



Abdi v Governor, Kakamega County Government & 2 others (Petition E004 of 2022) [2022] KEELRC 12817 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12817 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E004 OF 2022**

JW KELI, J

OCTOBER 6, 2022

**IN THE MATTER OF IN THE MATTER ARTICLES
1,10,19,20,21,22,23(3) (A,B,C),27(2),28,41,47(1),50,165,236(A
&B))258(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: UNLAWFUL, UNFAIR, UNPROCEDURAL AND UNREASONABLE
SUSPENSION FROM THE OFFICE OF CHIEF EXECUTIVE OFFICER FOR THE
KAKAMEGA COUNTY WATER AND SANITATION COMPANY LIMITED.**

AND

IN THE MATTER OF THE EMPLOYMENT ACT

BETWEEN

ABDIKADIR MOHAMED ABDI PETITIONER

AND

GOVERNOR, KAKAMEGA COUNTY GOVERNMENT 1ST RESPONDENT

**BOARD OF DIRECTORS OF KAKAMEGA COUNTY WATER AND
SANITATION COMPANY LIMITED 2ND RESPONDENT**

KAKAMEGA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

RULING

1. The ruling is on the petitioner’s notice of motion application dated May 19, 2022 seeking the following substantive orders:
 - a. That this honourable court do cite the 2nd respondent’s chairman , Laban Peter Ayiro and Chritabel Ashiono the acting CEO and the 3rd respondent’s Chairperson Catherine Raini



Omwena and Ms Lucy Kihamba the CEO for being in contempt of the court order issued on the May 10, 2022.

- b. That this honourable court be pleased to order the 2nd respondent's chairman, Laban Peter Ayiro add Christabel Ashiono the acting CEO and the 3rd respondent's Chairperson Catherine Raini Omwena and Ms Lucy Kihamba the CEO be arrested and brought before this honourable court for sentencing and/or committal to civil jail for a period the court may determine and be ordered to personally pay the sum of monies the court may determine as a penalty for deliberately defying and violating the orders of this honourable court given on the May 10, 2022.
 - c. Costs
2. The application is based on the grounds of disobedience of the court order of May 10, 2022 stating:- 'for the integrity of the court process status quo with regard to the petitioner's employment is ordered' and is supported by the affidavit of Abdikadir Mohamed Abdi sworn on the May 19, 2022.
 3. The application is opposed by the respondents *vide* replying affidavit of Lucy Kihamba, CEO of the 3rd respondent sworn on the June 21, 2022 who deny being in contempt.
 4. The application was canvassed by way of written submissions. The petitioner's/applicant's submissions drawn by Hassan N Lakicha & Company Advocates are dated July 20, 2022 and filed in court on the July 25, 2022. The respondent's written submissions drawn by Vivianne Mmbaka Komwonyo, county attorney and advocate for the respondents are dated July 22, 2022 and filed in court on the July 25, 2022.

Determination

The relevant law

5. Currently we do not have a substantive law on contempt following the decision in [Kenya Human Rights Commission v Attorney General & another](#) [2018] eKLR, where Justice Mwita declared that the entire [Contempt of Court Act](#) No 46 of 2016 to be invalid for lack of public participation as required by articles 10 and 118(b) of the [Constitution](#) and found that the said Act as enacted encroached upon the independence of the judiciary. The decision is law for now.
6. Consequently, we revert to previous position where the law with respect to the procedure for institution of contempt of court proceedings in this country was which is section 5 of the [Judicature Act](#) (cap 8 Laws of Kenya). That section provides:
 - '(1) 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.
 - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.'
7. In the circumstances, the current law that governs contempt of court proceedings is the English law currently applicable in England as held by Justice Odunga in [Alfred Mutua v Boniface Mwangi](#) [2022] eKLR at paragraph 14 where the court upheld the decision of the Court of Appeal in [Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others](#) [2014] eKLR, where the court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High



Court are concerned is section 5 of the Judicature Act. The court upholds the decision by Justice Odunga.

