



REPUBLIC OF KENYA



KENYA LAW
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Bironga (Suing on His Own Behalf and on Behalf of Evelyne Mogere, Johnson Moriasi Nyandika, Rebecca Nyakundi Okari, Nicodemus Morara Nyamweya and Patrick Ndubi Mamboleo) v County Government of Nyamira; Jones Omwenga, The County Executive Committee Member for Finance, County Government of Nyamira & 2 others (Contemnor) (Judicial Review E015 of 2023) [2025] KEHC 1122 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1122 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
JUDICIAL REVIEW E015 OF 2023
WA OKWANY, J
FEBRUARY 27, 2025**

BETWEEN

**TONNY OIRA BIRONGA DECREE HOLDER
SUING ON HIS OWN BEHALF AND ON BEHALF OF EVELYNE MOGERE,
JOHNSON MORIASI NYANDIKA, REBECCA NYAKUNDI OKARI,
NICODEMUS MORARA NYAMWEYA AND PATRICK NDUBI MAMBOLEO**

AND

THE COUNTY GOVERNMENT OF NYAMIRA RESPONDENT

AND

**JONES OMWENGA, THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR
FINANCE, COUNTY GOVERNMENT OF NYAMIRA CONTEMNOR
ASENATH MAOBE, THE CHIEF OFFICER FINANCE IN THE COUNTY
GOVERNMENT OF NYAMIRA CONTEMNOR
JACK MAGARA, THE COUNTY SECRETARY OF THE COUNTY
GOVERNMENT OF NYAMIRA CONTEMNOR**

RULING

Background

1. The decree holders/Respondents herein filed a claim against the County Government of Nyamira and County Public Service Board vide Kericho ELRC Cause No. E002 of 2021 seeking the payment



of unpaid salaries amounting to Kshs. 24,592,372. The said court entered judgment in favour of the decree holders in the sum of Kshs. 24,592,372 together with interests and costs.

2. The decree holders thereafter filed an Application before this Court vide Chamber Summons dated 31st May 2023 seeking orders of mandamus to compel the Respondents to pay the decretal sum and costs. On 31st October 2024, parties recorded a consent wherein the Respondents agreed to settle the decretal sum, by instalments, within the agreed timelines. The consent was adopted as an order of this court and the file thereafter marked as closed.

The Application

3. Through the Application dated 16th January 2025, the Applicants/Contemnors herein reopened the case by seeking the following orders: -
 1. Spent
 2. That the Court grants leave to the firm of Samuel N. Mainga and Co. Advocates to properly come on record for the 1st, 2nd and 3rd Contemnors/Applicants.
 3. Spent.
 4. That the Honourable Court be pleased to discharge, set aside and suspend the warrant of arrest dated the 3rd January 2025 against the Chief Officer Finance and the other two contemnors herein.
 5. That the Honourable Court be pleased to review and/or vary the terms of the Consent Order dated the 31st October 2024, particularly on the timelines set out therein on the settling of the decretal amount in instalments.
 6. That costs of the Application be provided for.
4. The Application is brought under Section 1A, 1B, 3, & 3A of the *Civil Procedure Act*, Order 22 Rule 22(1), Order 51 Rules 1 & 3 of the *Civil Procedure Rules 201*, Order 51 Rule 1 of the *Civil Procedure Rules* and Article 50 of the *Constitution*.
5. The Application is supported by the affidavit of Chief Officer (Finance) of the County Government of Nyamira, Dr. Asenath Maobe, and is premised on the grounds that the County Government of Nyamira was not able to comply with the consent order due to insufficiency of funds in the county's coffers. The Respondent contends that the failure to settle the decretal sum was not wilful or deliberate but was occasioned by circumstances beyond their control especially owing to the stalemate and wrangles at the Nyamira County Assembly.
6. The Respondents filed a Notice of Preliminary Objection and the Replying Affidavit of Tonny Oira Bironga in response to the Application. They state that the Application is not properly before the court and should be struck out in limine because Counsel for the Applicants did not comply with the provisions of Order 9, Rules 9 and 10 of the *Civil Procedure Rules*. They further state that the Court became functus officio the moment it adopted the consent order and that the Applicants have not demonstrated any factual or legal grounds to warrant the setting aside or review of the consent order. They state that the contemnors should be held responsible for non-compliance with the court orders as they have not indicated when they are likely to make the payments.
7. At the hearing of the Application, Counsel for the County Government of Nyamira informed the Court that he was not aware of the Application and that they did not intend to participate in it.



