



**Kenya County Government Workers Union (Nairobi Branch) & 2 others v Nairobi City County & 5 others; Ethic and Anti-corruption Commission & another (Interested Parties) (Cause E068 of 2022) [2022] KEELRC 1256 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1256 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E068 OF 2022**

**SC RUTTO, J  
JULY 8, 2022**

**BETWEEN**

**KENYA COUNTY GOVERNMENT WORKERS UNION (NAIROBI BRANCH) ..... 1<sup>ST</sup> APPLICANT  
KENYA COUNTY GOVERNMENT WORKERS UNION (STAFF BRANCH) ..... 2<sup>ND</sup> APPLICANT  
KENYA COUNTY GOVERNMENT WORKERS UNION ..... 3<sup>RD</sup> APPLICANT**

**AND**

**NAIROBI CITY COUNTY ..... 1<sup>ST</sup> RESPONDENT  
NAIROBI COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT  
COUNTY SECRETARY, NAIROBI COUNTY ..... 3<sup>RD</sup> RESPONDENT  
MOHAMED SAHAL ..... 4<sup>TH</sup> RESPONDENT  
CONTROLLER OF BUDGET ..... 5<sup>TH</sup> RESPONDENT  
CENTRAL BANK OF KENYA ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**ETHIC AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY  
COMMISSION ON ADMINISTRATION OF JUSTICE ..... INTERESTED PARTY**

**RULING**

1. The Applicants brought the instant motion under Order 51 Rules 1 and 3 of the *Civil Procedure Rules, 2010*, Sections 1A, 1B and 3B of the [Civil Procedure Act](#) and all other enabling provisions of the law.



2. The Applicants seek the following orders through the Motion Application: -
- a) Spent.
  - b) THAT interim orders be issued pending hearing and determination of the main claim, that the 1<sup>st</sup> Respondent is ordered to forthwith be paying full salaries of the claimants' members timely and estopped from paying the same in piecemeal starting with the month of February 2022.
  - c) THAT (sic) 1<sup>st</sup> Respondent is ordered to immediately and unconditionally release the full and already due pay to the claimants' members and their creditors for the months of October, November and December 2021 and for the month of January 2022.
  - d) THAT (sic) 1<sup>st</sup> Respondent is ordered to pay all fines accrued by the claimants' members for the months of October, November and December 2021 and for the month of January 2022 to the various financial institutions' and connected institutions to whom the claimants' members owed financial liability to but for the omission of the 1<sup>st</sup> Respondent were unable to meet.
  - e) THAT this honorable court be pleased to grant further orders and/or directions as it deems fit and expedient in the circumstances.
  - f) THAT this honorable court be pleased to grant further orders and/or directions as it deems fit and expedient in the circumstances.
  - g) THAT the costs of this application be borne by the Plaintiff/Respondent.
3. The Application is supported by the grounds on its body and on the Affidavit sworn by Mr. Festus Ngare, who describes himself as the Branch Secretary of the 1<sup>st</sup> Applicant. Briefly that: -
- i. The 1<sup>st</sup> Respondent requisitioned the Controller of Budget for the release of the sum of 765,000,000.00 to be used for payment of the claimant's members' gross salaries for the months of October, December 2021 and January 2022 owing to the fact that the same had been delayed respectively.
  - ii. The said amount was authorized and released by the national government to the 1<sup>st</sup> Respondent for subsequent payment to the claimants' members as gross salaries to enable subsequent deductions and remittance to the different institutions including the claimants' members' banks towards the payment of their loan facilities.
  - iii. The 1<sup>st</sup> Respondent however omitted to pay the gross salaries and opted to only pay the net salaries thus diverting the difference to other unauthorised use different from what it requisitioned for.
  - iv. To date, the 1<sup>st</sup> Respondent has not made the said payment despite demand being made by the claimants nor has the 1<sup>st</sup> Respondent given any valid reason explaining the unlikely conduct despite making commitment to pay the amounts on the 14<sup>th</sup> of October 2021, a commitment it did not keep.
  - v. The Respondents have diverted unlawfully the payments meant for and or budgeted and or set aside by the national controller of budget and authorized for such payment upon requisition raised by the Respondent presented to the national controller of budget leading to financial misfortunes unnecessarily being visited upon the claimants' members.
  - vi. The claimants claimed from the Respondent a sum of Kshs. 490,471,990.35 being Sacco loans, pension deductions, NHIF, NSSF, PAYE, Post bank loans, eco bank loans, family bank loans,



union dues and other benefits as amount diverted to other use and a further amount of Kshs. 70,000,000.00 as staff claims in the month of January 2022.

