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| Case Number: | Cause 731, 42 & 211 of 2019, E013, E041 & 004 of 2021 & 8, E6538, E6605, 877 & 208 of 2020 (Consolidated) |
| Date Delivered: | 18 Jan 2022 |
| Case Class: | Civil |
| Court: | Employment and Labour Relations Court at Nairobi |
| Case Action: | Ruling |
| Judge: | Maureen Atieno Onyango |
| Citation: | Kenya Union of Clinical Officers v Chairman, Council of Governors & 3 others; Ministry of Labour and Social Protection & another (Interested Parties); Ongwari James Elvis & 15 others (Contemnors) [2022] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Employment and Labour Relations |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Application dismissed |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 731 OF 2019

(CONSOLIDATED WITH E013/2021, 8/2020, 42/2019, E041/2021, E6538/2020, E6605/2020, 877/2020, 004/2021, 208/2020 AND 211/2019)

KENYA UNION OF CLINICAL OFFICERS

CLAIMANT/APPLICANT

VERSUS

CHAIRMAN, COUNCIL OF GOVERNORS

1ST RESPONDENT

MINISTRY OF HEALTH

2ND RESPONDENT

47 COUNTY PUBLIC SERVICE BOARD

3RD RESPONDENT

NAIROBI METROPOLITAN SERVICES

4TH RESPONDENT

AND

MINISTRY OF LABOUR AND

SOCIAL PROTECTION

1ST INTERESTED PARTY

HON. ATTORNEY GENERAL

2ND INTERESTED PARTY

AND

HON. ONGWARI JAMES ELVIS

1ST CONTEMNOR

KISII REFERRAL HOSPITAL

2ND CONTEMNOR

DR. ENOCK ONDARI

3RD CONTEMNOR

KENYENYA SUB-COUNTY

DISTRICT HOSPITAL

4TH CONTEMNOR

DR. SAMORA MICHELL

5TH CONTEMNOR

KEUMBU HOSPITAL

6TH CONTEMNOR

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| DR. LINDA KEMUNTO | 7TH CONTEMNOR |
| OGEMBO SUB-COUNTY | |
| HOSPITAL LEVEL 4 | 8TH CONTEMNOR |
| DR. DAVID OKINYI | 9TH CONTEMNOR |
| CHIEF OFFICER FOR | |
| FINANCE KISII COUNTY | 10TH CONTEMNOR |
| WILFRED AUMA | 11TH CONTEMNOR |
| CHIEF OFFICER FOR HEALTH | 12TH CONTEMNOR |
| MR. VINCENT MIRERA | 13TH CONTEMNOR |
| THE SECRETARY/CHIEF EXECUTIVE OFFICER OF | |
| KISII COUNTY PUBLIC SERVICE BOARD | 14TH CONTEMNOR |
| MR. PATRICK LUMUMBA | 15TH CONTEMNOR |
| THE COUNTY SECRETARY AND HEAD OF PUBLIC SERVICE | |
| KISII COUNTY GOVERNMENT | 16TH CONTEMNOR |

RULING

1. By an application dated 6th April 2021 the Applicant, Kenya Union of Clinical Officers seeks the following orders –

(i) *Spent.*

(ii) *THAT the 1st to 16th Contemnors herein and any other*

officer of the of Kisii County Government served with this order be summoned to appear before the Court and/or show cause why they should not be punished for persistent and deliberate contempt of Honorable Court orders made on 22nd February 2021.

(iii) *THAT the Honorable Court be pleased to punish and commit the Contemnors herein and any other officer of the of Kisii County Government served with this order, to civil jail for a period not exceeding six (6) months for wilful and deliberate disobedience of the Court Orders given herein on 22nd February 2021.*

(iv) *THAT the Contemnors be denied audience by this Honorable Court and any other Employment and Labour Relations Court until they purge the contempt of the Court which has impeded the course of justice.*

(v) *THAT the costs of this application be borne personally, jointly and severally by the Contemnors, on full indemnity basis.*

2. The application is supported by the grounds on the face thereof and the affidavit of George Maroah Gibore, the General Secretary

of the Applicant.

