



Kenya Chemical Workers Union v Kenya Flexgrovure Limited (Cause 127 of 2016) [2024] KEELRC 1897 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1897 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 127 OF 2016
DN NDERITU, J
JULY 18, 2024**

BETWEEN
KENYA CHEMICAL WORKERS UNION CLAIMANT
AND
KENYA FLEXGROVURE LIMITED RESPONDENT

RULING

DIVISION - I. Introduction

1. The claimant filed a notice of motion (the application) dated 3rd July, 2023 under a certificate of urgency seeking for the following orders –
 1. Spent
 2. That the Honourable court be pleased to issue summons and an Order compelling and or directing Mahendra Chandulal Patel, Sonal Patel and Sejal Ashish Patel to Appear before Court within the next Seven (7) days and or such period as shall be directed by the Court to explain to the Court why they have failed and or refused to comply with this Honourable Courts Order given on 18th May 2023.
 3. That the Honourable Court be pleased to commit the contemnors Mahendra Chandulal Patel, Sonal Patel and SEJAL ASHISH PATEL to Civil jail for a period of six (6) months or any other period that the Honourable Court deems fit and/or until they purge the contempt and or such further orders be made as may be just.
 4. That the Contemnors Mahendra Chandulal Patel, Sonal Patel and Sejal Ashish Patel purge the contempt by obeying this Honourable Court’s Orders given on 18th May 2023 through enforcing and or executing and or implementing the consent Order of 21st February 2017, and be stopped from further disobeying Orders issued by this Honourable Court.



5. That the Costs of this Application be borne by the contemnors
2. The application is expressed to be brought under “Order 40 Rule 4 of the Civil Procedure Rules, Section 5 of the *Judicature Act* Section 29 of the *Contempt of Court Act* 2016 and All other enabling provisions of the law”
3. The application is based on the grounds on its face and supported with the affidavit of Peter Ouko Onyango, the national secretary general of the applicant, sworn on even date, with several annexures thereto.
4. In response to the application the respondent filed a replying affidavit sworn by Mahendra Chandulal Patel, one of the directors of the respondent, on 2nd February, 2024, with several annexures thereto.
5. The claimant filed a supplementary affidavit sworn by Peter Ouko Onyango on 4th March, 2024.
6. By consent, the application was canvassed by way of written submissions. The claimant through Mr. Onyango filed written submissions on 31st January, 2024 while the respondent through Mr. Njoroge, Advocate, filed on 19th March, 2024.

II. Evidence

7. It is deposed in the supporting affidavit that pursuant to the impugned orders the claimant wrote to the county labour officer, Nakuru, the conciliator, who invited the parties to attend a conciliation meeting on 19th June, 2023. However, it is alleged that the respondent failed, refused, and or neglected to attend the meeting.
8. Further, it is deposed that on 20th June, 2023 the conciliator issued a report for the parties to enforce a consent executed by the parties on 21st February, 2017. Yet, it is deposed, the respondent has refused to comply with the orders issued by the court as above.
9. It is on the basis of the foregoing that the court is urged to issue summons to the directors of the respondent to show-cause why they should not be committed to jail for their deliberate disobedience of the impugned court orders.
10. In the replying affidavit in response to the foregoing, it is deposed that vide an order of 21st February, 2017 the court directed the respondent to adjust the monthly wages of all unionisable employees in accordance with the then binding collective bargaining agreement (CBA). It is deposed that due to the economic meltdown caused by the Covid 19 pandemic and inflation, the respondent was left with no option other than to declare the employees (grievants) redundant. It is deposed that as at the time of redundancy most employees had withdrawn their membership with the claimant and copies of the letters/notices of the said withdrawal are attached.
11. It is deposed that upon redundancy, all the employees were paid their terminal dues and the matter was thus settled as per the documents attached and exhibited. It is deposed that thereafter the respondent closed its operations and it is now inoperative. It is deposed that based on the foregoing evidence the respondent is not in contempt of the consent order of 21st February, 2017, the orders of 18th May, 2023, or indeed any other orders of the court as the matter was fully settled as between the employees and the employer, the respondent.
12. It is deposed that the respondent was neither informed nor invited to the alleged meeting called by the conciliator on 19th June, 2023 and that they were not aware of the orders of the court issued on 18th May, 2023.