- vii. Failure to remit and or pay the gross salaries to the employees' accounts as provided to the employer has resulted to the financial institutions attaching the employees net salaries and any other finances in their accounts and in extreme circumstances freezing the funds in the employees' accounts leading to exorbitant default penalties.
- viii. Some employees have had their names being listed negatively with the credit reference bureau, while the Sacco to which the employees belong have refused to offer loans to the employees while NHIF have is also now refusing to offer medical covers to such employees.
- ix. The employees have on several occasions through the union written to the Respondents' demand rectifications of the omission but their demands have fell on deaf years.

## Responses

4. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent filed joint Grounds of Opposition in response to the Application, stating as follows: -
  - i. The application lacks merit, is frivolous, vexatious and an abuse of the court process;
  - ii. The application does not meet the requirements for granting interim orders sought;
  - iii. It is the responsibility of the national exchequer to distribute the entire funds as requested and not the responsibility of the county government; and
  - iv. The 1<sup>st</sup> respondent discharged its duty by paying employees as is supposed to. That employees received their net income and deductions were channeled to the intended purpose.
5. The 2<sup>nd</sup> respondent filed Grounds of Opposition through which it avers that: -
  - i. The averments made by the claimants against it are unsubstantiated.
  - ii. Its functions are set out under section 59 of the *County Government Act* and its scope is limited to making recommendations to the Salaries and Remuneration Commission on behalf of the county government on the remuneration, pensions and gratuities for county public service employees.
  - iii. Therefore, it is not involved in the implementations of the county budget which includes the wages, salaries and other remuneration of county employees.
  - iv. After the creation of the Nairobi Metropolitan Services (NMS), the payroll with respect to the employees who were seconded to the NMS was to be executed by the NMS.
  - v. Once the sharing of the county revenue was completed, the mandate of the NMS was separated from the county government.
  - vi. The 2<sup>nd</sup> respondent does not play any role with respect to remittance or distribution of salaries hence the entire claim against it is unmerited.
6. The 5<sup>th</sup> Respondent opposed the Application through the Replying Affidavit of Dr. Margaret Nyakang'o, who avers that: -



- i. She does not budget for the counties. The County governments have a responsibility to prepare an annual budget which is developed in accordance with a budgeting and planning framework developed by the County Executive Committee and approved by the County Assembly.
  - ii. The annual budget appropriates funds to the different programs in the recurrent and development expenditure votes and the funds should be spent within the financial year.
  - iii. She approves withdrawal of funds from the County Revenue Fund, if satisfied that the withdrawal is in accordance with the law.
  - iv. In the months of October 2021, December 2021 and January 2022, the Nairobi City County Treasury requisitioned for funds towards payment of personnel emoluments to the staff. As required by law, the requisitions were supported by a summary of the monthly payroll report from the Integrated Personnel and Payroll Database showing the gross and net payments.
  - v. Upon being satisfied that the said requisitions complied with law, she authorized withdrawal of funds being payment of the gross monthly personnel emoluments from the County Revenue Fund to the County Recurrent Operational Account as follows;
    - (a) October 2021 .....Kshs. 403,996,775
    - (b) December 2021 .....Kshs. 412,511,526
    - (c) January 2022 .....Kshs. 416,669,067
  - vi. Cumulatively, the total amount of funds disbursed for payment of gross personnel emoluments for the months of October 2021, December 2021 and January 2022 was Kshs. 1,233,177,368.00.
  - vii. Once the authority to withdraw is granted and the money is transferred from the County Revenue Fund and deposited into the County's operational account which is the spending account, it becomes the responsibility of the County through the County Treasury to ensure that payments are done according to the approval which was granted.
  - viii. She already authorized withdrawal of gross monthly salary for Nairobi County for the months of October 2021, December 2021 and January 2022 and the said funds were already deposited into the county's operational account for payment of salaries.
7. On its part, the 6<sup>th</sup> Respondent opposed the Application through the Replying Affidavit of Mr. Kennedy Kaunda Abuga who identifies himself as its General Counsel. He avers that: -
- i. No prayers have been sought against the 6<sup>th</sup> Respondent.
  - ii. The 6<sup>th</sup> Respondent is mandated under section 4A of the *Central Bank of Kenya Act* to act as the banker to, fiscal agent of the national and county governments.
  - iii. The Nairobi City County Assembly has various accounts with the 6<sup>th</sup> Respondent.
  - iv. The 6<sup>th</sup> Respondent has no input or control on the 1<sup>st</sup> Respondent's utilization of funds released from the accounts it holds.
  - v. The 6<sup>th</sup> Respondent is not privy to any contracts or arrangements that exists between the claimant's members and the 1<sup>st</sup> Respondent.
  - vi. There is no cause of action by the claimants against the 6<sup>th</sup> Respondent.