3. It is the Applicant's contention that on 30th December 2020 the Court in KISUMU ELRC E270 of 2020, made an order pursuant to which the Claimant suspended the strike that had commenced on 7th December 2020 and the Claimant's members presented themselves to their various work stations at Kisii County in order to resume duty. That they were however maliciously and unlawfully turned away by the County Government on the wrongful assertions that there were various disciplinary proceedings ongoing against them.

4. That the Claimant's members made several attempts to return to work following the order of 30th December 2020 but were on each occasion turned away and threatened with arrest and harm by goons stationed at their various work stations by the County Government.

5. That the Claimant continued to pursue various conciliatory efforts to have the issues giving rise to the strike to be resolved amicably and centrally in the country. This led to the signing of a Return to Work Formula signed on 1st January 2021. Kisii County Government and other County governments at the behest of the Council of Governors, however disowned and refused to abide by the Return to Work Formula.

6. That accordingly, the Claimant filed the present suit which was thereafter consolidated with other related suits including

KISUMU ELRC E270 of 2020.

7. On 22nd February 2021 this Court gave orders herein, wherein order No. 10, 11, 12 and 13 directed that interim orders already granted are extended, that where there were no interim orders, all employees who have gone back be paid/salaries be reinstated from date of reporting, that all disciplinary matters be stayed including evictions pending determination of this case and that all striking workers to resume duty in order to benefit from reinstatement of salaries.

8. That the said orders were extracted and served upon all the County Governments including Kisii County, and as such all the contemnors were well aware of the orders given by this Court directing that interim orders already granted are extended, that where there was no interim orders, all employees who have gone back be paid/salaries be reinstated from date of reporting, that all disciplinary matters be stayed including evictions pending determination of this case and that all striking workers to resume duty in order to benefit from reinstatement of salaries.

9. The Affiant deposes that the Court orders were duly served upon the Kisii County Public Service Board on 25th February 2021 as per affidavit of service of Akhenda Patrick sworn on 1st March 2021 and filed in Court on the same date.

10. That despite being duly served and aware of the said Court orders, the Contemnors have deliberately elected to be in total disregard and wilful disobedience of the same by denying the Applicant's members access to their duty/employment stations and consequently failing to include the Applicant's members in the facility duty rota, therefore making it difficult for the Applicant's members to discharge their duties in line with the Court orders.

11. It is the contention of Mr. Gibore that the contemnors have insisted that they can only comply with the Court orders of 22nd February 2021 upon final determination of this suit.

12. The Affiant avers that it is the obligation of every party against, or in respect of whom an order is given by a Court of competent jurisdiction to obey it unless and until the order is discharged.

13. That it is in the interest of justice and within the inherent powers of this Court to uphold its dignity and safeguard the sanctity of its orders and grant the orders sought.

14. In response to the application, VINCENT MIRERA, the 13th contemnor swore a replying affidavit on 21st May 2021 on his own behalf and on behalf of all the alleged contemnors.

15. MR. MIRERA states that he is the Acting Secretary to the Kisii County Public Service Board and therefore the Chief Executive

Officer of the said Board.

16. It is his averment that upon commencement of the impugned strike by health care workers on 7th December 2020, the Cabinet Secretary, Ministry of Health, filed a claim under certificate of urgency being Nairobi ELRC Cause No. E6494 of 2020 in which the Court by an order dated 16th December 2020 directed all health workers, among them the members of the Kenya National Union of Clinical Officers, the Applicant herein, "to suspend the strike for 14 days to allow for negotiations". The Affiant states that in his understanding the clinical officers were to resume work pending the negotiations.

17. That the Kisii County Government also filed Kisumu ELRC Cause No. E027 of 2020 (now Nairobi Cause 877 of 2020) and obtained orders on 30th December 2020 directing the members of Kenya National Union of Clinical Officers to resume duty immediately.

18. He further avers that when Cause No. 877 of 2020 came up for mention on 20th January 2021, directions were given that the matter be heard together with Cause No. E6494 of 2020.

