



**KENYA TEA GROWERS ASSOCIATION.....APPLICANT**

**VERSUS**

**FRANCIS ATWOLI,**

**JOSHUA OKELLO OYUGA,**

**HENRY OMASIRE,**

**MESHACK KHISA,**

**JOSHUA OWUOR & DAVID BEGI**

**AS OFFICIALS OF THE KENYA PLANTATION & AGRICULTURAL WORKERS  
UNION.....RESPONDENTS**

**RULING**

1. The Notice of Motion dated 21<sup>st</sup> October 2010 is brought under the provisions of **Section 5** of the **Judicature Act** and it is the Applicant's Prayer that Francis Atwoli, Joshua Okello Oyuga, Henry Omasire, Meshack Khisa, Joshua Owuor and David Begi, as officials of the Kenya Plantation and Agricultural Workers Union, be committed to Civil Jail for disobedience of the Orders made by this Court on 14<sup>th</sup> October 2010.
2. To put the matters into perspective, by a Petition dated 14<sup>th</sup> October 2010, the Applicant sought the following Orders against the Respondents;
  - (a) That the Court be pleased to declare that the Respondent and the Petitioner are equal before the Law.*
  - (b) The Court be pleased to declare that the Petitioner has a right to mechanize in its operations.*
  - (c) The Court be pleased to declare that the Petitioner and its members have the right to use tea plucking machines in its operations.*
  - (d) The Court be pleased to declare that the Petitioner is entitled to use tea plucking machines in its operations without prior consultations with the Respondent.*
  - (e) The Court be pleased to declare that the basis upon which the Respondent has issued a strike notice in its letter dated 11<sup>th</sup> October 2010 is an attempt to infringe on the petitioner's Constitutional right as enshrined under the provisions of Sections 27(1)(2), 40(1)(a)(b) and 41(4)(a) of the Constitution.*
  - (f) The Court be pleased to declare that the Respondent's strike notice issued on 11<sup>th</sup> October 2010 is unlawful and that the same should be withdrawn forthwith.*

**(g) The Court be pleased to grant the Petitioner's costs of this Petition.**

**(h) That the Court be pleased to make any other such Orders as it deems just."**

3. From the Prayers, it can be seen that the dispute between the parties was triggered by the Applicant's decision to use tea plucking machines in its operations, a matter that the Respondents were unhappy with and which led to their decision to call a strike of members of the Union aforesaid against the introduction of tea plucking machines.

4. Simultaneously with the Petition, a Chamber Summons Application seeking restraining Orders against the Respondent Union was filed and upon hearing the advocate for the Applicant ex-parte, Gacheche, J. granted the following Orders;

***"(1) That the Application be certified as urgent and that the same be heard ex parte in the first instance.***

***(2) That pending the hearing and determination of this Application, an injunction be and is hereby granted restraining the Respondent, its agents, members and/or its representatives from causing, effecting, inciting or otherwise calling for a strike by the Petitioner's employees. (Emphasis added)***

***(3) That the Application be served for hearing inter partes on 26<sup>th</sup> October 2010."***

5. It is the above Orders that the Applicant claims that the alleged contemnors breached and deliberately violated and the Applicant in grounds set out on the face of the Application has stated as follows;

(i) On 14<sup>th</sup> October 2010, this Court granted an Order that provided that pending the hearing and determination of the Injunction Application, an Injunction be and is hereby granted restraining the Respondent, its agents, members and/or representatives from causing, effecting, inciting or otherwise calling for a strike by the Petitioner's employees.

(ii) On 15<sup>th</sup> October 2010, the firm of Kaplan & Stratton served the Court Order, the Injunction Application and the Petition upon the Respondent's Mr. Thomas Kipkemboi the Deputy General Secretary of the Union who out rightly refused to acknowledge receipt/service of the Court Order, the Petition and the Injunction Application dated 14<sup>th</sup> October 2010.

(iii) On 15<sup>th</sup> October 2010, the Applicant and Unilever Tea Ltd informed their employees that this Court had granted the Applicant and Unilever Tea Ltd. an Injunction restraining the Union from causing, effecting, inciting or otherwise calling for a strike by the employees.

(iv) On 18<sup>th</sup> October 2010, the General Secretary, Francis Atwoli addressed a meeting at the Sotik Highlands Primary School Grounds, Kapchorua, Tinderet and Kericho Green Stadium. The officials present at Tinderet, Kapchorua, Kericho Green Stadium and Sotik Highlands Primary School were Francis Atwoli, Joshua Okello Oyuga, Henry Omasire, Meshack Khisa, Joshua Owuor and David Begi. As a result of the statements made by General Secretary Francis Atwoli on 18<sup>th</sup> October 2010, the employees at Tinderet and Kapchorua have stopped working at Williamson Tea Estates causing Williamson Tea to suffer losses.

