



Kenya County Government Workers Union v County Public Service Board of Narok (Cause 457 of 2016) [2022] KEELRC 1145 (KLR) (5 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1145 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 457 OF 2016
HS WASILWA, J
JULY 5, 2022**

**BETWEEN
KENYA COUNTY GOVERNMENT WORKERS UNION APPLICANT
AND
COUNTY PUBLIC SERVICE BOARD OF NAROK RESPONDENT**

RULING

1. Before me for determination is the Claimant/ Applicant's application dated January 17, 2022 brought pursuant to Article 159(2) of *the Constitution*, section 5(1) of the *Judicature Act*, section 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law seeking the following Orders; -
 1. That this Application be certified urgent and the same be heard ex parte in the first instance.
 2. That this Honourable Court do find and hold the Respondent herein in contempt of Court for disobeying and defying the Orders directing that one, Levin Mulei Kimeu (a member of the Claimant and grievant) be reinstated back to work not later than January 1, 2022 issued by Hon Lady Justice H. Wasilwa in Kenya County Government Workers Union Versus County Public Service Board of Narok: Employment cause No. 457 of 2016 Nakuru on the December 2, 2021 and further;

An order for committal to jail for contempt be issued against County Secretary, County Public Service Board of Narok for knowingly and intentionally disobeying orders of this Honourable Court.
 3. That the Court makes an orders that until the Respondent purge their contempt to the satisfaction of the Court, the Respondent ought not to be heard by this Honourable Court or participate in these proceedings.



4. That costs of this Application be provided for.
2. The grounds upon which the Application is made are that; -
 - a. This Honourable Court delivered its judgement in this matter on the December 2, 2021 directing the Respondent to immediately reinstate the grievant, Levin Mulei Kimeu, back to office not later than January 1, 2022.
 - b. When the said judgement was delivered the Respondent was represented by its Advocate one Kemboi law Advocate as such the Respondent was made aware of the said Orders of Court.
 - c. To ensure that the Respondent was duly served, the Claimant instructed a process server, one Geoffrey Mongare Mogaka, on the January 11, 2022 to serve the said Orders upon the Respondent, which were duly served.
 - d. Despite being served with the Orders of the Court, the Respondent has failed and or refused to comply with the said Court Orders.
 - e. In response, the Respondent vide their letter of January 12, 2022, intimated that it will not comply with the said Court Orders as it had appealed the decision of the Court and waiting decision of the same from the Court of Appeal.
 - f. It is averred that the grievant, Levin Mulei Kimeu, continues to suffer when the orders of the Court were clear for the Respondent to reinstate him.
 - g. It is contended that the Respondent has not tabled any evidence on the alleged appeal, neither have they obtained stay of execution of the Orders of this Court not to warrant the non-compliance.
 - h. The Applicant urged this Court to move with speed and hold the Respondent in contempt of Court Orders to restore dignity of the Court and maintain the rule of law.
3. This Application is also supported by the Affidavit of Benard Odera Okello, the advocate ceased of this matter, deposed upon on the January 17, 2022, which affidavit basically reiterates the grounds of the Application stated above.
4. The Application is opposed by the Respondent vide its replying affidavit deposed upon by Elizabeth Sanangoi Lolchoki, the Secretary of the County Government of Narok and the contemnor herein, on the April 14, 2022.
5. The affiant avers that the application disguised as contempt of Court application is frivolous, vexatious and an abuse of Court process. She added that the application herein is full of misstatements.
6. She avers that they have never defied or disobeyed the Orders of this Court issued on December 2, 2021. She states that as soon as the judgement of Court was pronounced, the Respondent instructed its advocates on record to lodge an appeal which Notice was filed on December 16, 2021. On December 14, 2021 the Respondent's advocates requested for satisfied typed proceedings and judgment which they were still waiting for to lodge the Record of appeal.
7. It is stated that sometimes in January, 2022 the grievant, Mr. Kimeu, visited the Respondent's offices and informed them that he had secured another job in Machakos county and sought for clearance and when he was directed to follow due procedure in clearing, he instead pressed for compliance of the Court orders in this suit through this Application.



8. On the damages awarded to the grievant, the affiant avers that the same is only payable after the Claimant or the grievant follows up the same in accordance with section 21 of the [Government Proceedings Act](#).
9. The affiant intimates that it is willing to comply with the orders of Court of appeal which can either affirm the Orders of this Court or vary the same. She states further that the application herein must fail in light of Section 81.10 of the *UK Civil Procedure (Amendment) Rules 2012*, for failing to provide the full grounds of the alleged acts of contempt.
10. It was contended that the application herein has failed to meet the threshold for a proper contempt of Court for failing to give specific acts that the Respondent did in disobedience of the said Court Orders.
11. This Application was dispensed with by way of written submissions with the Applicant filing on the May 31, 2022 and the Respondent filed on the June 2, 2022.

Applicant's Submissions.

12. The Applicant submitted that the judgement of this Court and Orders extracted thereafter were clear and unambiguous. The same were served upon the Respondent who blatantly refused to obey them on allegation that the Claimant had secured another job in Machakos County when no evidence was table before this Court as required under section 107 and 108 of the [Evidence Act](#). To buttress their argument, the Applicant cited the case of *Evans Otieno Nyakwana V Cleophas Bwana Ongaro* [2015] eKLR where Justice Majanja held that;

“As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(10) of the [Evidence Act](#)...”