The Applicant's Case

8. The applicant submits that the 1st and 3rd respondents are not his employers to exercise disciplinary control over him (relies on clauses N.3.1 and N.4.1 of the 2nd respondent's Human Resources Policies and Procedures Manual December 2020 which vest disciplinary control and removal of the company officers on the 2nd respondent's board) and that they are in contempt of court by their purported action.
9. That the respondents *vide* the affidavit of Lucy Kihamba state that *vide* letter of May 16, 2022 the 3rd respondent invited the applicant to disciplinary hearing and this invitation had also been done on April 7, 2022 way before the instant proceedings began.
10. The applicant submits that the action by the respondents as reflected in their letter of May 16, 2022 amount to an act of contempt of the court orders and that this court has unfettered discretion to cite and issue orders of committal as against the respondents for not only blatantly, knowingly and intentionally ignoring the orders of the court but also for taking actions that directly contravened the said orders.
11. The applicant further submits that court orders are not opinions and ought to be obeyed and compliance with such is not a matter of choice and that it is in the interest of justice that the respondents be brought to book for their actions and orders issued on the May 10, 2022 be upheld and enforced by this court.
12. To buttress his foregoing argument the applicant relies on the decision of the court in Sharif Molana Habibi Mohammed v County Government of Kilifi (2017)Eklr where the court held that:- "court orders must be obeyed. courts cannot hold their hands as their orders are disobeyed with impunity left, right and centre. This would amount to an abdication of the sacrosanct duty bestowed upon the courts by the Constitution."

The court in the foregoing decision adopted with approval the holding in *Hadkinson v Hadkinson* (1952)ALL ER 567, where Romer L.J stated:-

'It is plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it be irregular or void.'

13. The applicant further relies on several other authorities to buttress their case of contempt by the respondent which uphold the holding in the *Hadkison case* and the court took notice the said decisions.

The Defence

14. The respondents through the county attorney of the government of Kakamega county submits that the employment of the applicant with the respondents has not been terminated.
15. That the respondents have abided by the court order of May 10, 2022 to wit status quo was issued with regard to petitioner's employment in order to ensure integrity of the court process which as this court guided was the position as at May 10, 2022. The respondents submit that the said position has not changed. To buttress their submissions the respondents rely on the High Court decision by Justice Mabeya in Kenya Airline Pilots Association (KALPA) v Cooperative Bank of Kenya Limited and another (2020)eKLR on meaning of an order of 'status quo' wherein the court pronounced itself thus:-⁴



- ‘8. In essence, therefore, a status quo is meant to preserve the subject matter as it is/existed, as at the day of making the order. See *TSS Spinning & Weaving Company v NIC Bank Limited & Another* (2020)eKLR . Status is about the a court of law maintaining the situation or subject matter of the dispute or state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.”
16. The respondents further rely on the decision of Justice L Gacheru in *Bakari Shaban Gakere v Mwana Idd Guchu & 3 others* (2022)e KLR where the court held that the purpose of the an order of status quo is to maintain the substratum of the suit.
 17. The respondents further submit that their letter of May 16, 2022 does not in any colour, form or shape seek to alter the subject matter by terminating the petitioner’s employment. That the substratum of the petition is intact in line with the tenor of the court order of May 10, 2022.
 18. The respondents submit that their actions have been diligent, fair and transparent in dealing with the petitioner’s suspension.
 19. The respondents further submit that the persons sought to be cited for contempt namely, Prof Laban Peter Oyiro, Mrs Catherine Raini Omweno , Mrs Christabel Ashiono and Mrs Lucy Kihamba did not author the impugned letter and submits that this points to the fact that the present application is tainted with malice and vendetta against the said individuals as a means to settle scores.
 20. That the applicant has not demonstrated who the contemnors are and whether they were served or held responsibility for effecting the court orders. The respondents submits that looking at annexure AM2 the alleged contemnors were not served and to buttress their submissions rely on the decision of Lady Justice A Ong’icho in *HMI v KBH* (2021) eKLR where the court held that the law requires that the application for committal or contempt of court to be served personally on the respondent. In that case the court found that the applicant did not comply with the requirement as they served the advocate.
 21. The respondents alleges lack of clarity in the court order and that both parties seem to have different interpretation of the court order of May 10, 2022. That the petitioner seems to hold the opinion that the order directed him to return to office(import of paragraph 6 of the petitioner’s submissions dated July 20, 2022) and on the other hand the respondents believe the order was to the effect that the prevailing situation as at May 10, 2022 prevails which position meant the petitioner remains on suspension.
 22. The respondents submit that the position of the petitioner’s employment as at May 10, 2022 was on suspension together with procedures attendant thereto which they submit reasonably justifies the contents of the letter of May 16, 2022. That the author of the letter was under reasonable belief that a disciplinary hearing forms part and parcel of the procedures of employee under suspension. That the court did not halt the disciplinary proceedings but the tenor of the court order directed that the substratum of the petition being the petitioner’s employment not being terminated pending determination of the matters before court.
 23. The respondents submit that the court order served was erroneous (annexure LK -7) and that the position was also acknowledged by the applicant in affidavit of service(AMA2) paragraph 3 where it is stated that the receipt of service was declined on account of fact that the order was not proper. To buttress these submissions the respondents rely on the decision of Justice Mativo in *Samuel M.N Mweru & others v National Land Commission & 2 others* (2020)eKLR where the court held the test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and malafide .



