of Vihiga , Mr. Ombina, who was handling the matter left office which explains why the Applicant lost track of the case. The Board comprises of new members who took office in November 2019, and were unaware of the case until



when the office was served with Notice for Contempt dated 25th June 2021 and Application dated 3rd August 2021, that the confusion was partly caused by advocates for the Claimants whose Notice of Appointment filed in court indicted they were acting for the Respondent/Applicant (Annexure FE-3 being Notice of Appointment of Advocate Anyumba & Associates Advocates indicted to be by the Respondent dated 2nd October 2017). That the Claimants have commenced execution through contempt of court proceedings which unless stayed shall resort in substantial loss or injury to the Board members who shall be imprisoned. That the Applicant would have defended the claim if they were properly notified as they have good defence to the claim in that by the Application of Section 77 of the County Governments Act and Sections 85 of the Public Service Commission Act, that the Claimants were required to appeal to the Public Service Commission against the conduct of the County Public Service Board and not institute court proceedings, that the Applicant could not have brought to the attention of the court the issues of jurisdiction which are substantial as the trial was *ex parte*, that the Application has been brought without unreasonable delay as they first knew of the matter on 28th July 2021 when they were served with Notice of contempt. That by reason of unresolved question of Jurisdiction, the execution pursued is punitive to the Applicant and for prejudicial and that the Applicant is ready and willing to abide by the terms the court may direct.

4. The Application is supported by the Affidavit by Frankline Esipula sworn on the 16th August 2021 who says he is the Chairperson of the Applicant appointed to office in November 2019. He avers that the first board was appointed in 2014 to 2019 when his team took over. That the current Board only learnt of this case on 28th July 2021 when the Notice of contempt dated 23th June 2021 was served and the contempt Application served on 4th August, 2021 (FE-1(a & b)). That the counsel who was handling the case for the Board was one Mr. Edward Ombima who left service to contest for Speaker of the County Assembly before filing defense as directed by court.
5. That the officer, Mr. Ombima, was working in the County Executive's legal office and the Board had no direct control over him. That further from the file record he learnt that the notification of the ruling of the court granting leave to the Board to file defence out of time was not made by the officer but the firm of Anyumba & Associates (FE- 2). The same law firm had filed Notice of change indicating he was representing the Respondents (FE – 3). That he is advised by the legal team the claim ought to have been filed at Public Service Commission if the claimants were aggrieved by the decision of the Board. That the Application is not meant to defeat justice at all as it raises substantial issues of law. The Board has good defence of jurisdiction which they were not able to present to court as the case proceeded *ex parte*. That the court creates precedence for subordinate courts and if issue of great importance like jurisdiction is brought to its attention, the same should be addressed to avoid creating precedence that does not accord within the established Principles of Law. That Judgment to be reviewed is annexed (FE- 4) together with the draft defence (FE – 5).
6. The deponent states that the Board is ready and willing to abide by the terms that the Honourable Court shall direct. That the orders sought are in best interest of justice and not prejudicial to the Claimants at all. The Board members face risk of going to prison over issues they are not personally responsible for which they are seeking opportunity to be heard.
7. The Application is opposed through replying affidavit of George O. Anyumba who is the Advocate having conduct of Claimant's Respondent's case sworn on the 5th April 2022. He avers that the application is unmerited, vexatious and total abuse of court process, it is *resjudicata*, overtaken by events, unprocedurally before court and no sufficient grounds advanced to warrant orders sought. That the Application is full of false hood in that:-