8. The Application was canvassed by way of written submissions which I considered. I find that a number of issues arise for my determination, namely: -
- i. Whether the Applicant’s advocates are properly on record.
 - ii. Whether this court is functus officio.
 - iii. Whether the Court has jurisdiction to hear and determine the Application.
 - iv. Whether the Application is merited.
9. It is trite that jurisdiction is everything without which the Court cannot take one more step. This was the finding in *Owners of the Motor Vessel Lilian “S” vs. Caltex Oil [Kenya] Ltd* [1989] eKLR where it was held thus:-
- “Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before court the moment it holds the opinion that it is without jurisdiction”.
10. I will therefore determine the issue of this court’s jurisdiction first as the determination will have a bearing on whether the court can proceed and determine the other issues. Indeed, it would have been desirable and proper for this court to determine the issue of jurisdiction at the earliest opportune time so as to save the court and the parties from the inconvenience of proceeding before a court which may not have the powers to entertain their dispute. This early determination was however not possible because none of the parties raised the subject of jurisdiction.
11. A perusal of the pleadings filed herein reveals that the judgment that gave rise to the impugned consent was rendered by the Employment and Labour Relations Court (ELRC) in Kericho *vide* ELRC Cause No. E002 of 2021 on 10th February 2022. The decree arising from the said judgment was not settled thus precipitating the filing of the instant Judicial Review (JR) proceedings against the Judgment Debtor for an order of mandamus to compel the County of Nyamira to pay the decretal sum. As I have already stated at the beginning of this ruling, parties recorded a consent on the JR application which consent is the subject of the instant application.
12. From the undisputed facts of the case, it is clear that the case commenced before the Employment and Labour Relations Court (ELRC) where the judgment entered before the JR Application was filed before this court to enforce the said judgment.
13. Flowing from the above facts , I am minded of this Court’s jurisdiction which is clearly spelt out in Article 165 of the *Constitution*. as follows: -
3. Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;



- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court shall not have jurisdiction in respect of matters -
- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;
or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162(2). [Emphasis added]
14. the *Constitution*. also establishes specialized courts of equal status to the High Court to deal with employment and land related matters. Article 162 of the *Constitution*. provides as follows: -
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
15. The core function of the ELRC is to hear and determine disputes specified under Section 12 of *Employment and Labour Relations Court Act* No. 20 of 2011 which outlines the court’s jurisdiction as follows:
12. Jurisdiction of the Court
- 1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the *Constitution*. and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
 - a. disputes relating to or arising out of employment between an employer and an employee;
 - b. disputes between an employer and a trade union;
 - c. disputes between an employers’ organisation and a trade unions organisation;
 - d. disputes between trade unions;



- e. disputes between employer organizations;
- f. disputes between an employers' organisation and a trade union;
- g. disputes between a trade union and a member thereof;
- h. disputes between an employer's organisation or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union officials; and
- j. disputes relating to the registration and enforcement of collective agreements.

16. In *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others* [2012] eKLR the Supreme Court held that jurisdiction flows from either the Constitution. or statute.
17. Based on the foregoing and having noted that a court cannot act without jurisdiction, it follows that where the High Court is presented with a matter that emanates from an employment dispute, it must down its tools and allow the appropriate court to take over and deal with the matter.
18. I have already established that the decretal sum to be settled through the consent recorded by the parties herein emanated from the judgment rendered by the Employment and Labour Relations Court. To my mind, the instant Judicial Review proceedings are geared towards enforcing the decree issued by the ELRC. I find that the proper court to execute/enforce the decree should be the court that delivered the judgment.
19. It is my further view that, by instituting Judicial Review proceedings before this Court the Respondents are inviting this Court to usurp the powers vested in the Employment and Labour Relations Court by the Constitution. and Statute. I am of the humble view that the Employment and Labour Relations Court cannot hear and determine an employment dispute then cede its jurisdiction to the High Court at the point of execution of the decree. I find that parties were under a duty to inform the Court, from the outset, that their consent was in respect to a judgment that emanated from the Employment and Labour Relations Court.
20. For the reasons that I have stated in this ruling I find that in the it will serve the interest of justice to refer this matter to the Employment and Labour Relations Court at Kericho for further necessary action and determination.
21. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 27TH DAY OF FEBRUARY 2025.

W. A. OKWANY

JUDGE