19. That the clinical officers in Kisii County did not resume duty as directed by the Court in the two suits and disciplinary action was taken against the striking workers who failed to resume duty which culminated in their summary dismissal by 31st December 2020.

20. It is therefore the Affiant's position that the orders of the Court made on 22nd February 2021 in Nairobi ELRC Cause 731 of 2019 as consolidated with ELRC Cause No. 8 of 2020, ELRC Cause No. 42 of 2019, ELRC No. E013 of 2021, ELRC No. E041 of 2021, ELRC No. E6538 of 2020, ELRC No. 877 of 2020, ELRC Misc. No. 004 of 2021, Petition No. 208 of 2002 and Petition No. 211 of 2019, which the contemnors are alleged to have disobeyed did not affect those employees of Kisii County Government who had been dismissed from service by 31st December 2020.

21. The Affiant further avers that upon the dismissal of the said employees, the Applicant herein filed Kisumu ELRC Cause No. E009 of 2021 challenging the dismissals.

22. It is his position that the alleged contemnors acted within the law, that the application does not meet the threshold for contempt and therefore lacks merit and should be dismissed with costs.

23. That, in the order issued on 22nd February 2021 in Nairobi ELRC Cause No. 731 OF 2019 as consolidated with ELRC NO. 8 OF 2020, ELRC NO. 42 OF 2019, ELRC NO. E013 2021, E;RC NO. E041 OF 2021, ELRC NO. E6538 OF 2020, ELRC NO. 877 OF 2020, ELRC MISC. NO. 004 OF 2021, PETITION NO. 208 OF 2020 & PETITION NO. 211 OF 2019, this court issued amongst other orders as follows:-

"10. THAT, in the meantime, interim orders already granted are extended."

"11. THAT, where there was no interim orders all employees who have gone back be paid salaries be reinstated from the date of reporting."

"12. THAT, all disciplinary matters be stayed including eviction pending determination of the case"

"13. THAT, all striking workers to resume duty in order to benefit from reinstatement of salaries."

24. That the deponent of the affidavit in support of the present application has acknowledged that the members of the Applicant are aware of the order issued in KISUMU ELRC cause No. E027 OF 2020 by this court suspending the strike but disingenuously fail to acknowledge the order made on the 16th December 2020 in Nairobi ELRC Cause NO. E6494 of 2020 suspending the impugned strike which order required them to report to duty but they failed to do so.

25. That the failure by members of the applicant herein to suspend their strike as directed by the Court vide the order of 16th December 2020, in Nairobi ELRC Cause No. E6494 of 2020 was the trigger of disciplinary process against the members of the applicant within Kisii County which disciplinary process culminated into the dismissal of some officers who failed to show cause.

26. That by the 31st December 2020, disciplinary processes against members of the applicant herein who failed to report back on duty upon suspension of the strike by the Court had been concluded and dismissal letters issued to all officers who failed to show cause.

27. The Affiant further deposes that it is disingenuous for the deponent of the affidavit in support of the present application to claim that members of the applicants presented themselves to various work stations when he knows as a fact that some of the members of the applicant who failed to show cause had been dismissed by 31st December 2020 and as such they were no longer employees of the Kisii County Government.

28. In a further affidavit sworn by VICTOR OBIRIA BWANCHETE the Kisii County Branch Secretary of the Applicant on 15th June 2021 in response to the replying affidavit of VINCENT MIRERA, he avers that the Applicant's members returned to work on 5th January 2021 but were turned away.

29. It is further his averment that it is only after the filing of the instant application that the contemnors selectively purported to "reinstate" some members of the Applicant as is evident in copies of letters of reinstatement attached to the affidavit.

30. It is further the Affiant's averment that the hearing of appeal by the Kisii County Government was in further contempt of this Court's orders.

Submissions

31. The application was disposed of by way of written submissions.

32. The Applicant submits that the contemnors have not denied knowledge of the orders they are alleged to have disobeyed. It is further the submission of the Applicant that the orders of 22nd February 2021 are valid and clear, that all disciplinary actions against the health workers be stopped, the employees be reinstated back to work and that the employees be paid their salaries upon reporting back to work.

