



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION 38 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 11th November, 2020)

KENYA COUNTY GOVERNMENT WORKERS UNION.....PETITIONER/APPLICANT

VERSUS

WAJIR COUNTY GOVERNMENT.....1ST RESPONDENT/CONTEMNOR

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

AND

IBRAHIM AHMED YAKUB.....3RD RESPONDENT/CONTEMNOR

SHALLE SHEIKH MURSAL.....4TH RESPONDENT/CONTEMNOR

ABDULLAHI MOHAMED HASSAN.....5TH RESPONDENT/CONTEMNOR

RULING

1. The Petitioner/Applicant, Kenya County Government Workers Union filed a Notice of Motion application dated 25th August 2020 under Section 5(1) of the Judicature Act Cap 8 the Laws of Kenya, Part 81, Rule 81.4 of the England Civil Procedure (Amendment No.2) Rules, 2012 and Rule 28(1) of the Employment and Labour Relations Court (Procedure) Rules 2016. It seeks for Orders:-

1. Spent

2. THAT 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 Service Board**
- c. Abdullahi Mohamed Hassan - Chief Officer, Finance - Wajir County Government.**

Be summoned before this Honourable Court to show cause why they should not be committed to civil jail for blatantly failing to comply with Orders given by this Honourable Court on 16th January, 2020.

3. THAT on failing to show necessary cause, the said officers be committed to prison for a maximum period of six (6) months for being in contempt of this Honourable Court's Judgment/Orders given on 16th January, 2020.

4. THAT the Respondents be barred from addressing this Honourable Court in this matter unless and until they have purged of the contempt.

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

6. THAT this Honourable 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. THAT cost of this application be borne by the Respondents.

2. The Application is based on the grounds that this Honourable Court gave orders on 16/01/2020 restraining the Respondents, its agents, officers or persons acting under their instructions from arbitrarily, subjectively and unlawfully reviewing the Petitioner/Applicant's member's salary downwards. That the order/decrees emanating from the Judgment delivered in this suit in favour of the Petitioner was duly served upon the Respondents on 24/01/2020 through their Advocates on record. That the Respondents/Contemnors were further personally served on 30/07/2020 with the said Orders but have willfully disobeyed the Orders of the Court by continuing to vary and/or alter the Petitioner's members' terms of employment and/or engagement to the detriment of the said members and without complying with the due process of the law. That the same has hence occasioned extreme hardship and injustice to the Petitioner/Applicant's members and that the Respondents have further failed to pay the Petitioner's members in full, the unlawfully varied salaries from January 2015 to date.

3. That the 1st and 2nd Respondents have not tendered any legal justification for their disobedient conduct and that in the absence of legitimate grounds, their disobedience is in direct contempt of the Orders of the Court. The said conduct is calculated to bring the authority of this Honourable Court into disrepute and amounts to insubordination by a Constitutional office and Public officers. That the terms of the said Order were clear, unambiguous and binding on the Respondents and have neither been varied nor set aside and/or appealed, hence remain in force as pronounced. That the 3rd, 4th, and 5th Respondents/Contemnors are the custodians and officers of the 2nd Respondent mandated to ensure that the 1st and 2nd Respondents comply with the Judgment/Decree and subsequent payments as directed by the Court. That unless the Respondents are restrained, the Petitioner/Applicant member's employment, labour and constitutional rights shall continue to be infringed upon and that the Applicant has no other way of enforcing the said orders except through the orders sought herein being granted.

4. Shalle Sheikh Mursal who is enjoined as the 4th Respondent/Contemnor, swore a Replying Affidavit on 21st September 2020 averring that they have since filed a Notice of Appeal dated 29th January, 2020 (annexed as **SSM1**) expressing their dissatisfaction with the findings of the court and declaring their intention to invoke their right to appeal. That their advocates have also lodged an application for stay of execution in the Court of Appeal at Nairobi in **Civil Appeal E291 of 2020** and that any proceedings and determinations by this Honourable Court therefore will be interfering with the subject matter of the appeal, be pre-emptive on the outcome of the appellate process and may at the very worst embarrass the superior court. He notably generally makes averments to justify the Respondents' case prior to judgment being delivered in the Petition.

5. He also avers that there has been no willful disobedience of court orders as he can confirm that the amount they receive for monthly payment of recurrent expenditure is based on budgetary allocations which are also based on a payroll that was substantially updated in 2015, after the consensual salary review and harmonization. That since 16/01/2020 when judgment was delivered, no fresh budget has been passed by the 1st Respondent Assembly and that any compliance with the orders of the Court including payment of arrears from January 2015 and the onwards payment of salaries that were payable before the harmonization and review would present legal and financial difficulties. He avers that proceedings herein the Applicant/ Petitioner are an abuse of Court process because less draconian or restrictive measures are available.