The Standard Of Proof In Contempt Of Court Proceedings

24. The Supreme Court in the decision cited by the counsel for the applicant in *Republic v Ahmad Abolfathi Mohammed & another* (2018) upheld the standard of proof of contempt as per the decision in the case of *Mutitika v Baharini Farm Limited* [1985] KLR 229, 234 where the Court of Appeal held that: “In our view, the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”(para 28)
25. The Supreme Court in paragraph 29 of the foregoing decision explained the rationale of the test as follows:-
- “The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she wilfully acted in a manner that flouted the court order”.(emphasis given)
26. The court finds and determines that the standard of proof of contempt in civil proceedings is as stated by the Supreme Court (supra) in upholding the decision of the Court Appeal in *Mutitika v Baharini Farm Limited* [1985] KLR 229, as being higher than that of civil proceedings of balance of probabilities and almost but not exactly beyond reasonable doubt as contempt of court is quasi criminal in nature. In view of the Supreme Court holding the court is not persuaded by the authority cited by the respondents of *Samuel M.N Mweru & others v National Land Commission & 2 others* (2020)eKLR on standard of proof that the elements of contempt of court must be proved beyond reasonable doubt.

Whether the application met the standard of proof for contempt of court as defined by the Supreme Court in Republic v Ahmad Abolfathi Mohammed & Another (2018)(supra).

27. Meaning of the status quo order .
- The *Black’s Law Dictionary* (10th Edition Bryan A Garner) defines the term ‘status quo’ to mean ‘the situation that currently exists’. The court upholds the holding of Justice Mabeya in *Kenya Airline Pilots Association v Cooperative Bank of Kenya Limited & another* (2020)Eklr to the effect that the order of status quo preserves the subject matter as it exists as at the day of making the order. In the instant case the applicant was on suspension as at May 10, 2022 hence the subsequent invitation to disciplinary hearing was outside the status quo. The applicant challenges the status of the 3rd respondent as its employer and produces documentary evidence under the petition. The action towards discipline of the petitioner by the 1st and 3rd respondents are challenged and that gives the court a valid reason to look into the internal disciplinary process of the employer. That informed the order of status quo pending the determination of the dispute in court.
28. Applying the standard of proof (Supreme Court in *Republic v Ahmad Abolfathi Mohammed & another* (2018)(supra) was the act by the 3rd respondent of inviting the applicant for disciplinary hearing *vide* letter dated May 16, 2022 after status quo order on the employment of May 10, 2022 tantamount to deliberate defiance of the court order? The deponent of the respondents’ replying affidavit Lucy Kihamba, the acting secretary of the 3rd respondent, admits to knowing the order meant employment status of the applicant as at May 10, 2022. The court notes her attempt to justify their action under



paragraph 12 by stating the court should interfere with internal disciplinary proceedings in exceptional circumstances and which is not the case in the instant case. The court position is that court orders ought to be obeyed even if the party thinks they are irregular or vague and the only option is to move the court to set the order aside. It is not open to a party issued with a court order to interpret it outside its face value meaning as respondent attempts to do under paragraph 7 of the replying affidavit of Lucy Kihamba. The court frowns at such behaviour and rebukes the respondents for their attempt to undermine the order of the court. In so holding the court upholds the decision in *Clarke and others v Chadburn & others* (1985) 1 ALL E.R(PC),211 as cited with approval by Justice Lenaola sitting at High Court then in *Kenya Tea Growers Association v Francis Atwoli and 5 others* (2012) eKLR where the he observed:-

‘I need not cite authority of proposition that it is of high importance that orders of the courts should be obeyed, wilful 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 illegal.. even if the defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.’