13. The applicant maintained that the law under which contempt proceedings are filed is section 5(1) of the [Judicature Act](#) and cited the case of *Samuel M.N. Mweru and others v National Land Commission and 2 others* [2020] eKLR where the Court held that;

“The applicable law as regards contempt of Court existing before the enactment of the [Contempt of Court Act](#) was restated by the Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others*, [2014] eKLR. In that case the Court found that the English law on committal for contempt of Court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the [Judicature Act](#) which provided that:

“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.”

This section was repealed by section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the [Judicature Act](#), which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the [Judicature Act](#). This Court is in this regard guided by the applicable English Law which is Part 81 of the *English Civil Procedure Rules of 1998* as variously amended, and the requirement for personal service of Court orders in contempt of Court proceedings is



found in Rule 81.8 of the English Civil Procedure Rules.” I agree with the above reasoning that since the act that repealed section 5 of the *Judicature Act* [17] has been declared unconstitutional, the effect is that section 5 of the *Judicature Act* [18] still stands. Having concluded as aforesaid, I find it fit to examine the procedure for instituting contempt of Court proceedings under section 5 of the *Judicature Act* [19] which provides as follows:- 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.”

14. Furthermore, it was submitted that section 36 of the *High Court (Organization and Administration) Act* 2015 empowers the High Court and by extension this Court to punish parties for disobedience of its Orders.
15. The Applicant submitted that before contempt orders are granted, the Applicant must demonstrate existence of the Orders, knowledge of the Orders by the Respondent and failure by the Respondent to comply with the said Orders as was held in *Samuel M.N. Mweru and others N National Land Commission and 2 others (Supra)*.
16. Consequently, that the above mentioned conditions were all satisfied as the Order of Court issued on December 2, 2021 was served upon the Respondent who refused to comply with the same causing the claim to stay out of employment. Therefore, that they Respondent should be held in contempt of Court and the Application allowed as prayed.
17. On costs, the Applicant submitted that costs follow the event and urged this Court to award it costs when allowing the Applicant.

Respondent’s Submissions.

18. The Respondent submitted that it has not refused to obey the Orders of the Court issued on the December 2, 2021 rather that it appealed the said Orders and informed the Claimant of its decision to appeal as such the non-compliance is not willful. It was argued that the Grievant had intimated to them that he no longer was willing to work for them and wanted to clear and go work for Machakos County informing their action of not reinstating the Claimant. It was further argued that as much as there is no paper work trail evidencing their allegation, the affidavit duly sworn by the Respondent’s affiant is sufficient evidence as was held in *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR where the Court held that; -

“The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the Respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants’ claims?... It is evident that the learned Judge treated oral evidence (which in this case was not available), as superior to affidavit evidence and thereby dismissed the appellants’ affidavits as bare allegations. With due respect, the learned Judge failed to appreciate that what is sworn under oath is not a simple matter but a serious issue, for which a deponent can be charged with perjury if it turns out that the deponent has lied under oath. In other words, the consequences are the same as that for a witness who testifies orally



and perjures himself by lying on oath. In our view, affidavit evidence is legally admissible evidence in a Court of law. It occupies the same place as any other evidence that is admissible in a Court of law... We come to the conclusion that the appellants' affidavits not having been challenged by the Respondent, the facts averred were essentially admitted. The learned Judge erred in rejecting the affidavit evidence as they formed an appropriate basis for the claim.”

19. It was argued that the Respondent has been willing and is still willing to comply with the Orders of the Court only when the grievant makes up his mind on reinstatement or clearing with it.
20. On whether the said application is in conformity with the Kenyan laws, it was submitted that indeed the applicable law is the *Judicature Act*, however that this application failed to adhere to part 81.10 of the UK Civil procedure (Amendment) Rules of 2012 which require that committal application made against a party who was not party of the proceedings, the applicant must give full grounds on which the committal application is made and must identify separately and numerically each alleged act of contempt including, if known, the date of each alleged act.
21. For that reason, the Respondent submitted that, the Claimant has made an omnibus application that the county secretary who was not a part to the proceedings is in contempt without giving detailed particulars as such the application is not proper and ought to be dismissed with costs.
22. I have examined the averments of the parties herein. The applicants contend that the Respondents in blatant disregard for the orders of this Court issued in this case vide the Court's Judgment have refused to reinstate the grievant to work.
23. The Respondents on their part admit to receiving the Judgment and orders of the Court but indicated that they have not reinstated the grievant because they preferred an Appeal to Court of Appeal which is still pending.
24. Filing of an appeal per se is not a panacea to disobedience of Court orders.
25. The Respondents must demonstrate that they have stay orders staying this Court Judgment which allows them not to reinstate the grievant.
26. The Respondents have not demonstrated they have any stay orders from any Court of competent jurisdiction.
27. It is therefore my finding that the Respondent has disobeyed the orders of this Court and are therefore guilty of contempt of Court.
28. I therefore agree with the applicants and find the contemnors – County Public Service Board of Narok guilty of contempt and they are therefore liable for punishment.
29. The costs of this application to the applicants.

RULING DELIVERED VIRTUALLY THIS 5TH DAY OF JULY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Sarange for Claimant – present

Kere for Respondent – present



