



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

PETITION NO.38 OF 2019

KENYA COUNTY GOVERNMENT WORKERS UNIONPETITIONER

VERSUS

WAJIR COUNTY GOVERNMENT.....1ST RESPONDENT

WAJIR COUNTY ASSEMBLY SERVICE BOARD.....2ND RESPONDENT

IBRAHIM AHMED YAKUB3RD RESPONDENT

SHALLE SHEIKH MURSAL.....4TH RESPONDENT

ABDULLAHI MOHAMED HASSAN.....5TH RESPONDENT

RULING

The petitioner, Kenya County Government Workers union filed application dated 8th April, 2021 and seeking for orders that;

1. ...

2. The following officers of the 1st and 2nd respondents namely;

- a. Ibrahim Ahmed Yakub - Speaker, Wajir County Assembly Service Board;
- b. Shalle Sheikh Mursal - Clerk, Wajir County Assembly;
- c. Abdullahi Mohamed Hassan - Chief Officer, Finance, Wajir County Government;

Be summoned before this court to show cause why they should not be committed to civil jail for blatantly failing to comply with orders made in the judgement of 16th January 2020 ...

3. On failing to show cause, the said officers be committed to prison for a maximum period of six (6) months for being in contempt of this court's judgment/orders on 16th January, 2020.

4. The cited respondents/contemnors be barred from addressing this court in this matter unless and until they have purged themselves of the contempt.

5. Officer Commanding Wajir Police Station do execute the prayer 2 herein.

6. This court be pleased to impose a penalty of a fine against the cited officers and in default of payment thereof their movable and immovable assets including but not limited to land and buildings be attached and sold to satisfy the penalty for contempt of court

7. Costs of this application be provided for.

The application is made on the grounds that on 16th January, 2020 the court delivered judgement and restrained the respondents from

arbitrarily subjecting and unlawfully reviewing the petitioner member's salary downwards. The decree of the court was served upon the respondents on 30th July, 2020 and in wilful disobedience, the respondents have continued to vary and alter the petitioner's member's terms of employment to their detriment and without complying with the due process.

In his Supporting Affidavit, Hon. Roba Duba avers that the respondents have failed to pay the petitioner members in full the lawful salaries from January, 2015 to date. There is no legal justification for the disobedience and such conduct is deliberate, unjustified and direct contempt of the court following judgement herein.

Hon. Duba also avers that the orders of the court herein directing the respondent to pay the petitioner members their salaries has not been varied, set aside of appealed and remain in force.

The 3rd respondent has been enjoined in these proceedings as the Speaker, Wajir County Assembly and chairperson of the 2nd respondent pursuant to section 12(a) of the County Government Act.

The 4th respondent has been enjoined herein as the Clerk, Wajir County Assembly and the secretary to the 2nd respondent pursuant to section 12(4) of the County Government Act.

The 3rd and 4th respondents have been enjoined herein for failing to perform their duties to provide for sound human resource management in line with section 12(7) of the County Government Act.

The 3rd, 4th and 5th respondents have been enjoined herein for failing to perform their duties and for disobeying orders herein issue don 16th January, 2020 and being officers vested with ensuring the 2nd respondent attains fiscal discipline and allocation and use of funds, value for money and probity in the use of public funds. As custodians and officers of the 2nd respondent mandated to ensure compliance with the court decree they have failed.

Hon. Duba also avers that on 10th December, 2020 the court found the 3rd, 4th and 5th respondents to be in contempt of court and upon amendment of the application dated 17th March, 2021 the court directed the respondents and contemnors to abide the court judgement which they have failed and refused to oblige hence the instant proceedings seeking committal of the cited persons to civil jail for a period of 6 months for disobeying court orders herein.