8. The Interested Parties did not participate in the matter.

### Submissions

9. The Applicants in relying on the provisions of section 120 of the *Evidence Act*, submitted that the 1<sup>st</sup> Respondent should be estopped from paying the claimant's members' salaries in piece meal. To further buttress this issue, the Applicants cited the cases of *Pickard v Sears* 112 ER 179, *Sera Njeri Mwobi v John Kimani Njoroge* [2013] eKLR and *Carol Construction Engineers Limited & another v National Bank of Kenya* [2020] eKLR. In further submission, the Applicants stated that it had a prima facie case with a likelihood of success. That further, refusal by the 1<sup>st</sup> Respondent to remit the deductions had exposed the members of the Applicants to injury that cannot be adequately compensated for in damages. The Court was invited to consider the determination in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR.
10. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the Applicants ought to have exhausted the prescribed constitutional and statutory appeal procedure to the Public Service Commission prior to moving the Court. It placed reliance on the case of *Kenya Medical Practitioners Pharmaceuticals and Dentists Board v County Secretary Taita Taveta County Government & 3 others* [2021] eKLR and *Charles Apudo Obare & another v Clerk County Assembly of Siaya & another* [2020] eKLR and *Alfred Sifa Dena v Benjamin Kai Chilumo* [2020] eKLR.
11. It was also the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' submission, that the Application is misconceived and an abuse of the court process because the decision to file the impugned Application amounted to a collective grievance subject to the collective grievance dispute resolution procedure. The case of *Satya Bhama Gandhi v Director of Public Prosecutor & 3 others* [2018] eKLR, was cited in support of this position.
12. It was further submitted that the Applicants had not established any special circumstances to warrant grant of the orders.
13. The 2<sup>nd</sup> Respondent reiterated its Grounds of Opposition and submitted that it did not have a role to play with respect to remittance or distribution of salaries. To buttress its position, the 2<sup>nd</sup> Respondent cited the case of *Okiya Omtatah Okoiti v Nairobi Metropolitan Service & 3 others* [2020] eKLR. It was further submitted by the 2<sup>nd</sup> Respondent that it was upon the Applicants to prove that the amounts claimed were unremitted if at all.
14. The 5<sup>th</sup> Respondent reiterated the averments contained in its Replying Affidavit and submitted that it was the responsibility of the county governments and not the Controller of Budget to prepare an annual budget in compliance with the law. That further, its mandate ends at the point of authorizing withdrawal of funds from the county fund and thereafter, a county government is then able to implement its budget through payment of recurrent and development expenditures once money is released from a county revenue fund.
15. The 6<sup>th</sup> Respondent submitted that the Application and the Memorandum of Claim do not raise any cause of action against it. That there are no orders sought against it. That the issues raised fall outside its scope hence has no role to play in the issues raised in the Application. It further submitted that the Application against it is vexatious. The 6<sup>th</sup> Respondent urged the Court to strike out its name from the proceedings. It placed reliance on the case of *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR.



16. Arising from the Application, the responses thereto and the submissions from all parties, it is apparent that the singular issue falling for the Court's determination, is whether the Application is merited.
17. From the face of the Application, it is evident that the nature of the orders sought by the Applicants at this interlocutory stage, is in the form of a mandatory injunction as it seeks to compel the 1<sup>st</sup> Respondent to perform certain acts.
18. Essentially, the Application seek to compel the 1<sup>st</sup> Respondent to: -
  - i. forthwith be paying full salaries of the claimants' members timely and estopped from paying the same in piecemeal starting with the month of February 2022(now past);
  - ii. immediately and unconditionally release the full and already due pay to the claimants' members and their creditors for the months of October, November and December 2021 and for the month of January 2022; and
  - iii. to pay all fines accrued by the claimants' members for the months of October, November and December 2021 and for the month of January 2022 to the various financial institutions' and connected institutions to whom the claimants' members owed financial liability to but for the omission of the 1<sup>st</sup> Respondent were unable to meet.
19. The Court set out the principles applicable in cases of mandatory injunctions in *Locabail International Finance Ltd vs Agro. Export & another* [1986] ALL ER 901, as follows: -
 

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the court thought that the matter ought to be decided at once or where the injunction was directed at simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial, it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory order.”
20. This position was reaffirmed by the Court of Appeal in *Kenya Breweries Ltd & another v Washington O. Okeya* [2002] eKLR and *Nation Media Group & 2 others v John Harun Mwangi* [2014] eKLR.
21. In essence, a Court can only grant a mandatory injunction at an interlocutory stage, in clear cases and where special circumstances exist.
22. In the instant case, the central issue is remittance of the entire salary of the members of the Applicants to authorized third parties. It is notable that all the Respondents except the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have distanced themselves from the responsibility of paying the salary of the Applicants' members.
23. In support of their case, the Applicants exhibited the following: -
  - i. A letter dated January 27, 2022, from Family Bank Limited to the 1<sup>st</sup> Respondent in respect of check off loan arrears for its staff for the months of November, 2021 upto 31<sup>st</sup> December, 2021.
  - ii. A letter dated January 21, 2022 from Absa Bank Kenya PLC to the 3<sup>rd</sup> Respondent with the subject being delayed scheme loan payments.
  - iii. A letter dated November 30, 2022 from the Cooperative Bank to the 3<sup>rd</sup> Respondent with respect to delayed check off personal loan for the 1<sup>st</sup> Respondent executive staff.