(v) The Union officials/representatives have willfully and flagrantly contravened the Court Order issued on 14<sup>th</sup> October 2010 by inciting the Applicant's workers to go on strike despite service of the said Court Order on 15<sup>th</sup> October 2010 and despite the fact that they were aware of the Court Order.

(vi) To preserve the integrity and dignity of this Court it is imperative that this Court commits the said Respondent's officials so that the sanctity of constitutional Court Orders can be upheld and the Rule of Law is observed and preserved.

6. Further, in a Supporting Affidavit sworn on 20<sup>th</sup> November 2012, one Samuel Thumbi, a member of the Executive Committee of the Applicant, deposed that;

(i) *On service of the Orders of Gacheche, J. on 15<sup>th</sup> October 2010, one Samuel Njoroje Muchai, a process server, attempted to serve the same on one Thomas Kipkemboi, Deputy Secretary-General of the Respondent Union but he declined to accept the same.*

(ii) *On the same day, by a Notice to its employees, the Applicant informed them that an injunction had been issued stopping the strike.*

(iii) *On 16<sup>th</sup> October 2010, the Respondent called its members in Sotik to a meeting on 18<sup>th</sup> October 2010 at Sotik Highland Primary School grounds to discuss the matter of tea plucking machines. The meeting was to be addressed by one Francis Atwoli, Secretary-General of the Union.*

(iv) *On 18<sup>th</sup> October 2010, the planned meeting indeed took place and the said Francis Atwoli, and Joshua Oyuga addressed the meeting and stated that “all employees should continue to strike” until Francis Atwoli by a radio announcement directed them to return to work.*

(v) *Earlier in the day, Meshack Khisa and David Begi, local officials of the Union had gone round Sotik town in a pick-up and their language cast doubt on the legitimacy of the Court Order and incited the Applicant’s employees to participate in the intended strike and urging them to abandon work and attend the meeting to be addressed by Francis Atwoli later in the day.*

(vi) *That Francis Atwoli on the same day, in the company of Joshua Okello Oyunga, Henry Omasire, Meshack Khisa, Joshua Owuor and David Begi addressed meetings attended by tea plantation employees at Tinderet, Kapchorua and Kericho Green Stadium where he announced that the strike would continue unless he directed otherwise and that the Applicant had gone to the wrong Court and procured a Court Order which had not been served on the Respondent.*

(vii) *As a result of the above actions on the part of the alleged contemnors, the Applicants employees went on strike on 18<sup>th</sup> October 2010 and 19<sup>th</sup> October 2010 and the Applicant incurred losses amounting to Kshs.7,394,589.40.*

(viii) *That the alleged contemnors acted in full knowledge of the Court Orders and disobeyed the same defiantly and contemptuously.*

7. Other Affidavits by Isaac Kiprotich Majirai, Philip Kibii Cheruiyot and Emmanuel Ngetich, all support the above facts as alleged by Samuel Thumbi who in another Affidavit sworn on 25<sup>th</sup> November 2010 reiterated those matters.

8. I should only add that Philip Kibii Cheruiyot recorded part of the speech of Francis Atwoli on 18<sup>th</sup> October 2010 and the words allegedly uttered were the following;

**“Excerpt 1. Reference to the Strike going on until instructions to the contrary on Radio.**

***....”So I want you people to go back .... mimi nashukuru mmekuja kwa wingi .... Muambie wale wamefungiwa Bwana Atwoli ametuambia kama General Secretary wa Kenya Plantation and Agricultural Workers Union, tusiende kazini mpaka tusikie radio.***

***Tukiungana pamoja ndio tutamaliza hii mambo ya mashine ....(clapping)....na msiwe na uoga kwa ajili mimi niko huko mbele .... Don’t fear mimi ndio nilileta hii katiba mpya pamoja na wezangu wengine” ....***

**Excerpt 2. Reference to the Jurisdiction of the High Court**

*“Na si wasinione mimi mfupi hivi wacheze na mimi. (clapping)*

*Mimi naskia wanatisha hapa watu ....ooh.... iko High Court order .... Iko nini .... Siwaje hapa niwasomee sheria ya orders. (clapping).*

*Sisi ni wafanyikazi na tuna mahakama yetu ya viwanda, kama hakuna order kutoka Industrial Court .... Ambayo katika sheria za wafanyikazi kifungu cha themanini na saba namba mbili kinasema muajiri ama muajiriwa wakiwa na shida wataenda kwanza kwa afisa wa labour wasiposikizana wanaenda katika Industrial Court, na wasema kwa kizungu .... No any other Court shall hear a dispute that is supposed to be Industrial Court dispute. (clapping).*

*It’s mandatory, na employer hapana danganya watu, anatembea hapa, wanahonga honga watu kuintimidate watu” ....*

