



Universities Academic Staff Union (UASU) Egerton University Chapter v Egerton University & 2 others (Cause E016 of 2022) [2022] KEELRC 13430 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13430 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E016 OF 2022
DN NDERITU, J
DECEMBER 7, 2022**

BETWEEN

**UNIVERSITIES ACADEMIC STAFF UNION (UASU) EGERTON UNIVERSITY
CHAPTER CLAIMANT**

AND

**EGERTON UNIVERSITY 1ST RESPONDENT
COUNCIL, EGERTON UNIVERSITY 2ND RESPONDENT
VICE CHANCELLOR, EGERTON UNIVERSITY 3RD RESPONDENT**

RULING

I. Introduction

1. In a notice of motion dated June 13, 2022 the claimant/applicant prays for-
 1. Spent
 2. That this honourable court be pleased to make a finding that the members of the 2nd respondent and the 3rd respondent are all guilty of contempt of court for disobeying the court order issued in this matter on May 30, 2022.
 3. That having made a positive finding pursuant to prayer 2 above, the honourable court be pleased to commit all the members of the 2nd respondent and the 3rd respondent to civil jail for a period of six months or such period as the court deems fit; or to personally pay, each of them, such fine as this court deems just in the circumstances.
 4. That the cost of this application be provided for and be borne by the respondents.
2. The application is expressed to be brought under section 5 of the *Judicature Act* (cap 8) of the laws of Kenya and all other enabling provisions of the law.



3. The application is based on the grounds on the face of it and supported by the affidavit of Dr Grace Wanjiru Kibue sworn on June 13, 2022 with several annexures thereto. The same deponent swore a further affidavit on July 4, 2022.
4. In opposition to the application the respondents filed a joint response by way of a replying affidavit sworn by the 3rd respondent, Prof Isaac Kibwage, on June 21, 2022 with several annexures thereto.
5. By consent, it was agreed that the application be heard by way of written submissions. Mirugi Kariuki & Co Advocates for the claimant filed their written submissions on July 4, 2022 while Wekesa & Simiyu Advocates for the respondents filed on July 12, 2022. Counsel for the respondents filed further submissions on July 19, 2022.

II. Background

6. Vide a statement of claim dated May 17, 2022 filed in court on even date, the claimant seeks the following-
 1. A declaration and a finding by the honourable court that its illegal for the respondent to defer the salaries of the members of the claimant in a manner that is financially adverse and prejudicial to their gross pay that was payable as of November 31st, (30th), 2021 and consequently, a permanent order of injunction, restraining the respondents from further withholding the said salaries within such a matrix.
 2. A declaration and a finding that, in view of section 17(1) of the *Employment Act*, the return to work formula dated March 4, 2022 is void to the extent that it provides that Egerton University shall pay salaries to the staff members. Effective end of March, 2022, within the available funds and that three months into the semester, the status of finances will be reviewed in the spirit of adjusting the salaries within the available funds.
 3. A declaration and finding by this honourable court that any deferred portion of salaries payable to members of the claimant, should accrue a compound interest, at the applicable commercial rates, effective from the day that such of portion of the salary was deferred or became payable.
 4. A permanent order restraining the respondents from surcharging the 60% of the salaries for the months of December, 2021, January and February, 2022, paid to some members of claimant during the subsistence of the strike that commenced effective November 15, 2021.
 5. An order directing the respondents to pay all members of the claimant, full salaries for the months of December, 2021, January, and February, 2022, at the gross salary payable as at November, 2021.
 6. That cost of these proceedings be borne by the respondents.
7. Along with the statement of claim the claimant filed a notice of motion of even date seeking for the following orders –
 1. That this application is certified urgent and the same be heard *ex-parte* in the first instance.
 2. That pending hearing and determination of this application *inter-partes* the honourable court be pleased to issue an order, restraining the respondents from further adjustment/ reorganization or deferring the claimant’s members’ salaries in such a manner that the monthly – pay is less than what was the gross pay as at November 31, 2021, and this order to apply with effect from the salaries payable end of May, 2022.



