



**Kenya County Government Workers Union v County Government of
Mandera & another; Kombe & another (Intended Respondent) (Cause
958 of 2018) [2022] KEELRC 4076 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4076 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 958 OF 2018
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION CLAIMANT

AND

COUNTY GOVERNMENT OF MANDERA 1ST RESPONDENT

MANDERA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

AND

ALI KOMBE INTENDED RESPONDENT

COUNTY PAYROLL MANAGER INTENDED RESPONDENT

RULING

1. There are 3 applications, all filed by the claimant, which are under consideration in this ruling.
2. They are dated July 2, 2020, October 26, 2021, and November 26, 2021 respectively.
3. The claimant union brings the claim on behalf of its member [grievant], Abdi Adan Bakey, who worked for the 1st respondent as Human Resource/Payroll Manager, and later Deputy Director Human Resource. The claimant prays for orders, barring the respondents from: terminating the grievant's contract of employment; barring the respondents from removing the grievant from the payroll; and compelling the respondents to pay the grievant his full salary.
4. The applications seek similar orders. The first application was consolidated with the second, on October 27, 2021. The claimant principally seeks orders that: -
 - a. The intended respondents are joined to the proceedings.



- b. There be a stay of the decision to remove the grievant from the payroll.
 - c. A temporary injunction restraining the respondents from terminating the grievant's contract.
 - d. An order compelling the respondents to pay the grievant's full salary.
5. The applications are mainly based on the affidavit of the grievant, sworn on October 26, 2021.
 6. He explains that the respondents started making illegal deductions on his salary, on or about the year 2016. The deductions precipitated the filing of the claim.
 7. Through the intervention of a conciliator from the Labour Office, the respondents ceased deductions. The grievant states that he reached an out of court settlement with the respondents, which is evidenced in a notice of withdrawal of suit, dated September 28, 2021. The notice did not involve the claimant.
 8. He states that the respondents resumed deductions in April 2020, after the notice of withdrawal of the suit, which compelled the claimant to file subsequent applications seeking the protection of the court.
 9. The grievant states that on November 11, 2021, the court granted him interlocutory orders, restraining the respondents from continuing with deductions on his salary. The claimant states that the respondents, have not fully complied with the orders of the court. The 1st intended respondent, is the County Chief Officer and the 2nd intended respondent, the Payroll Manager. They are the specific officers who are said to have received the interim orders, and who refused to comply. The claimant states that, they are necessary parties, for purposes of enforcement of the orders.
 10. Adan Kullow, 1st respondent's Legal Officer, filed a replying affidavit sworn on February 17, 2022.
 11. He explains that the office of the Auditor General, conducted an audit of the 1st respondent for the period July 1, 2013 to June 30, 2014. It was found that the grievant had received unlawful payment of salaries and overtime. The grievant was the Payroll Manager during the audited period. He had paid to himself overtime of Kshs 588,608 and salary of Kshs 967,028.
 12. Overtime pay was not approved, and all work done by the grievant was within his ordinary course of duty. Salary paid was backdated from January 2014, allegedly on account of the grievant having been promoted. There was no such promotion, approved by the Public Service Board. The total sum recoverable from the grievant was Kshs 1,555,639. The Auditor General recommended that the amount be recovered from the grievant. The County Executive adopted the recommendation for recovery of the sum.
 13. It was resolved that the 1st respondent deducts 25% of the grievant's salary monthly. Public officers are personally liable for any losses sustained by County Governments, which is attributable to fraud, and County Governments have an obligation to recover such losses, under section 203 of the *Public Finance and Management Act*.
 14. In September 2018, the claim filed in court was fully settled pursuant to a consent executed by the grievant and the 1st and 2nd respondents. The consent did not state that the 1st respondent would stop deductions. The respondents therefore considered the claim to have been withdrawn, and were taken aback, to receive numerous Applications filed before the court subsequently, by the claimant.
 15. Another payroll audit in March 2020, disclosed that the grievant had been receiving a monthly basic salary of Kshs 50,590, irregularly. His letter of appointment entitled him to Kshs 41,590 monthly. The new discovery meant that the grievant had a new debt of Kshs 607,160 which he was advised, would be recovered with the outstanding debt. The grievant did not deny this new debt.



16. Deductions were not arbitrary. They were lawfully effected, under section 19 [1] [e] of the [Employment Act](#).
17. He was issued a letter dated October 19, 2021, to show cause why he had been absent without the leave of the 1st respondent or other lawful cause, from August 26, 2021 to October 2021. He was not able to account for 13 days he was away. The respondent decided to withhold his salary for these days.
18. The interim orders granted to the grievant issued against this background. They are meant to defeat justice. The grievant has approached the court with unclean hands. There was material non-disclosure by the claimant, leading to grant of the interim orders. The joinder of the Intended respondents is bad in law. They are employees of the 1st and 2nd respondents. They do not employ the grievant. The respondents pray for dismissal of the applications.

The Court Finds: -

19. The claimant has not established why the intended respondents should be joined to the proceedings. They are employees of the 1st and 2nd respondents, and do not have employment liability, over the grievant. Any grievances the claimant and the grievant have, should be addressed to the employer, who is known and is available to answer to any claims. The prayer to have the two intended respondents, added to the proceedings is declined.
20. The respondents have shown that deductions made against the grievant's salary are well-founded in law and fact.
21. The grievant was found by the Auditor-General, to have paid to himself illegal salaries and overtime. It was recommended that these be recovered, which the 1st respondent implemented, by deducting monthly, 25% of the grievant's salary, pursuant to Section 19[1] of the [Employment Act](#), and section 203 of the [Public Finance Management Act](#).
22. Secondly, he was later found to have paid to himself salaries on a higher job grade for a period of 5 years, aggregated at Kshs. 607,160. Thirdly, he was absent from work without explanation, leave of the respondent or lawful cause, for 13 days. The respondent made a decision to deduct from the grievant's salary for 13 days absent. These latter day deductions were added onto the outstanding debt. The grievant did not dispute these debts.
23. The claimant did not disclose these facts to the court when interim orders issued. The claimant approached the court with dirty hands, and the court has no obligation to aid the grievant's cause.
24. The effect of the orders made, is to restrain the respondents from discharging their statutory obligations under section 19[1] of the [Employment Act](#) and section 203 of the [Public Finance Management Act](#). The orders shield the grievant from the consequences of his illegal acts. It is clear that he has not come to court with clean hands.
25. The consent signed between the grievant and the 1st and 2nd respondents, excluded the claimant, and was never presented to the court for adoption. The claim was never therefore, legally withdrawn, and the court cannot act on it.
26. The court does not think that considering the various acts of gross misconduct alleged against the grievant, and order should issue against the respondents, barring them from terminating the grievant's contract of employment. The court would be interfering with a management prerogative unreasonably. If any contemplated termination is not in accordance with the law, the grievant has the option of pursuing remedies which include compensation and reinstatement. The grievant has not



demonstrated that he merits the interlocutory intervention of the court. He definitely has approached the court with unclean hands. He is a public officer, who from the recommendations of the Auditor General, appears to have engaged in abuse of Public Office.

It is ordered: -

- a. The applications filed by the claimant dated July 2, 2020, October 26, 2021 and November 26, 2021, are declined.
- b. Costs to the respondents and the intended respondents.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT NAIROBI, THIS 29TH DAY OF SEPTEMBER 2022.

James Rika

Judge