In reply, the respondents filed Grounds of Opposition and the Replying Affidavit of Shalle Sheikh Mursal that the legality of the amendments to the Notice of Motion dated 25th August, 2021 is challenged since the court has rendered itself by ruling delivered on 11th November, 2011 and convicted the cited contemnors on 10th December, 2020. The amendments are without any backing of law and the application is *res judicata*. The second trial by way of a second contempt of court application is substantively the same as the first application addressed by the court hence a treat to the right to fair trial under article 50 (2)(o) of the Constitution.

That the court lacks jurisdiction to entertain the instant application as the petitioners have not followed the right procedure for instituting execution proceedings against the County Government as stipulated under section 21 of the Government Proceedings Act. The court should adopt a supervisory role in the matter that does not violate the respondents' constitutional right to fair trial under Article 50 of the Constitution.

In the Replying affidavit, Mursal avers that he is the Clerk, County Assembly of Wajir an upon the judgement herein on 16th January, 2020 and the orders to pay the petitioner members full salaries from January, 2015 to date and tabulated dues at ksh.73,228,320 is disputed. The other order of the court was the reinstatement of the employees and which matter is subject of appeal a the Court of Appeal in Appeal E291 of 2020.

The 1st and 5th respondents have no role in the implementation of the court orders since the issue of employment and remuneration is under the 2nd respondent.

Mursal also avers that as the Clerk of the Wajir County Assembly and Secretary to the Board he was affected by the alteration of pay and reduction of salary done upon consultation of the employees.

On 11th November, 2020 the court in its ruling found that the contemnors would not suffer prejudice if they were summoned to show cause why they should not be committed to civil jail and on 26th November, 2020 the same was mentioned and adjourned to 10th December, 2020 when the court convicted the contemnors to two weeks and an alternative to pay Ksh.300, 000 which was done. Save no contemnor was given a right to representation.

Salary harmonisation is a process commenced through independent audits and the 2nd respondent advised to terminate the employment of half of its employees as the 2nd respondent had offered contracts against the norm and SRC guidelines.

The 2nd respondent has been exploring measures to reduce the wage bill and comply with SRC set guidelines from January, 2015 and in the intended appeal, these matters will be gone into.

Mursal also avers that the procedure of executing court decree through institution of contempt of court proceedings is an act in bad faith since the petitioner swishes to handicap the respondents operations. There is no compliance with the Government Proceedings Act and the instant application is premature and should be dismissed with costs.

Both parties attended and made oral submissions.

In determining the instant application, the court has taken into account the affidavit, the written and oral submissions.

Judgement herein was delivered on 16th January, 2020 and following failure by the respondents to comply, on 11th November, 2020 the court delivered ruling and found the respondents and cited officers/persons in contempt and further directions requiring them to purge the contempt.

Following the court ruling, the contemnors were sanctioned on 10th December, 2020.

Despite the sanction, the contempt is not purged.

The averments by the respondents and in the Replying Affidavit of Mr Mursal dated 10th May, 2021 and the alleged constraints rendering the respondents and the contemnor unable to comply with the judgement and decree of the court are not matters for this court to address at this instance. The cited Court of Appeal No.E291 of 2020 though cited and alleged to relate to the order directing the respondents to reinstate the petitioner members has not been attached and even where it may have been cited, there is no stay of execution herein or from the referenced court.

The judgement and decree of the court stands.

The respondents have challenged the instant application by the petitioner to cite them for contempt of court on the grounds that the court erred in directing for the amendment of the Notice of Motion on 17th March, 2021 and allowing the petitioner to file application dated 8th April, 2021 on similar grounds as application already addressed vide ruling delivered on 11th November, 2020. In this regard, Contempt of court consists of conduct which interferes with the administration of justice or impedes or perverts the course of justice. Civil contempt consists of a failure to comply with a judgment or order of a court or breach of an undertaking of court. See **St Mary Academy Limited & another v Grace Njeri Mukora & another; Yvonne Jeruto & another (Contemnors) [2021] eKLR**.

And in the case of **Sam Nyamweya & Others v Kenya Premier League Ltd and Others [2015] eKLR** the court held that;

contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.