3. That pending hearing and determination of this application *inter-partes*, the honourable court be pleased to issue a temporarily order of injunction restraining the respondent from surcharging or deducting from claimant's members' salaries, monies paid, being sixty percent (60%) or the payable salaries, to some of the claimant, in the months of December, 2021, January and February, 2022 during the subsistence of the strike that had been called by the claimant/applicant effective November 15, 2021.
4. That pending hearing and determination of this application *inter-partes* the honourable court be pleased to issue an order, restraining the respondents from further adjustment/reorganization or deferring the claimant's members' salaries in such a manner that monthly a net gross-pay is less than what was the net-gross pay as at November 31, 2021, and this order to apply with effect from the salaries payable by end of May, 2022.
5. That pending hearing and determination of this application *inter-partes*, the honourable court be pleased to issue a temporarily order of injunction, restraining the respondent from surcharging or deducting from claimant's members' salaries, monies paid, being sixty percent (60%) of the payable salaries, to some members of the claimant, in the months of December, 2021, January, and February, 2022 during the subsistence of the strike that had been called by the claimant/applicant effective November 15, 2021.
6. That costs of this application be provided for and be borne by the respondents.
8. The said application was certified urgent on May 18, 2022 (Wasilwa J) and fixed for *inter-partes* hearing on May 24, 2022. On the hearing date counsel for the respondents was not ready to proceed and sought for more time, three days, to file responses to the application. The application was then fixed for hearing before this court on May 30, 2022.
9. On May 30, 2022 counsel for respondents and or the respondents did not show up for the hearing and no responses had been filed to the application dated May 17, 2022. This court then granted interim orders in the following terms-
 1. That pending hearing and determination of this application *inter-partes* an order is hereby issued, restraining the respondent from further adjustment/reorganization or deferring the claimant's members' salaries in such a manner that the monthly gross pay is less than what was the gross pay as at November 31, 2021, and this order to apply with effect from the salaries payable end of May, 2022.
 2. That pending hearing and determination of this application *inter-partes*, a temporarily order of injunction is hereby issued, restraining the respondents from surcharging or deducting from the claimant's members' salaries, monies paid, being sixty percent (60%) of the payable salaries, to some members of the claimant, in the months of December, 2021, January, and February, 2022 during the subsistence of the strike that had been called by the claimant/applicant effective November 15, 2021.
 3. That mention on June 15, 2022 for further orders/directions. Counsel for claimants to serve a mention date.
10. Upon service of the said order the respondents failed and or refused to obey the same and consequently the claimant filed the notice motion dated June 13, 2022 seeking orders for contempt of court as alluded to in the introductory part of this ruling; that is the application that is the subject matter of this ruling.



III. Claimant's Case

11. The claimant's position in this application is contained in the supporting affidavit to the application, the further affidavit, both sworn by Dr Grace Wanjiru Kibue, and the written submissions by counsel.
12. For avoidance of repetition, all parties agree that there is a valid, lawful, and unambiguous order issued by the court on May 30, 2022 and that the same was properly served upon the respondents. There is also no argument that the respondents have not obeyed the said court order to this very day.
13. The battleground is that the respondents argue that they are not in a position to obey the said court order for reasons beyond them while the claimant takes the position that the respondents have blatantly, willfully, and deliberately disobeyed the said court order.
14. The deponent in the supporting affidavit states that the subject court order was served upon the respondents on May 30, 2022 via email and again physically on May 31, 2022. A duly stamped copy of the order has been exhibited as evidence of service.
15. The deponent has also exhibited a notice dated June 6, 2022 by the respondents addressed to academic staff, members of the claimant, to the effect that the respondents were not able to honour the court order.
16. In any event the respondents were represented by counsel in court on May 24, 2022 which is in itself a confirmation that the respondents had received the said court order and were aware of the contents thereof. They were under legal obligation to obey and honour the same.
17. The claimant states that all other public universities pay salaries at 100% and there is no reason whatsoever why the respondents have failed to oblige to the said court order other than adamant refusal, failure, and blatant contempt to do the lawful and right thing. The deponent argues that salaries are a first charge and non-discretionary on respondents budget and that unless money meant for salaries has been diverted to other use there is no plausible reason as to why members of the claimant should not be paid as ordered by the court.
18. In any event, the deponent argues, even in the return to work formulae (RTWF) dated November 30, 2020 the respondents agreed to pay salaries at 100% plus 50% of the arrears each month. The deponent states that the claimant has been very patient with the respondents in the matter of payment of salaries as the salaries sought are those based on 2013-2017 CBA, yet the 2017-2021 is in force and other public universities are allegedly already implementing the latter at 100%. The deponent states that majority of the members of the claimant were not paid monthly salaries for December, 2021, January and February, 2022 and that others are yet to be paid deferred salaries for the months of July to October, 2020.
19. The deponent states that by the respondents failing and or refusing to pay the salaries to the members of the claimant as required by the law, members of the claimant have been unable to meet their financial obligations hence subjecting them to financial embarrassment and ridicule and that the situation is compounded by the deliberate, adamant, and contemptuous refusal by the Respondents to obey the court order alluded to above.
20. It is on the basis of the foregoing that the claimant has pleaded with this court to grant orders as sought in the application as alluded to above.