29. The Court to emphasise the absolute compliance with court orders further upholds with approval the decision in *Hadkinson v Hadkinson* (1952)ALL ER 567, where Romer L.J. stated:-

‘It is plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it be irregular or void.’

30. The respondents submit that no proper court order was served on the respondents. On whether the alleged contemnors were served, the court finds and determines that the order having been issued in the presence of their counsel and the respondent representatives having been served(exhibit AMA2), the contemnors had knowledge of the said orders, by the position they hold in leadership of the Respondents. In so finding the court upholds with approval the ruling by Justice Lenaola in *Basil Criticos v Attorney General and 8 others* (2012) eKLR

‘.. the law has changed and as it stands today knowledge supersedes personal service.. where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.’

31. The court finds that the replying affidavit of Lucy Kihamba sworn on behalf of the respondents discloses knowledge of the court order. The alleged contemnors did not file any response to deny knowledge of the court order of May 10, 2022. Submissions are not pleadings.

32. On whether the application then meets the standard of proof of higher than balance of probabilities and almost and not like the beyond reasonable doubt the court considered the letter dated May 11, 2022 under which it is indicated that the court did not order return to work (annexture LK-7) and ground (e) of the notice of motion application. The respondents submit that there was misinterpretation of the court order by both parties. That the petitioner interpreted the order to mean he could return to the office while the respondents interpreted the order to mean preservation of the substratum of the petition being the employment of the petitioner.

33. The impugned court order of May 10, 2022 states in part:-‘for the integrity of the court process, status quo with regard to the petitioner’s employment is ordered.’

It is not in dispute that as at May 10, 2022 the petitioner was under suspension albeit pending disciplinary proceedings. The order of status quo meant the prevailing position as at May 10, 2022 was



preserved (status quo means the situation that currently exists (supra)). The status of the 1st and 3rd respondents in relation to the applicant's employment terms having been challenged under the petition also meant no further action from the time and date of the order whether disciplinary or otherwise would be carried out against the applicant to affect his employment adversely until determination of the case. The order does not in any way return the applicant to office.

34. The court finds and determines that the instant application being based on ground(e) which is outside the court order, then the application for contempt of court against the respondent fails the standard of proof as the petitioner/applicant attempted to enforce non-existent order of return to office.

Conclusion And Disposition

35. The court found that the application does not meet the required standard of proof which is higher than that of civil proceedings of balance of probabilities to merit orders sought. The court declines to grant orders sought as one of the grounds under which the application is based is that the applicant was unable to access office which allegation is outside the court order. The court order preserved the status of employment as at May 10, 2022 and nothing more.

36. The application by way of notice of motion dated May 19, 2022 is dismissed. Each party to bear own costs.

37. Taking into consideration the continuing employer employee relationship, the different view held by the parties of the meaning of the status quo court order of May 10, 2022, in order to conclusively determine the case in a timely manner, the court hereby issues the following orders:-

- a. That pending the hearing and determination of the petition dated March 15, 2020 the respondents are jointly and severally prohibited from taking any disciplinary proceedings against the petitioner while on suspension or taking any action towards terminating his employment.
- b. The notice of motion dated March 15, 2022 and the petition dated March 15, 2022 to be heard together.
- c. The respondents are granted 7 days from today to file response to the petition and the notice of motion of even date.
- d. The petitioner is at liberty, upon service, to file reply on the petition within 7 days upon being served by the respondent.
- e. Mention on October 13, 2022 to confirm compliance and issue submissions directions.

38. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 6TH OCTOBER 2022.

J. W. KELI,

JUDGE.

In the presence of :-

Court Assistant: Brenda Wesonga

Claimant : Ms Mohamed Abdikadir

Respondent/Applicant :- Absent