In dealing with an application of contempt of court the court is invited to move firmly and secure the rule of law.

In **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] eKLR** the court held that;

Where an application for committal for contempt of court orders are made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance, an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious - a contemnor would have no right of audience in any court of law unless he is punished or he purges the contempt. So, the court is obliged to hear the application for committal first before any other matter. This is a general rule which must be applied strictly.

The rationale for dealing with contempt and the requirement that the contemnor must purge the contempt is twofold. First, in civil proceedings the court has no interest in punishing a litigant unless this is the only option to ensure orders issued are obeyed. Secondly, the court must ensure where there is contempt of its orders; such is purged in a genuine manner and in good faith.

In **Directline Assurance Co Ltd v Jamii Bora Bank Ltd & 5 others (2015) eKLR** where he stated that;

... A civil court has no interest in punishing a litigant, unless a litigant leaves the court with no option but to resort to quasi-criminal proceedings to punish a litigant. When a court orders are being disobeyed, or are about to be disobeyed, and the contemnor comes down and purges the contempt, either out of his own freewill or at the prompt of the court, the court will accept the purge of the contempt unless circumstances exist to suggest that the coming down, or the alleged purging of the contempt, is not genuine, or is done in bad faith, or is in itself a continuation of the original contempt. In accepting the coming down of the contemnor, the court will assess the reasons given for the disobedience, the time taken to come down, and the cost incurred in the process

On 17th March, 2021 the cited officers of the respondent and in the presence of their advocate attended court and pleaded to be allowed to process the dues within six (6) months. The respondent's advocate also cited the fact that parties were negotiating and present in court were Ibrahim Ahmed Yakub, the 3rd respondent; Shalle Sheikh Mursal, the 4th respondent; and Abdullahi Mohamed Hassan, the 5th respondent when the court directed them that *the respondents are bound to comply as directed* with regard to the judgement herein.

There is no effort whatsoever to comply or purge the contempt.

All the respondents are aware of the subject orders.

The respondents have previously attended court over contempt proceedings and were sanctioned. They cannot cite technicalities at this stage as the reason for failure to comply and purge the contempt. Far from it.

The court satisfied that at all material times the respondents and its officers are in wilful deliberate and refuse to purge the contempt and hence impede on the rule of law.

What the Respondents have failed to do is to provide evidence of the lack of means or financial inability to meet the terms of the Court order and decree. The Respondents face a serious allegation that they are in wilful disobedience of a Court order. To escape liability, they needed to place succinct evidence that the disobedience is not intentional but because of reasons beyond their control. Little, indeed no effort has been made in this regard.

The reason why court will punish for contempt is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the any other matter and neither is it about placating the applicant who moves the court by taking contempt proceedings. It is about preserving and safeguarding the Rule of Law.

A party who walks through the Justice Door with a court Order will be obeyed by those to whom the Order is directed.

The upshot is that I find the respondents - Wajir County Government, Wajir County Assembly Service Board and through its officers Ibrahim Ahmed Yakub, Speaker - Wajir County Assembly; Shalle Sheikh Mursal - Clerk, Wajir County Assembly; and Abdullahi Mohamed Hassan - Chief Officer Finance, Wajir County Government are in contempt of Court for disobedience of the Court order issued on 16th January, 2020 and have failed to purge the contempt. before any sanction for the said disobedience can issue, this Court will accommodate the contemnors and give them 14 days from today to implement the order of 16th January, 2020 failing which:-

i. The respondents will not be heard by this Court or be allowed to participate in these proceedings until the contemnors purge their act of contempt.

ii. The contemnors will be invited to offer mitigation prior to sentencing.

iii. The contemnors shall attend personally on 28th October, 2021 in open court.

Accordingly, application dated 8th April, 2021 is hereby allowed as against all contemnors. Costs to the petitioner.

DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021

M. MBARU

JUDGE