IV. Respondents' Case

21. As stated elsewhere in this ruling the respondents filed a joint replying affidavit sworn by Prof Isaac Kibwageon June 21, 2022.



22. The deponent states that after the respondents received the subject court order he wrote to the Principal Secretary in-charge of education and research on June 9, 2022 seeking assistance for funds to enable the respondents to comply with the court order. He states that the respondents issued a notice to members of the claimant on June 6, 2022 informing them that the respondents are not able to obey the court order due to lack of funds. He has attached copies of the two letters/notices.
23. The deponent alleges that the respondents are unable to pay salaries as ordered by the court due to the negative effects of Covid-19 pandemic which affected revenue streams through low student enrolment and poor performance in other revenue generating activities.
24. The deponent alleges that the RTWF of March 4, 2022 acknowledged and recognized the financial hardship persisting and that the salaries to be paid were pegged on “within the available funds”.
25. The deponent states that all salaries for members of the claimant are processed at 100% but due to the bad financial situation they are paid at 57% and the balance is deferred to be paid at a future date when the financial situation improves.
26. On the basis of the foregoing the deponent states that the respondents have neither ignored nor breached the court order and pray that the application be dismissed with costs.

V. Submissions by Claimant’s Counsel

27. Counsel for the claimant has set out the conditions or elements that an applicant needs to prove and or meet to found a case for contempt of a court order. Counsel has relied on *Samuel MN Mweru & others v National Land Commission & 2 others* [2020] eKLR and the book, *Contempt in Modern New Zealand*, in support of the argument. The four elements identified are that- there exists a valid court order containing clear and unambiguous terms, the respondent must be shown to be aware of the order and the terms thereof (essentially that service of the order was effected), the respondent has breached and or failed to comply with the order, and finally that the failure and or refusal to comply with the court order is willful and deliberate.
28. The court agrees with counsel for the claimant that the first three elements are not in dispute and the same are proved. The fourth issue is the battleground as the respondents argue that they are unable to comply with the court order due to factors beyond their control. However, the claimant holds and argues that the failure by the respondents to obey the court order is deliberate, willful, blatant, and in bad faith.
29. Counsel has submitted that the claimant is asking for members to be paid what they used to earn before the strike, that is the salary as at November 30, 2021. He argues that the respondents have failed, refused, and or neglected to pay salaries for December, 2021, January and February, 2022.
30. Counsel argues that the 1st respondent is a public university and hence salaries are a first charge on the monthly expenditure and that unless the money meant for salaries has been diverted to other areas there is no plausible or reasonable explanation from the respondents as to why the salaries are not paid as required in law and as obtaining before the strike in November, 2021.
31. Counsel argues that the respondents have heard adequate time to address the issue of salaries and the letter addressed to the ministry is just a gimmick and an afterthought intended to deceive the court that efforts have been made yet no good faith has been demonstrated by the respondents towards complying with the court order.
32. Counsel insists that the respondents are in contempt of court and pleads with this court to grant the orders as prayed for.



VII. Submissions by Counsel for the Respondents

33. Counsel submits that the respondent has explored ways of complying with the court order without success. He submits that low student enrolment and Covid-19 have had such negative financial impact on the university that it is not possible to pay salaries at 100%.
34. Counsel argues that in the RTWF entered into between the claimant and the respondents salaries were to be paid “within the available funds”. It is submitted that the claimant is well aware of the dire financial situation that the university is experiencing and hence it is hypocritical for the claimant to file this cause well aware of that situation and the terms of the aforesaid RTWF.
35. The respondents submit that salaries for members of the claimant are processed at 100% but paid at about 57% with the balance deferred to be paid at a future date when the financial situation improves. According to the respondents the claimant is unilaterally walking away from a binding RTWF which according to respondents is a binding contract. The respondents submit that if the salaries were paid at 100% the university would have to close down as other services including operational costs would not be met due to lack of adequate funds.
36. Counsel has cited *Michael Sistu Mwaura Kamau v The Director and Public Prosecution & 4 others* [2018] eKLR and *Samuel MN Mweru & others v National Land Commission & 2 others (supra)* to illustrate the elements and ingredients that need to be proved in sustaining an application for contempt of court.
37. Counsel submits that the claimant has not demonstrated that the failure by the respondents to obey the court is deliberate and willful. On this basis the respondents have pleaded that this application be dismissed with costs.
38. In his further submissions counsel for the respondents has vehemently argued that the respondents have complied with the court order by way of paying the salaries within the funds available.
39. Counsel takes issue with what he views as an attempt by counsel for the claimant to introduce and adduce evidence through submissions. He cited *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR to emphasize this point.
40. Counsel reiterates that the respondents have done all that they could but it is currently not possible to pay the salaries at 100%. He submits that there is no specific budgetary allocation for salaries and hence no funds have been diverted from salaries to other expenditure areas.