13. It is deposed that the application is frivolous, mischievous, and an abuse of the court process as the claimant is purporting to act for and on behalf of persons who are no longer its members and hence acting without instructions.
14. In the supplementary affidavit it is deposed that the claimant is not aware of the alleged withdrawal of membership by the employees and that the alleged letters of withdrawal exhibited by the respondent are not signed.
15. Further, it is deposed that the ruling of 18th May, 2023 was delivered in the presence of counsel for the respondent and hence they were all along aware of the said ruling.

III. Submissions

16. It is submitted for the claimant that Mahendra Chandulal Patel, Sonal Patel, and Sejal Ashish Patel are directors of the respondent and they are supposed to enforce the orders of the court made on 18th May, 2023 by implementing the consent order of 21st February, 2017.
17. It is submitted that this court has jurisdiction to punish for contempt under Section 5 of the *Judicature Act*. The claimant has cited Samuel M. N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR in establishing the ingredients of contempt of court – That there was a valid lawful court order; That the respondents were aware of the terms of the order; and, That the respondent willfully failed, refused, and or neglected to obey the lawful order.
18. It is further submitted that the book Contempt in Modern New Zealand offers a comprehensive read on the above ingredients to the effect that - The court order was clear and unambiguous and binding upon the respondent; the respondent had proper notice and knowledge of the order; the respondent has acted in breach of the order; and, the conduct in breach is deliberate and willful.
19. It is submitted that the respondent was represented in court by counsel when the ruling of 18th May, 2023 was delivered. It is further submitted that the decision in Shimmers Plaza Ltd v NBK [2015] eKLR is clear that the knowledge of a court order by a counsel is binding on a party.
20. The court is urged to allow the application as it has powers to hear and determine the same based on Articles 159 & 162(2)(a) of *the Constitution*, Section 5 of the *Judicature Act*, & Section 12 of the Employment & Labour Relations Court Act.
21. Counsel for the respondent identified the single issue for determination in this matter as – Whether the respondent is in contempt of the court orders issued on 18th May, 2023.
22. It is submitted that the respondent is neither in contempt of the court orders of 27th February, 2017 nor those of 18th May, 2023. It is submitted that economic downturn and the Covid 19 forced the respondent out of business and that the only avenue out was to declare all its employees redundant. It is submitted that following the redundancy all the employees were paid their terminal dues. It is further submitted that as at the time of the redundancy all the employees had withdrawn their membership with the claimant.
23. Further, it is submitted that the respondent and more so the named directors of the respondent were not served with the court orders of 18th May, 2023 and as such the orders sought in the application are untenable. Counsel has cited Africa Management Communication International Limited v Joseph Mathenge Mugo & Another [2013] eKLR wherein the court held that proof of personal service or knowledge of a court order is essential in an application of this nature as the consequences of contempt may include penal punishment.



24. It is submitted that contempt proceedings are quasi criminal and all the essential ingredients of contempt must be demonstrated as held in Samuel M. N. Mweru & Others V National Land Commission & 2 Others (Supra).
25. It is further submitted that the respondent was not invited to the alleged conciliation meeting and that no evidence has been tendered by the claimant to that effect.
26. It is submitted that Section 4(1) of the [Labour Relations Act](#) gives to employees the right to join and also to exit trade unions. It is submitted that the claimant is purporting to act for employees who were not or are no longer their members and without instructions from the alleged members who ceased to be members of the union as per the evidence tendered and exhibited by the respondent in the replying affidavit.
27. Further, it is submitted that the directors of the respondent cannot be punished in the manner sought in the application unless the corporate veil is lifted. Counsel has urged the court to be guided by Geoffrey Kathuri Kison & 10 Others v East African Portland Cement Co. Ltd & 5 Others [2021] eKLR wherein the court cited Katsuri Limited v Kapurchand Devar Shah [2016] eKLR.
28. The court is urged to dismiss the application with costs.