- (a) The Claimants filed an application dated August 28, 2015 which was heard exparte on November 3, 2015 and injunction orders issued “GOA – 1”.
 - b) The said application was thereafter heard inter- parties and a ruling thereon delivered on January 27, 2016 “GOA2” a copy of the order is annexed.
 - c) The Respondent filed an application dated November 10, 2016 seeking to set aside the exparte proceedings in this cause and which application was heard. The said order is not annexed.
 - d) That upon the delivery of judgment herein the Respondent was duly informed of the same(GOA - 11 letter dated 7th December 2010) and that this was together with the Claimant’s bill of costs (“GOA - s” copy annexed).
 - e) The Respondent was duly informed of the taxed costs vide letter dated April 29, 2021 .
 - f) That the Respondent/Applicant were reminded of the decretal sum in the cause letters dated April 29, 2021 & July 13, 2021.
 - g) That the decree and certificate of costs were served upon the Respondent herein. Served copies and received annexed. The Counsel avers that the Respondent/Decree holder stands to suffer great prejudice if this application is allowed and the Respondent none if application is not allowed. That it is fair, just, prudent and in interest of justice the Application be dismissed.
8. The Application is canvassed by way of written submissions. The Applicant’s written submissions dated May 5, 2022 are drawn by James Mukabi, County Solicitor, office of the County Attorney County Government of Vihiga and filed in court on May 5, 2022. The Respondent’s /Claimants written submission drawn by Anyumba & Associates were received in court on April 7, 2022.

Determination of the Application dated 16th August 2021

9. The Applicant identified 2 issues for determination:-
 - i. Whether the judgment entered on the 1st day of December 2020 against the Respondent/ Applicant should be set aside.
 - ii. Whether this court has competent jurisdiction to entertain the matter.
10. The Respondent in their submissions address the merits of the application.
11. The court then finds that issue for determination neutral to both parties is whether the Application is merited.

Whether the Application is merited

12. The Application is brought under Articles 50 (1) and 150 (2) (d) of *the Constitution* , Section 80 of the *Civil Procedure Act*, Orders 45, Rules 1,2,3 & 4 and Order 50 Rule B of the *Civil Procedure Rules*, Section 12 (2) and 3 (i) & viii of the Employment & Labour Relations Court Act , Rule 33 of the Employment and Labour Relations Court Procedure Rules High Court vacation Rules and all other enabling provisions of the law.
13. Article 50 (1) of *the Constitution* provides that everyone has the right to have any dispute that can be resolved by the Application of law decided in a fair and Public hearing before a court or if appropriate another independent and impartial tribunal or body,
14. Article 159(20(d) provides that Justice shall be administered without undue procedural technicalities.



15. Section 80 of the *Civil Procedure Act* provides for review of a decree where no appeal is preferred.
16. Order 45 of the Civil Procedure Rules provides for application for review. Section 45 (3) provides that no such application shall be granted on ground of discovery of new matter or evidence which the Applicant alleges was not within his knowledge or could not be adduced by him when the decree was passed without strict proof of such allegation.
17. The Applicant submits that discretion to vacate the decree lies with the court guided by principles under Order 22 Rule 25 and order 12 Rule 7. These were not the provisions cited under the Notice of Motion. Order 22 rule 25 provides for stay of execution of decree until the pending suit is determined on such terms to security or otherwise as it thinks fit. Order 12 rule 7 of the Civil Procedure Rules where judgment has been entered the court may on application may set aside or vary judgment or order upon such terms as may be first.
18. The Applicant relies on the decision in *Esther Wamaittha Wanjibia & 2 others -vs- Safaricom ltd* (2014) eKLR to buttress its point that the discretion of the court is free and the main concern of the court is to do justice to the parties before it. The discretion is intended to be exercised to avoid hardship or injustice resulting from accidents, inadvertence, or excusable mistake or error but not designed to assist a person who deliberately sought whether by evasion or otherwise to delay cause of justice. Further the reason or failure to attend should be considered.
19. The Applicant further relies on the decision of *Philip Ongeru -vs- Catherine Nyero Owoku* SCCA 14/2001 (2003) where it is stated for the judgment to be vacated the court must be satisfied that one of these two has been met.
 - (a) Either that the defendant was not properly served with summons.
 - (b) or that the defendant failed to appear in court at the hearing due to sufficient cause.
20. The Respondents have adduced evidence as outlined in their replying affidavit that the Defendant/ Applicant had been properly served and was aware of the hearing date which was issued following its application to set aside the proceedings to enable applicant file defence. All these are undisputed facts. The Applicant submits that the Respondent should not be punished for failures of Mr. Edward Ombima who at the time of Judgment delivery was the Principal Legal Officer of the County Government of Vihiga. Unfortunately he left the office leaving the department in disarray and did not file defence.
21. The court finds that the Applicant has not met the threshold of the 2 issues set in Philip Ogonu case (supra) as the reason for failing to file defence upon being granted leave by court is not justified. It is not in dispute that the said Mr. Ombima was an employee of the County Government of Vihiga at the time of hearing and the said office was duly served with hearing notices. The defence of mistake of Advocate is not applicable in this case. The said Mr. Ombima was an internal staff. The Applicant has not met the threshold for review of decree under Order 45 of the *Civil Procedure Act* or Rule 33 of the Employment and Labour Relations Court. At this stage the court states that the Respondent did not submit on the law or cite any authorities.
22. The discretion of the court though freely exercised is guided by the Law and rules of fairness. The Claimants are ex-employees who have been waiting for justice since 2016. The Applicant was granted leave to file defence and failed to do so. It is obvious that the Respondent's membership is bound to change following elections which do happen regularly in this country. The office of County Attorney is not elective. The court finds and determines that the Application is meant to delay justice for the