VII. Determination

41. Flowing from the foregoing analysis of the evidence and submissions from both sides, it is clear that there is only one issue for determination in this application and that is whether the respondents are in contempt of court for failure to obey the court order issued by this court on May 30, 2022.
42. This court agrees with counsel for both sides on the four elements/ingredients of contempt of court that the applicant has to prove to sustain the prayers sought.
43. As stated in an earlier part of this ruling the first three ingredients are admitted by both sides and hence not contested. There is a valid and unambiguous court order, the same was properly and timeously served upon the respondents, and the respondents have not complied with the said order. It is the fourth ingredient that is contested. While the claimants argue that the respondents have deliberately and blatantly refused to obey the said court order, the respondents argue that they have made all



necessary efforts to obey and implement the said order but they are unable to do so for factors and circumstances beyond them.

44. It is therefore incumbent upon the claimant to demonstrate and prove that the respondents have deliberately and willfully failed and or refused to comply with the court order cited.
45. Contempt of court in civil proceedings are essentially quasi-criminal. They are not ordinary civil proceedings since a contemnor is amenable to penal consequences which may include fine or even jail term. However, such proceedings are not criminal. It is not a criminal trial. The standard of proof therefore is beyond that of civil proceedings which is on balance of probabilities, but certainly below that of beyond reasonable doubts in criminal cases.
46. But before tackling this issue let the court comment on the issue and place of salaries in an employment relationship.

IX. Labour Rights

47. Article 41 of the [Constitution](#) provides as follows-

"41.

- (1) Every person has the right to fair labour practices.
- (2) Every worker has the right—
 - (a) to fair remuneration;
 - (b) to reasonable working conditions;
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike.
- (3) Every employer has the right—
 - (e) to form and join an employers organisation; and
 - (f) to participate in the activities and programmes of an employers organisation.
- (4) Every trade union and every employers' organisation has the right—
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining."

48. In operationalizing labour rights the Legislature has passed several statutes including but not limited to the [Employment Act](#) (the Act), [Fair Administrative Action Act](#), the [Employment and Labour Relations Court Act](#), [Labour Relations Act](#), et al.



49. It is evidently clear that fair remuneration and reasonable working conditions are some of the foremost constitutional rights for each and every employee.
50. Section 17 of the Act provides for protection of wages and states in part that “an employer shall pay the entire amount of the wages earned by and payable to an employee in respect of work done by the employee in pursuance of a contract of service directly”. The Act provides for the minimum terms and conditions of the relationship between an employer and an employee. Any agreement that purports to provide for terms that are less favourable and or in contravention of the minimum terms set in the Act is null and void.
51. Full payment of the agreed wages by the employer to the employee for work done is a basic labour right. There is no way an employee shall work without receiving the full pay as agreed by and between the parties. In case of members of the claimant herein the salaries are paid monthly and hence become due and payable at the end of each month -See section 18(2)(c) of the Act. Further, section 19 of the Act out-laws deductions from wages of any amount other than what is authorized by the law. There is nothing in law called deferred pay; the respondent herein is asserting that wages due and payable to members of the claimant shall be paid at a future date.
52. The law is very clear on the deductions that may be made from the wages of an employee – See sections 19, 20, and 21 of the Act.
53. An employer who is unable to meet the wages of employees is not helpless in law. Section 40 of the Act provides on how an employer may reduce the workforce by lawfully terminating the excess workers on redundancy. The Legislature foresaw a situation where, for whatever reason, an employer may not continue keeping workers in payroll yet not able to meet their wages and other needs. In such situations one of the options is for the employer to let go some of the workers by adhering to the law on redundancy.
54. Denial or deferral of payment of wages is not one of the options available to an employer. Such a move is unconstitutional and unlawful.
55. It is on the basis and understanding of the law as stated above that this court granted the *ex-parte* order that is now contested as disobeyed by the respondents in these contempt of court proceedings.

