



REPUBLIC OF KENYA



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Kenya Magistrates & Judges Association (KMJA) v Salaries & Remuneration Commission (SRC); Judicial Service Commission (Interested Party) (Petition 29 of 2019) [2021] KEELRC 924 (KLR) (21 September 2021) (Ruling)

Kenya Magistrates & Judges Association (KMJA) v Salaries & Remuneration Commission (SRC); Judicial Service Commission (Interested Party) [2021] eKLR

Neutral citation: [2021] KEELRC 924 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 29 OF 2019
NZIOKI WA MAKAU, J
SEPTEMBER 21, 2021

BETWEEN

KENYA MAGISTRATES & JUDGES ASSOCIATION (KMJA) PETITIONER

AND

SALARIES & REMUNERATION COMMISSION (SRC) RESPONDENT

AND

JUDICIAL SERVICE COMMISSION INTERESTED PARTY

RULING

1. The Petitioner filed a Notice of Motion Application dated 18th February 2021 seeking for this Court to cite and punish the Respondent for disobeying court orders issued by this Honourable Court. Upon service of the motion, the Respondent filed a preliminary objection dated 9th March 2021 which contends that the Court lacks jurisdiction to punish for contempt of court under Section 5 of the *Judicature Act* and that only the High Court and the Court of Appeal have the power to punish for contempt of Court as under Section 5(1) of the *Judicature Act*. The Respondent/Applicant submits that in the case of *Tasmac Limited v Roberto Marci & 2 Others* [2013] eKLR, the Court held that the limits of the authority of a Court (jurisdiction) are imposed by the Constitution or a statute. Further, that in *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others* [2012] eKLR the Supreme Court held that a Court's jurisdiction flows from either the Constitution or legislation or both and a Court of law cannot therefore arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The Applicant also relies on the Supreme Court case of *In the Matter of Interim Independent Electoral Commission* [2011] eKLR where the Court discussed the issue of



jurisdiction as established in the case of Owners of the *Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1.

2. The Respondent/Applicant submits that the ELRC is indeed vested with the jurisdiction to punish for contempt of Court as provided under Section 20 of the [Employment Act](#) and that it is instead objecting the jurisdiction of the ELRC to punish for contempt of Court under the [Judicature Act](#). It reiterates that the Petitioner's Application dated 18th February 2021 is brought under the provisions of Section 5 of the [Judicature Act](#) which provides as follows:
 5.
 - (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. (emphasis theirs)
3. The Respondent/Applicant submits that evidently, the jurisdiction to punish for contempt of Court under the [Judicature Act](#) is exclusively reserved for the High Court and the Court of Appeal and does not extend to any other Court including the ELRC. The Respondent/Applicant relies on the case of [Republic v Karisa Chengo & 2 Others](#) [2017] eKLR where the Supreme Court held that status and jurisdiction are different concepts; status denotes hierarchy while jurisdiction covers the sphere of the Court's operation and Courts can therefore be of the same status, but exercise different jurisdictions. That the Supreme Court in the Karisa Chengo case above went on to find that since Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should similarly be concluded that the ELC and ELRC cannot also hear matters reserved to the jurisdiction of the High Court. The Respondent/Applicant submits that the Motion Application dated 18th February 2021 is therefore incompetent and fatally defective for invoking the wrong provisions of the law. To this end, it cites the case of [Daniel Kimani Njibia v Francis Mwangi Kimani & Another](#) [2015] eKLR where the Supreme Court in dismissing a motion brought before it under the provisions of the [Appellate Jurisdiction Act](#), relied on the Supreme Court case of [Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone](#) [2013] eKLR where it held that the Court of law has to be moved under the correct provisions of the law. It further submits that the Court of Appeal in Malindi Civil Appeal No 18 of 2015-[Woburn Estate Limited v Margaret Bashforth](#) [2016] eKLR held that contempt of court proceedings are quasi-criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. The Respondent submits that the Court in the case of [Trans Mara Sugar Co. Ltd v Hosea Muga; Oscar Odhiambo Odongo \(Interested Party\)](#) [2020] eKLR while relying on the Woburn Estate case held that in contempt of court proceedings, the application is akin to a charge sheet in criminal proceedings. The Respondent/Applicant submits that the Motion dated 18th February 2021 being in the nature of a charge sheet, is defective and cannot form the basis for properly invoking this Court's jurisdiction to hear an application for contempt of court. It submits that in the absence of a motion seeking to amend the contempt of court application in question, the same is rendered a non-starter and must fail and that the Notice of Preliminary Objection dated 9th March 2021 on the other hand is merited and meets the ingredients of a preliminary objection as set out in [Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited](#) [1969] EA. 696 and should therefore be upheld.
4. The Petitioner/Respondent submits that the Applicant has failed to address itself on any single authority on the question of the jurisdiction of the Employment and Labour Relations Court to punish for contempt of court, which is the real question before this Court. It submits that when the High Court declared the [Contempt of Court Act](#) 2016 as being unconstitutional, the jurisdiction of