**Excerpt 3. Reference made to the entire tour and activity that morning across the Region.**

*....”Tumekuwa Tinderet, mkutano ulikuwa mzuri .... Tumekuwa Kapchrwa, Nandi Hills ....hapajakua na shida yoyote, na polisi walikuwa, hata wanasaidia watu kwenda kwa mkutano.*

*Tumetoka Kericho saa hii Green Stadium ilijaa watu .... Na tumekuwa na inspekta ule mkubwa sana senior inspekta of police ambaye alikuwa anasimamia na kusaidia watu kuja kwa mkutano na hii ndio kazi ya polisi” ....*

9. I should pause here and note that from all the Affidavits in support of the Application, the name that features at every instance is that of Francis Atwoli. **What is his response to the above allegations?**

10. His Affidavit in reply was sworn on 29<sup>th</sup> November 2010 and in it he states that;

(i) *He has no knowledge whether Thomas Kipkemboi was served with the Court Order in issue but he got knowledge of it on 22<sup>nd</sup> October 2010 when he read of it in the “East African Standard” daily newspaper.*

(ii) *He did not incite anyone in any of the meetings that he attended and he only informed members of the fact that he would take up the issue of tea plucking machines with the Applicant and he also told them “to be vigilant for the outcome of the case.”*

(iii) *The strike action was “constitutional, lawful and protected.” and was “in exercise of basic rights of employees enshrined in the Bill of rights of the Constitution of Kenya and protected under relevant provisions of the **Employment Act.**”*

(iv) *That by the time the Order of Injunction was issued, “the process of the strike was already commenced with the issuance of the strike notice”. There was therefore nothing left of the process to cause, effect or incite any further or otherwise call for as the strike was concerned (sic)”.*

(v) *That the real issue in dispute (tea plucking machines) was “receiving attention at the Industrial Court as a trade dispute”.*

(vi) *He has never disobeyed any Court Orders because he believes in “the respect of lawful institutions of dispute resolution” and that “he never will be cowed in [his] pursuit to defend and protect members’ rights and welfare for the only reason [he] exists as their Secretary-General,” is to pursue those goals.*

11. One Joshua Okello Oyuga also swore a Replying Affidavit in response to the Application and he deponed that while he was aware that the Orders of Gaceche, J. were indeed issued, he was unaware that Thomas Kipkemboi had refused to accept service of the same. He only came to know of the orders on 22<sup>nd</sup> November 2010 when the same was published in the “East African Standard” daily newspaper.

12. He confirms that Francis Atwoli spoke at the meetings in Sotik Highland Primary School grounds, and Kericho Green Stadium, but he was not aware of any meeting at Tinderet or Kapchorua. He never heard the said Atwoli uttering the words attributed to him but he heard him saying that the Union had taken the dispute about the tea plucking machines to the Industrial Court.

He dismissed the Application as an abuse of Court process, full of rumours, hearsay and conjecture and denied that he was personally served with it.

13. I have taken into account the Submissions by the advocates for the parties and to my mind, the first issue to address is the Law applicable to the matter before me.

14. Time and time again, our Courts have looked to the decision in Hadkinson vs. Hadkinson [1952] All E.R. 567 as expressing the law on the subject of contempt of Court Orders. It was held thus;

***“It was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a Court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an Application to the Court by him not being entertained until he had purged his contempt;***

***The Court would only refuse to hear a party to a cause when the contempt impeded the course of justice by making it more difficult for the Court to ascertain the truth or to enforce its orders and there was no other effective means of securing his compliance. The Court might then in its discretion refuse to hear him until the impediment was removed or good reason was shown why it should not be removed.”***

15. The reasoning of the learned judges in that case (Somervell, Denning and Romer, L.JJ) is plain and obvious; **of what use are Court Orders if those to whom they are directed, look at them with disdain? How can the dignity and independence of the Courts be maintained if the Orders they issue are contemptuously ignored?**

16. The other issue to address is service and/or knowledge of the Court Order. Both Francis Atwoli and Joshua Oyuga have stated that they were unaware of the Court Orders until they saw it in the “*East African Standard*” newspaper of 22<sup>nd</sup> November 2010 although the Orders were in fact issued on 14<sup>th</sup> October 2010. It is also their case that they were not served with the Court orders and therefore the events of 18<sup>th</sup> October 2010 cannot be said to be tantamount to contempt.

17. On this issue, our Courts seem to have moved steadily towards the position that although **Order 52 Rules 3 and 4 of the Supreme Court Practice Rules of England** would point towards personal service as a factor in determining contempt, in fact knowledge of an order is higher than service.