33. The Applicant submits that none of the alleged contemnors has averred that the orders were not clear. It is further the Applicant's submission that the alleged contemnors have not controverted the assertions contained in the supporting affidavit of George Gibore sworn on 6th April 2021.

34. It is the Applicant's submission that Cause No. ELRC E6494 had nothing to do with the strike commenced on 7th December 2020 and in any event Kisii County was never a party to the suit nor an indirect beneficiary of the orders made in the said suit.

35. It is further the submission of the Applicant that the orders of 30th December 2020 in Cause No. 877 of 2020 issued on 31st December 2020 and served upon the Applicant on 4th January 2021 were complied with and its members reported back to work on 5th January 2021 but were turned away by the Kisii County Government and the health officials in charge of the various health facilities. That a copy of the letter suspending the strike was served upon the Kisii County Government on 5th January 2021.

36. For the Respondents there are no submissions on record.

Analysis and Determination

37. I have considered the pleadings and the submissions on record. The issues arising for determination are whether the alleged contemnors are guilty of contempt and if the Applicant is entitled to the orders sought.

38. Contempt of Court is defined in **Black's Law Dictionary, Tenth Edition** as -

"Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

39. Mativo J. in **Mengich t/a Mengich & Co Advocates & Another v Joseph Mabwai & 10 Others [2018] eKLR** states the elements of a Civil Contempt as espoused in a book titled "*Contempt in Modern New Zealand*" as follows:

- a) *The terms of the order were clear and unambiguous and were binding on the defendant.*
- b) *The defendant had knowledge of or proper notice of the terms of the order.*
- c) *The defendant has acted in breach of the terms of the order and*
- d) *The defendant's conduct was deliberate.*

40. In the instant case, the Court made the following orders on 22nd February 2021 –

- i) *THAT Parties to file submissions.*
- ii) *THAT All Claimants and Petitioners to file within 21 days.*
- iii) *THAT all Respondents and Interested Parties to file within 21 days of service.*
- iv) *THAT highlighting of submissions on the Claims/Petitions/Applications within 21 days of service.*
- v) *THAT all Parties to respond within 21 days of services.*
- vi) *THAT Partiers who have not filed response to do so within 14 days.*
- vii) *THAT after 14 days all Petitioners/Claimants to file submissions within 21 days.*
- viii) *THAT thereafter all Respondents to file submissions within 21 days of service.*
- ix) *THAT mention on 24/5/2021 to take date for judgement.*
- x) *THAT in the meantime, interim orders already granted are extended.*
- xi) *THAT where there was no interim orders, all employees who have gone back be paid/salaries be reinstated from date of reporting.*
- xii) *THAT all disciplinary matters be stayed including evictions, pending determination of the case.*
- xiii) *THAT all striking workers to resume duty in order to benefit from reinstatement of salaries.*
- xiv) *THAT report of the conciliation to be filed within 30 days.*
- xv) *THAT Deputy Registrar to notify the Conciliator.*

41. On 16th December 2020, Nzioki Wa Makau J. made the following orders in Cause E6494 of 2020 –

- (i) *That a temporary relief be and is hereby issued of suspending the strike for 14 days to allow negotiations before mentioning virtually the case on 30th December. 2020 to see if parties are able to agree on this single issue which should not bar the Respondents members from rendering service.*

(ii) That mention on 30th day of December, 2020.

42. The orders in E6494 of 2020 were made pursuant to an application by the Cabinet Secretary, Ministry of Health.

43. It is not in dispute that the County Government of Kisii approached the Court by way of notice of motion dated 10th December 2020 and obtained orders as follows –

1) THAT the application be served for inter partes hearing on 20th January 2021 before any Judge ELRC Nairobi.

2) THAT pending the hearing and determination of this application inter partes, an order suspending the strike by members of the Respondents within Kisii County be and is hereby granted compelling the 1st and 2nd Respondents, their officials, agents' representatives and or their members to call off the strike and resume duties at their respective work stations within Kisii County.