6. In a Further Replying Affidavit sworn on 19th October 2020 with the authority and on behalf of the other Respondents, Shalle Sheikh Mursal avers that there has been no deliberate or willful disobedience of Court orders by himself or the 3rd or 5th Respondents. That it is not in dispute that the figure of over Kshs. 73 Million was arrived at using the salaries of employees before promotions of the said employees and as such cannot be an accurate representation of the actual amounts owed, if any. That it is practically impossible to promote the employees who were initially downscaled as it negates the need to comply with the order for reinstatement issued by the Honourable Court in its judgment. Further, that reinstatement to the job scales held by some of the employees before commencement of the salary harmonization and review in January, 2015 would mean that employees who have since surpassed the job scales they originally held would be downscaled.

7. He avers that some employees have since left the employment of the 2nd Respondent yet the Applicant failed to disclose this to the Court and is claiming money on their behalf and computing money owed even for periods they were not under employment. That this Court ought to interrogate why the Applicant failed to disclose the promotions to the court and in his view, the dishonest non-disclosure was motivated by the financial gains accruing after judgment and the fact that the two Respondents would not be held liable for contempt of Court if the revelations came to light. He reiterates his averment that the 1st Respondent Assembly has not passed the annual budget estimates and the appropriation bill for the fiscal year 2020/21 and as such, any payments made in satisfaction of Court decrees would have to derive legitimacy and legality from the County Budgetary process.

8. He further avers that the Applicant is prematurely attempting to execute a decree against the County Assembly and County Government of Wajir through committal to civil jail proceedings. That under **Section 21 of the Government Proceedings Act**, individual officers of a government cannot be personally or individually liable for any payments demanded from the government and that as such, their movable or immovable property cannot be attached in execution of Court decrees as prayed by the Applicant.

9. The Applicant filed a Further Affidavit sworn on 9th October 2020 by its National General Secretary, Roba Duba who avers that the Respondents have no plausible defence to the Contempt of Court proceedings and have instead chosen to waste this Honourable Court's judicial time by trying to prosecute an already concluded suit. That the Respondents had an opportunity to raise all the issues they are currently raising but willfully failed and ignored to respond or file their respective responses to the Respondents' case despite the trial court granting them numerous opportunities to do so.

10. He avers that no proper memorandum of appeal or record of appeal has been filed since none of the said pleadings was served on the Applicant and that whether or not an appeal has been filed is not an issue for this Court to interrogate. Further, that the Respondent's

application for stay does not in any way bar the hearing and determination of the instant contempt of Court Application as the Court of Appeal has not issued any orders in that respect. That the obligation of every person against whom an order is made by a Court of competent jurisdiction to obey it also extends to cases where persons affected by a court order believe it to be irregular or even void. He further avers that the power of the Court to punish for contempt is inherent in a system of administration of justice and that it is the fundamental supremacy of the law which is being challenged. That the Respondents/ Contemnors have not denied service or denied knowledge thereof and that they should thus be held guilty of contempt of Court.

Petitioner/Applicant's Submissions

11. The Applicant/ Petitioner submits that the **Black's Law Dictionary (Ninth Edition)** defines contempt of court as conduct that defies the authority or dignity of a court and because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment. It relies on the case of **Africa Management Communication International Limited v Joseph Mathenge Mugo & another [2013] eKLR** wherein the Learned Judge associated himself with the holding of Lenaola J in the case of **Basil Criticos vs Attorney General and 8 others [2012] eKLR** where he stated that:-

“...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”.

12. That in the instant case, the cited officers of the 1st and 2nd Respondents were duly served and an affidavit of service is on record in proof of service thereof and further annexed as **RD-2** and **RD-3** in the Applicant's supporting Affidavit sworn by Roba S. Duba on 25/08/2020. That therefore the said officers were fully aware of the existence of the Judgment/Court Order issued on 16/01/2020.

13. The Applicant further cites the cases of **Hadkinson -v- Hadkinson (1952) P 285 at 288** and **Johnson -v- Walton (1990) 1 FLR 350 at 352** where the Courts held that Court orders must be obeyed unless and until they are discharged and must further be obeyed whether or not it should have been granted in the first place. That the Respondents hiding behind the purported appeal is an abuse of court process and does not in any way cure their contemptuous actions and that it is evident the Respondents do not wish to obey the Court's order issued on 16/01/2020, whatever the consequences. The Applicant draws this Court's attention to the case of **Republic v Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 others [2015] eKLR; Misc Application No. 58 of 2014** where G.V. Odunga J shared the sentiments of the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Culabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**. That in **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)**, the Court stated that disobedience of a Court order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment.

14. It is the Applicant's submission that this Court is given a general power to punish for all forms of contempt of Court by **Section 5 of the Judicature Act** which provides:-

"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."