IV. Issues for Determination

29. Upon going through the application, the supporting affidavit, the replying affidavit, the supplementary affidavit, and the annexures to the affidavits, and the written submissions by both sides, the court finds that there are only two substantive issues for determination – Whether the respondent is in contempt of the orders issued by the court on 18th May, 2023; and, Whether the named directors of the respondent should be summoned to answer to the alleged contempt and suffer the consequences if found culpable.
30. This cause has a long history. Before the claimant filed this cause in court, the parties had litigated in Nakuru Industrial Court Cause No. 181 of 2013 in regard to the terms and conditions of employment of the members of the claimant in a contested CBA. This cause was finally settled after the parties agreed on the terms of the CBA and filed a consent in court dated 30th July, 2013 which marked that cause as fully settled.
31. However, the claimant came back to court in 2016 and filed the instant cause on the grounds that the respondent had failed, refused, and or neglected to implement and abide by the terms of the CBA alluded to above. In the memorandum of claim filed in court on 6th April, 2016 the claimant is seeking the following –
 1. That the Respondent is in breach of Parties collective Bargaining Agreement as negotiated, agreed, and registered by this Honourable Court at RCA No. 241 of 2013.
 2. That Respondent withdraws immediately the inferior monthly wages which are not in tandem with provisions of Clause No. 27 and 28 of the Parties current collective Bargaining Agreement and replace them with rightful Collective Bargaining Agreement rates.
 3. That the Respondent calculate all salaries/Wages arrears and other benefits accruing from the underpayments necessitated by Respondent failure to adhere to Collective Bargaining Agreement rates as stipulated in Clause No.



27 and 28 of the Parties Collective Bargaining Agreement and pay to all affected employees on priority basis.

4. Special damages in terms of benefits and salaries/Wages arrears to all unionised employees who unlawfully continue earning inferior monthly wages contrary to the ones negotiated in the Collective Bargaining Agreement and any other suitable remedy which the Honourable Court may deem necessary to meet ends of justice.
 5. Costs of this suit be provided for.
32. Since 2016 this cause has remained in the court system unconcluded with many applications filed without the determination of the main cause. In one such application seeking the reinstatement of the cause after the same had been dismissed for non-attendance, this court delivered a ruling dated 18th May, 2023 and issued the following orders –
- a. That the undated notice of motion by the Claimant filed in court on 28th February, 2022 be and is hereby dismissed for want of merit with no order as to costs.
 - b. However, suo motto, the cause herein which was dismissed for non-attendance on 16th February, 2022 is reinstated in the interests of justice.
 - c. The parties and their respective counsel or representative, as the case may be, shall engage the County Labour office, Nakuru, to ensure that the matter is settled in terms of the consent order of 21st February, 2017, and the court order of 4th August, 2021.
 - d. The order in (c) above shall be complied within 30 days of the date hereof.
 - e. Either party may apply to court for enforcement of the said consent order.
 - f. There is no order as to costs of the application.
33. It is the above orders that the respondent is alleged to have disobeyed hence the instant application seeking for the orders set out in the introductory part of this ruling.
34. There is no contest that the respondent is a limited liability company with its own legal identity and personality separate and distinct from that of the named directors – See *Salmon v Salmon*.
35. It is important to note that the prayers in the application are not directed at the respondent but to the named directors. Of course, a company does not have a human life and only acts through directors, managers, employees, and other human agents. However, for any one to go after the directors or any agent of a duly registered limited liability company the corporate veil has to be lifted. As a legal or juridical identity, it is however possible for a limited liability company to be found in contempt. The only difference is that if found in contempt, since a company cannot be detained or jailed, other sanctions shall apply such as fines and other regulatory measures such as denial of licences, suspension of licences, and suchlike.
36. From the evidence, as per the replying affidavit, the respondent and the named directors state that they were not served with a court order following the court’s ruling of 18th May, 2023. While it is true, as stated by the claimant, that the respondent’s counsel, Mr. Njoroge holding brief for Miss Kamau, was in court during the delivery of the said ruling, I have combed through the file and I have not come across a formal order extracted from the said ruling. In any event, no such formal order has been exhibited by the claimant.