44. As has been submitted by the contemnors, the Applicant's members were subjected to disciplinary hearing on 30th December 2020. According to the minutes attached as Exhibit VM3 to the replying affidavit of Vincent Mirera, the clinical officers failed to either respond to the show cause letters dated 22nd February 2020 or their responses were not satisfactory. They were invited to the disciplinary hearing on 30th December 2020 but failed to attend. They were therefore all dismissed from service by letters dated 31st December 2020.

45. The dismissal is acknowledged by the Applicant in Kisumu ELRC Petition No. E009 of 2021 dated 28th January 2021 in which the Applicant seeks among other orders, the quashing, setting aside or otherwise annulling of the disciplining and/or proceedings taken by the Respondents against the Petitioners on the basis of the Petitioners' participation in the strike that commenced on 7th December 2020 following the strike notice of 23rd November 2020 and/or the Petitioners' alleged noncompliance with or resulting from orders of 16th December 2020 arising from NAIROBI ELRC 6494 of 2020.

46. The orders of this Court made on 22nd February 2021 which the contemnors are alleged to have disobeyed specifically required disciplinary hearings pending against the health care workers to be suspended and the reinstatement of salaries of striking workers upon resuming duty.

47. The Applicant's members whom the contemnors are alleged to have failed to reinstate in compliance with Court orders of 22nd February 2021 were no longer employees of Kisii County Government on the date of the orders as they had been dismissed from service on 31st December 2020 and had indeed filed suit against the dismissals which was at the date of the said orders pending before ELRC Court Kisumu in Petition No. 009 of 2021.

48. As was stated by Mativo J. in **Mengich t/a Mengich & Co Advocates & Another v Joseph Mabwai & 10 Others (supra)** in an application for contempt the Applicant must prove that the defendant acted in breach of the Court order and that the conduct was deliberate.

49. In the decision of the Supreme Court of India in **Indian Airports Employees Union v Ranjan Catterjee & Another [AIR 1999 SC 880: 1999(2) SCC:537]**, which was quoted with approval in **Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [2021] eKLR** the Court stated –

“ ... in order to amount to “civil contempt” disobedience must be wilful. If disobedience is based on the interpretation of court's order, notification and other relevant documents, it does not amount to wilful disobedience.”

50. In the instant case, the contemnors are alleged to have disobeyed the court order of 22nd February 2021. As has been deponed in the replying affidavit of **Vincent Mirera** the understanding of the contemnors is that the orders they are alleged to have disobeyed had been overtaken by events as the clinical officers had already been dismissed and they had filed suit that was pending in Court.

51. In the present case, there appears to be a different understanding of the orders of this Court issued on 22nd February 2021 by the Applicant and the contemnors. The contemnors believed they were acting within the law based on the previous court orders and that the orders of 22nd February 2021 did not affect the clinical officers who had already been dismissed from service. The Applicant on the other hand was of the view that the orders covered the already dismissed clinical officers.

52. Wilful disobedience is an essential ingredient for proof of civil contempt. The orders alleged to have been disobeyed must also be unequivocal and must not result in different interpretations by different parties.

53. In the instant suit, there is no proof of wilful disobedience of court order. The Court did not order reinstatement of employees who had been dismissed from service. This is an inference of the Applicant and the basis upon which the instant application is anchored. A party who believes a particular set of circumstances and acts on that belief cannot be said to be in wilful contempt. As was stated in the case of **Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui (supra)** wilful contempt of court orders is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove wilful and deliberate disobedience of the court order, if he were to succeed. This was aptly stated in **Gatharia K. Mutikika v Baharini Farm Limited [1985] KLR 227**, that:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

54. The understanding of the Court orders by the Applicant is completely different from that of the Respondent, who believed that the Court orders did not affect its employees who had already been dismissed from service by the date the orders were made. It is for the foregoing reasons that I find that the Applicant has not proved that the contemnors are guilty of wilful disobedience of this Court's orders of 22nd February 2021. The result is that the application fails and is accordingly dismissed.

55. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JANUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE



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