X. Willful and Deliberate Disobedience of the Court Order

56. As stated elsewhere in this ruling parties and counsel agree that the first three ingredients of contempt have been established against the respondents. However, the four elements are cumulative and all of them must be established and proved for this court to found the respondents in contempt of the said court order.
57. The respondents have given two reasons for the failure on their part to pay the monthly wages as and when they fall due. The first alleged reason is the negative financial impact occasioned by Covid-19 leading to prolonged closure of the university and hence low revenue from students’ fees. The second reason is the disruption caused by members of the claimant who took an industrial action by way of a strike from November, 2021 to about March, 2022 which culminated in the RTWF dated March 20, 2022.
58. It is the considered view of this court that if the RTWF was intended to defer payment of the agreed salaries or to allow illegal and unlawful deductions from those salaries, the same is null and void as it offends the clear provisions of the law cited above. As noted above, the Act provides for the minimum terms and conditions and the said RTWF cannot amend the law and take away the sanctity of the



law. The term “within the available funds” in the RTWF can only be construed to mean that any improvement of the terms and conditions as they subsisted as at November 30, 2021 was dependent on the availability of funds. It did not allow or license the respondents to defer pay and or make deductions as they pleased contrary to the clear provisions of the constitution and the other laws cited above. The respondents have deliberately opted to hide under the misguided, unilateral, selfish, and selective interpretation of the RTWF to willfully refuse, fail, and or neglect to obey the clear and unambiguous terms of the court order.

59. The other reason is the negative impact of the Covid-19. There are no audited accounts or other evidence adduced to demonstrate how revenue collection was affected by the pandemic. The pandemic should have affected all the public universities, institutions, and businesses in equal or similar measure. The claimant has submitted, and is so stated in the supporting affidavit, that other public universities have not failed to meet and pay full wages for their employees. This has provoked counsel for the claimant to pose the rhetorical question, and this court asks the same question - What is so unique with the respondents that they cannot pay full wages as and when the same fall due? There is no explanation whatsoever given by the respondents to this germane question.
60. The letter to the principal secretary in the ministry of education was written on June 9, 2022 after this court had issued the order for payment of full salaries. There is no evidence that the said letter was actually delivered and or received by the addressee and or that there was a follow-up on the same. Did the respondents have to wait until a court order was issued for them to start acting and following up on this issue? What employer expects workers to work day in day out and yet not pay salary in full? What tangible and serious steps have the respondents taken to obey the court order to alleviate the violation of the rights of the members of the claimant? These questions find no answers in the responses to the application by the respondents.
61. It is the considered view of this court that the respondents have willfully, deliberately, and blatantly failed, refused, and neglected to obey a valid court order that was properly served upon them terms whereof are clear and unambiguous. The respondents are not helpless in this situation had they given the court order due consideration with the seriousness that it deserves rather than the casual and lukewarm approach to the same.
62. There is no doubt that by their very willful and deliberate conduct and refusal to obey the court order the respondents have subjected members of the claimant to financial embarrassment, indignity, and hardship that is irreparable. The labour rights of the members of the claimant as analyzed elsewhere in this ruling have been violated and the abuse continues unabated.
63. The 1st respondent is a public university duly incorporated with a charter to offer higher education in Kenya and beyond. The 2nd respondent is the apex body of management of the university and the members thereof oversee the running and management of the university. They are the decision-making organ. The 3rd respondent oversees the day to day running of the university, holding a similar or same position as the chief executive officer (CEO).
64. It is the considered view of this court that all the respondents, jointly, severally, and individually have willfully, blatantly, and deliberately failed, refused, and or neglected to obey the court order issued by this court on May 30, 2022 and no reasonable or plausible explanation has been given or offered.
65. On the other hand, the claimant has established and proved all the four ingredients needed to sustain a finding that the respondents are in contempt of court to the required standard as stated in an earlier part of this ruling.



XI. Orders

66. Flowing from the foregoing this court makes the following orders in regard to the notice of motion dated June 13, 2022-
- a. This court hereby finds all the respondents jointly and severally guilty of contempt of court for deliberately and willfully disobeying the court order issued by this court on May 30, 2022.
 - b. All the respondents are ordered to appear before this court on the appointed date for sentencing.
 - c. The claimant is awarded costs of this application.
 - d. Further, it is ordered that the respondents shall have no further audience with this court in this matter until and unless they purge the contempt and obey the subject court order.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY OF DECEMBER, 2022.

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DAVID NDERITU

JUDGE