- Claimant. The Applicant had opportunity to file defence vide second chance offered when leave was granted to file defence out of time by court which it has produced as exhibit “FE – 2 “.
23. The Grounds for review as sought under Order 45 of the Civil Procedure Rules are limited. The court finds that the Application does not meet the threshold thereunder for court to set aside the judgment. The grounds of lack of jurisdiction are for appeal and not review.
24. The Application dated 16th August, 2021 is dismissed. Costs to the Respondent

Determination of Application dated 3rd August, 2021

25. The Application by the decree holder seeks the following orders;-
- (a) grant of leave to the Applicants to apply for an order of contempt against the Chairman, Vihiga County Public Service Board being the Chief Officer of the Respondent on whom the court order and other relevant court papers were served compelling him or her to comply the order of the court issued on 1st December 2020 and to punish him/her for failing to comply with the court order.
 - (b) That the grant of the leave be ordered to operate as a stay of any further actions or proceedings instituted by the said Respondent and/she be denied audience in this court until such a time that he/she shall have complied with the order complained of.
26. The Application is premised on grounds stated thereunder being the failure to settle decretal sum under judgment delivered on December 1, 2020 together with taxed costs of kshs. 1,704,960/-. The statement of facts is filed and supporting documents.
27. In response to the said Application the Respondent filed the Notice of Motion dated 10th August, 2021 which the court has determined above. The Applicant/Claimant’s submissions are a repetition of the grounds of the application. The Applicant does not submit on the law or cite authorities. Written submissions are not a replica of facts but should apply the law to facts with authorities.
28. The Respondent does not address this Application in its submissions. In a recent decision of this court in Bungoma JR NO. E001 of 2022 *R- -VS- County Secretary, The County Government Of Bungoma & 5 Others Exparte Kenya County Government Workers Union Bungoma County Branch* delivered on 7th July 2022, the court was invited to consider enforcement of judgment of the court. The Court in the said decision at paragraph 21 explained the procedure to enforce judgment against County Governments being the process under Section 21 of the *Government proceedings Act*. The court also held that County Governments are Government albeit devolved Government falling under the *Government Proceedings Act*. Section 21 provides for the process to be complied in pursuance of satisfaction of decree orders against the government. The court upholds its said judgment to apply in this application on the process of enforcement of decree against government. Further in relation to the instant application, under Section 21 (4) of the *Government Proceedings Act*, it is provided :- “(4) save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such of any money or costs.”(emphasis given)
29. Applying the above provision of the law, the court finds the instant Application is incompetent as far as it seeks order of contempt of court against the Chairman of the Respondent for failure to satisfy the decretal amount and taxed costs. The court further notes that the Claimant has not complied with the provisions of the *Government proceedings Act* on decretal monies recovery.



30. The court finds and determines that the Application dated 3rd August, 2021 is incompetent. The same is dismissed. No order as to costs as the Respondent did file a specific response in this Application.

Conclusion and disposition

31. The Application dated 16th August, 2021 is found without merit and is dismissed with costs to the Claimant.

32. The Application dated August 3, 2021 is held to be incompetent and is dismissed. No order as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 14TH JULY, 2022.

J. W. KELI,

JUDGE.

In the presence of :-

Court Assistant: Brenda Wesonga

Claimant : Absent

Respondent/Applicant :- Absent