15. That in **Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others [2015] eKLR**, it was observed that the power to punish for contempt is an important and necessary power for protecting the cause of justice and the rule of law, and for protecting the authority of the Court and the supremacy of the law. That in the case of **Board of Governors Moi High School Kabarak vs Malcolm Bell & Another (Supreme Court Petition Nos 6&7 of 2013)**, the Supreme Court of Kenya described the power to punish for contempt as a power of the Court "to safeguard itself against contemptuous or disruptive intrusion from elsewhere" and identified that power as one of the indisputable attributes of the Court's inherent power. That from the foregoing it is trite that contempt of court proceedings and applications are subtle and criminal in nature and would impose criminal sanctions if a conviction followed.

16. It prays that the relevant officers of the 1st and 2nd Respondents should be held guilty of contempt of court and be further committed to civil jail for blatantly failing to comply with the Orders of this Honourable Court issued on 16th January, 2020

Respondents' Submissions

17. The Respondents submit that because of the pending stay proceedings in the Court of Appeal, this is a perfect time to exercise restraint and patience. They rely on the case of **Republic v Attorney General & Another ex-parte Stephen Wanyee Roki (2016) eKLR para 43** where the Court observed that it makes sense to await the determination of any proceedings seeking to set aside a judgment which gave rise to these proceedings before continuing with these proceedings that seek to execute a judgment against a County Government.

18. It is their submission that the 1st and 5th Respondents have no culpability for non-performance of any statutory and constitutional duty or in the failure to satisfy any judgment/decrees relating to employment matters in the County Assembly Service Board of Wajir.

19. They further submit that in terms of **Article 220 (2) of the Constitution of Kenya, Section 131 of the County Governments Act, 2012 and Sections 125-129 of the Public Finance and Management Act, 2012** any payments made by the County Government, which by dint of **Article 176 of the Constitution of Kenya** includes both the County Executive and the County Assembly, cannot be made if they do not form part of budgetary allocations and the County Development plan. That as such any payments made in satisfaction of Court decrees would have to derive legitimacy and legality from the County Budgetary process and if the dictates were ignored and money is paid in disregard of the same, then it would result in an illegality. That without a budget in place and without any chance that an allocation for varied salaries and the payment of the salaries in arrears will be made without contravening the law, the Respondents cannot be held in contempt for deliberate, willful and blatant disregard or disobedience of Court orders.

20. The Respondents submit that there is an error of law and procedural impropriety in the manner the execution proceedings have been instituted by the Applicant/Petitioner. That on the question of execution against the government, the court in **Republic v Attorney General & Another ex-parte Stephen Wanyee Roki (supra)** held that no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs. That notably, the Court in the case of **Josphat Gatheo Kibuchi v Kirinyaga County Council [2015] eKLR** held that the provisions of Section 21 of the Government Proceedings Act are also applicable to proceedings relating to a county government.

21. That the rationale for treating the government differently in execution proceedings was addressed in **Republic v County Secretary, Nairobi City County & another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR** at para 42 and 43 where the Court held that the elaborate procedure is meant to give adequate notice to the Government to make arrangement to satisfy the decree. The Court further observed that the procedure is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court and that it is therefore necessary for further proceedings to be undertaken before the judgement can be implemented.

22. That the case of **Republic v Principal Magistrate's Court at Mavoko & another Ex-Parte Joseph Ole Lenku Governor Kajiado County & another [2018] eKLR** prescribed the procedure to be followed in pursuing execution proceedings against the government to include: getting issued with a certificate of costs and certificate of order against the Government; and then seeking a writ of mandamus compelling the relevant officer in the county government to honour the decree. That the said Court further cited with approval the case of **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** where Githua J opined that:-

“...The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the Court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the Court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”

23. The Respondents further submit that the Applicant herein instituted contempt of Court proceedings rather than following the laid down procedures for execution of decrees against the government and that this is respectfully a misapprehension of the law. That the present Application should thus be dismissed with orders as to cost.

24. I have examined the averments of the Parties herein. All that the Applicants want before Court is to have officers of the Respondent summoned to appear in Court and show cause why they should not be committed to jail for disobeying the Court's orders and judgement of 16/1/2020.

25. The Respondents have tried to explain why they are not to blame for disobedience if at all and indicate that they have sought stay orders in an application pending before the Court of Appeal.

26. The Respondents have not shown any prejudice they stand to suffer if they are asked to show cause. This will vindicate them and given them an opportunity to explain themselves. In the circumstances, I find no prejudice in granting this application.

27. I allow the application to the extent that the 3 officers named be summoned to show cause why they should not be committed in jail for disobeying this Court's orders dated 16/1/2020.

28. Costs in the cause

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Otieno Michael holding brief Brian Otieno for Petitioner/Applicant – Present

Mwiti for Respondent – Present