37. It is important to note that a formal order is the correct and lawful expression of a ruling as a decree is of a judgment. An order gives the concise and unambiguous interpretation of the ruling and that is what is supposed to be served upon a party. It is upon breach or violation or contempt of such order that a party may be held to be in contempt of court.
38. It is also important to note that the orders giving rise to the application were given suo motto by the court. In fact, the ruling of 18th May, 2023 concerned an application by the claimant for reinstatement of the cause which had been dismissed for non-attendance on the part of the claimant. However, whether issued suo motto, ex-parte, inter-partes, or in whatever other manner, orders of the court ought to be obeyed as there is no lesser order. Orders of the court carry equal force and must be obeyed by all and sundry.
39. The respondent has opposed the application on several fronts as per the replying affidavit and the written submissions by counsel. Firstly, it is stated that the respondent and the named directors were not aware of the court orders alluded to as no such orders were served upon them. Secondly, it is stated that the corporate veil has not been lifted so as to hold the named directors liable for alleged contempt on the part of the respondent. Thirdly, it is stated that the claimant is pursuing this cause without instructions as its alleged members are no longer such members and they are not in support of the application and the cause as they were declared redundant and their terminal dues settled. Fourthly, it is stated that the respondent is no longer in business and that the business premises is closed following economic downturn associated with the Covid 19 pandemic.
40. It is against the above back-ground that the application shall be considered and determined.
41. For a person, human or juridical, to be found in contempt of court, some ingredients or elements need to be demonstrated and proved. The parties in their respective submissions have captured the same. It is trite law that this court has the jurisdiction to punish for contempt in accordance with the provisions of Section 5 of the *Judicature Act*. The elements that an applicant needs to prove are well articulated in Samuel M. N. Mweru & Others v National Land Commission (supra), Shimmers Plaza Ltd v NBK (Supra), among many other decisions. In the book Contempt in Modern New Zealand the authors argue that for an applicant to succeed in an application for contempt of court the following must be demonstrated and proved –
- a. That there is a valid lawful order of the court whose terms are clear and unambiguous and binding on the respondent.
 - b. That the respondent had knowledge of the order or that the same was properly served.
 - c. That the respondent has acted in breach or violation of the said order.
 - d. That the breach or violation is willful and deliberate.
42. While the court confirms that there was a ruling delivered on 18th May, 2023, there is no evidence that a formal order was extracted and issued. While this may be an oversight on the part of the court or failure by the claimant in following up and ensuring that such a formal order was issued, the court notes that while the ruling was clear and unambiguous, there was no order issued and served. Besides, there is no evidence of service of the ruling upon the directors personally. There is also no evidence that the named directors were personally aware of the orders emanating from the ruling.
43. In the replying affidavit, it is deposed that the respondent was not invited to the conciliation meeting called by the County labour officer, Nakuru, which meeting the respondent is alleged to have failed to attend. The court has perused the record and there is no evidence that the invitation letter was served.



- 44. Further to the foregoing, as noted elsewhere in this ruling, the application for contempt is against the named directors, not against the respondent, yet the corporate veil is intact.
- 45. In the foregoing circumstances, can it be said that the respondent and or the named directors are in willful breach, violation, and contempt of the orders in the ruling of 18th May, 2023? The answer, and I so find and hold, is an emphatic no. This is for the obvious reasons canvassed in the foregoing paragraphs of this ruling. No formal order was extracted following the ruling of 18th May, 2023, no service of the order or the ruling was effected upon the named directors, and there is no evidence that the respondent or the named directors were aware of the orders. The court is not condoning or acquiescing to the incompetence or ineffectiveness of the counsel for the respondent in failing to inform the respondent and the named directors, of the contents and implications of the ruling. However, it would be unfair and unjust to assume that the respondent and the named directors had knowledge or were aware of the ruling, more so that a formal order was not extracted.
- 46. It is also not lost on this court of the position taken by the respondent that the respondent settled all the issues pertaining to this cause with the grievants who were allegedly lawfully declared redundant and paid all their due terminal benefits. It is stated that all the alleged members of the respondent withdrew their membership and as such the claimant is said to be pursuing this cause without instructions and not in the interest of its alleged members.
- 47. Interestingly, there is no evidence from the claimant that any of the grievants remain a member of the union or that they are still interested in pursuing and pressing the claim against the respondent. This should have been done by the claimant filing an affidavit sworn by the grievants or on their behalf. Those are weighty issues that need ventilation.
- 48. For all the foregoing reasons, the application by the claimant dated 3rd July, 2023 is hereby denied and dismissed with no order as to costs.
- 49. It appears to the court that the ground upon which the cause was founded has shifted during the period that the cause has been pending in court. In view of the issues raised, including allegations that the grievants have settled the matter with the respondent, it would make sense for the parties to fix the matter for hearing to avoid the matter clogging the system even further. The parties shall thus be allocated a hearing date of the main cause on priority basis.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 18TH DAY OF JULY, 2024.

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DAVID NDERITU

JUDGE

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