- iv. A letter dated January 19, 2022 from NACICO Cooperative Savings and Credit Society Ltd to the 3<sup>rd</sup> Respondent demanding for unremitted members check off deductions.
  - v. A letter dated January 24, 2022 from the 3<sup>rd</sup> Applicant to the 1<sup>st</sup> Respondent demanding remittance of union dues.
24. The common thread running through the aforesaid correspondence, is the non-remittance of third party deductions in the form of loan deductions, union dues and member subscriptions by the 1<sup>st</sup> Respondent, with respect to its employees.
  25. Through the Grounds of Opposition filed, the 1<sup>st</sup> Respondent stated that it discharged its duty and paid the employees' salaries as required. It further stated that the employees received their net salaries and that the deductions were channeled for the intended purpose. Despite these assertions, there was no accompanying evidence from the 1<sup>st</sup> Respondent's end to prove the same.
  26. Indeed, and as I note, the 1<sup>st</sup> Respondent did not file a substantive response to rebut the assertions by the Applicants, seeing that the Grounds of Opposition merely raised legal issues. It did not disclose much.
  27. On the other hand, the evidence presented by the Applicants in support of the Application was quite overwhelming, as it emanated from different parties and addressed the same issue of non-remittance of deductions by the 1<sup>st</sup> Respondent.
  28. If it is indeed true that the 1<sup>st</sup> Respondent remitted the third party deductions as required, then nothing would have been as easy as proving the same by way of evidence of payment to the said third party institutions or through payroll byproducts to that effect. As it is, the 1<sup>st</sup> Respondent did not even attempt to prove remittance in any form or manner. All it did was make bare denials.
  29. Coupled with the foregoing, it bears to note that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents did not dispute receiving the demand letters, exhibited by the Applicants. This further lends credence to the assertions by the Applicants, that the 1<sup>st</sup> Respondent had failed to remit the third party deductions in favour of its members, as by law required.
  30. In addition to the foregoing, the 5<sup>th</sup> Respondent confirmed that it gave an authorization to the 1<sup>st</sup> Respondent to withdraw funds from the County Revenue Fund for payment of gross personnel emoluments for the months of October 2021, December 2021 and January 2022 to the tune of Kshs 1,233,177,368.00. These averments by the 5<sup>th</sup> Respondent were not disputed nor countered by any evidence by the 1<sup>st</sup> Respondent, hence are presumed to be factual. This further gives weight to the assertions by the Applicants.
  31. The foregoing set of circumstances is indicative that the 1<sup>st</sup> Respondent's actions and omissions is in clear conflict with the requirements of Section 17(1) as read together with Section 19 of the [Employment Act](#), which require an employer to pay the entire amount of wages earned by or payable to an employee in respect of work done subject to authorized deductions which must be remitted in a timely manner.
  32. Indeed, the actions and omissions on the part of the 1<sup>st</sup> Respondent potentially exposes the members of the Applicant to unfair labour practices contrary to the provisions of Article 41 of [the Constitution](#).
  33. Against this background, I am persuaded that this is a clear case with special circumstances that merits grant of a mandatory injunction at this interlocutory stage.



34. My position is fortified by the determination by the Court of Appeal in *Shariiff Abdi Hassan v Nadbif Jama Adan* [2006] eKLR where it was held that: -

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

35. The upshot of the foregoing is that I find that the Application is merited and is hereby allowed in the following terms: -

- a) The 1<sup>st</sup> Respondent is ordered to immediately remit the outstanding authorized third party deductions in respect of the Applicants’ members.
- b) The 1<sup>st</sup> Respondent shall meet the costs of this Application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY, 2022.**

**STELLA RUTTO**

**JUDGE**

**Appearance:**

Mr. Odero for the Claimants/Applicants

Mr. Oruenjo for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Ms. Ndirangu for the 2<sup>nd</sup> Respondent

Ms. Rutto for the 5<sup>th</sup> Respondent

Mr. Njuguna for the 6<sup>th</sup> Respondent

No appearance 1<sup>st</sup> Interested Party

No appearance 2<sup>nd</sup> Interested Party

**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 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B 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.

**STELLA RUTTO**

**JUDGE**