18. It is common ground that neither of the alleged contemnors was ever directly served and that leaves the issue whether they had knowledge of the order prior to 18<sup>th</sup> October 2010. On that issue, I have the evidence of Isaac Kiprotich Maswai, Philip Kibii Cheruiyot and Emmanuel Ng’etich before me. They all stated, on oath, that they heard Francis Atwoli uttering words whose import was to confirm that not only was he aware and had knowledge of the Order but he also challenged it as having been given without jurisdiction. Cheruiyot went further to produce a transcription of words that he recorded as having been uttered by Atwoli and which I have reproduced above.

19. Is the evidence sufficient to warrant my finding that the words were indeed uttered and do they confirm that all or either of the contemnors had knowledge of the Court Orders?

20. There is no doubt, because it is admitted, that Francis Atwoli and Joshua Oyuga were present in some or all of the meetings held on 18<sup>th</sup> October 2010. It is unclear what words or what actions Joshua Oyuga and the other contemnors, save Francis Atwoli, uttered, and/or took to indicate that fact and

whether in fact the other contemnors save these two were present in those meetings; suffice it to say that in fact, Atwoli, in his Affidavit in reply, deponed to certain matters which showed that he was certainly aware of the Orders. **Why else would he admit that he told workers “to be vigilant of the outcome of the case” if he had no knowledge of it and the Orders issued four days earlier?**

He also confirmed that he told the workers that the dispute was receiving due attention at the Industrial Court, a fact confirmed by the witnesses mentioned above. He also confirmed that the strike was already on-going and so there was nothing to injunct, a confirmation that he knew the Orders and interpreted them accordingly.

21. I am satisfied that Francis Atwoli had knowledge of Court Order when he addressed all the meetings held on 18<sup>th</sup> October 2010. I am unable to find the same as regards all the other contemnors except Joshua Oyuga who has admitted that he was with Atwoli in some meetings where I am certain that the Court Order was part of Atwoli’s address to his supporters.

22. The next issue to address is whether the actions and/words of Atwoli and Oyuga aforesaid amounted to contempt of Court. In Mutika vs. Baharini Farm Ltd [1985] KLR 227, it was held that the standard of proof in contempt matters is higher than a balance of probability but not exactly beyond reasonable doubt. In some cases, however the “*beyond reasonable doubt*” standard has been invoked.

23. In the case before me, I am more than satisfied that even at the higher level of beyond reasonable doubt, when an individual has been served with and/or has knowledge of an Court Order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the Court Order had stopped it. He went further to interpret it as made without jurisdiction and that only the “*Workers Court*”, (the Industrial Court) had jurisdiction to determine the matter. He did not do so once but on a number of occasions as he flew by helicopter from place to place on 18<sup>th</sup> October 2012. His contempt was obvious and his conduct and words can attract no other finding.

24. As for Joshua Oyuga, he may have had knowledge of the Order but what did he say or do that would amount to contempt? He was with Atwoli in the rallies but none of the witnesses said that he said anything that would amount to a denigration of the Court. In all meetings, the star speaker was Francis Atwoli and he and others were either part of his entourage or his audience. I am unable to find that Francis Oyuga was guilty of contempt as alleged.

25. As for Atwoli, he has urged this Court to find that his brave action of defending the rights of workers should not attract any finding of contempt. He may indeed be brave but when his actions amount to contempt of Court, the “*kiboko*” of the Law will be meted out to him.

I say this because it does not matter that he may have been acting for a greater good. Court Orders must always be obeyed. In Clarke and Others vs Chadburn & Others [1985] 1 All E.R. (PC) 211, it was held as follows;

***“An act done in willful disobedience of an injunction or Court Order was not only a contempt of Court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others.”***

***“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Willful disobedience to an order of the Court is punishable as a contempt of Court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of Court for doing what they did, nevertheless those acts were validly done ... but the legal consequences of what has been done in breach of the Law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them ... even if***

***the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.” (Emphasis added)***

I wholly agree and there is no doubt that Atwoli may have imagined that the workers needed the strike for their greater good. But once he disobeyed the Order, then he had broken the barrier of illegality with all its consequences.

26. Having held as above, it is obvious that while dismissing the Application dated 21<sup>st</sup> October 2010 as against Joshua Okello Oyuga, Henry Omasire, Meshak Khisa, Joshua Owuor and David Begi, the Application as against Francis is allowed and he is hereby cited for contempt. He shall appear in this Court on a date to be agreed by the parties when an appropriate sentence and/or sanction shall be meted out to him.

27. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2<sup>nd</sup> DAY OF AUGUST, 2012**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

*Irene – court clerk*

*Mrs. Wetende hold brief for Mrs. Opiyo for Applicant*

*No appearance for Respondents*

**Order**

*Ruling duly read.*

**ISAAC LENAOLA**

**JUDGE**

**Further Order**

*Mention on 25/9/2012*

*Francis Atwoli to attend and summons to issue.*

**ISAAC LENAOLA**

**JUDGE**

**2/8/2012**