the court to punish for contempt reverted to Section 5 of the Judicature Act, and the Common Law and that when the Constitution of Kenya came in force on 27th August 2010, the High Court and the Court of Appeal were the only Superior Courts in Kenya before the addition of the Supreme Court, the Employment and Labour Relations Court and the Environment and Land Court. The Petitioner submits that this Honourable Court while properly interpreting Section 5 of the Judicature Act must thus take into account this important legal development. The Petitioner further urges the Court to consider the diverse authorities which affirm the jurisdiction of this court to punish for contempt of court. It cited the case of Teachers Service Commission v The Kenya National Union of Teachers & 2 Others [2013] eKLR where the Court held that the term 'High Court' in Section 5(1) of the Judicature Act includes the Industrial Court and the Environment and Land Court established under Article 162(2) of the Constitution and which clears any doubts on the jurisdiction of this Court to punish for contempt of court. In Kenya County Government Workers Union v The Governor, County Government of Kiambu & 5 Others [2016] eKLR, the Court rejected an objection that it lacked jurisdiction to punish for contempt of its orders and held that it would be subordinating Courts of equal status to High Court if the said Courts were to be deprived of power to punish for contempt of their orders, which would also be outrageously unconstitutional. The Petitioner/Respondent also cites the case of Woburn Estate Limited v Margaret Bashforth [2016] eKLR and the case of Hakika Transport Services Limited v Kenya Long Distance Truck Drivers and Allied Workers Union [2015] eKLR in support of its case. The Petitioner/Respondent submits that since the Respondent questioned the jurisdiction of this Court in the face of the above mentioned authorities, the same is enough reason for the Respondent to be condemned to pay the costs of the Preliminary Objection which should be dismissed.

5. The power to punish for contempt has been reposed in Courts and in the frontal challenge to the jurisdiction of the Court to punish for contempt is the citation of the Judicature Act as depriving this Court of the power to punish for contempt of Court. To its aid, the Respondent calls the case of Republic v Karisa Chengo & 2 Others [2017] eKLR. It would seem the Respondent misapprehended the ratio decidendi in the Karisa Chengo case which related to the criminal appeals handled by mixed benches of the HC, ELRC and ELC Judges. In the case of Teachers Service Commission v The Kenya National Union of Teachers & 2 Others [2013] eKLR the Court (Ndolo J.) held that the term 'High Court' in Section 5(1) of the Judicature Act includes the Industrial Court and the Environment and Land Court established under Article 162(2) of the Constitution. Ndolo J. citing with approval the Court of Appeal in the case of Mutitika v Baharini Farm Limited [1985] KLR 229, 234 held that:

“A person one who, knowing of an injunction, or an order of stay willfully does something, or causes others to do something, to break the injunction or interfere with the stay is liable to be committed for contempt of court as such person has by his conduct obstructed justice.”

6. The Respondent herein has been in contempt of Court orders and proceeds to nit pick as to where the jurisdiction of the Court to punish for contempt is reposed. As the Respondent has from evidence before the Court been willfully disobedient of the orders of this Court, the preliminary objection fails and the Court being seized with jurisdiction to punish for contempt finds the Respondent in willful disregard of Court orders. I hereby cite the Respondent for contempt of court and proceed to mete a punishment befitting such disregard for court orders. Having cited the Respondent for contempt of court, I impose penalty as follows:
 - i. The Respondent, that is to say the Salaries and Remuneration Commission shall pay a fine of Kshs. 5,000,000/- (read Five Million Kenya Shillings) within the next 30 days from the date of this Ruling.



- ii. Failure to pay the fine shall open the Respondent to the imposition of additional sanctions before the Court as well as potential for committal of its top management to civil jail should the sum not be paid within the next 30 days.
- iii. The Respondent must comply with the Court orders subject of these contempt proceedings forthwith.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE

