

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**ELRC CAUSE NO. E860 OF 2022**

**KENYA MEDICAL PRACTITIONERS  
PHARMACISTS AND DENTISTS' UNION.....CLAIMANT**

**VERSUS**

**KENYA HOSPITAL ASSOCIATION TRADING  
AS THE NAIROBI HOSPITAL.....RESPONDENT**

**AND**

**CABINET SECRETARY MINISTRY  
OF LABOUR AND SOCIAL PROTECTION.....INTERESTED  
PARTY**

**AND**

- 1. MR. JAMES NYAMONGO**
  - 2. MR. FELIX OSANO**
  - 3. MR. MOHAMED DOO SAID**
  - 4. HON. DR. CHRIS M. N. CICHANGE, PhD**
  - 5. MR. PHILEMON MWAISAKA, EBS, SS**
  - 6. HON JUSTICE (RTD) PHILIP WAKI, EBS**
  - 7. DR. FRED KAMBUNI, MBS**
  - 8. DR. MAGDALENE MUTHOKA, PhD**
  - 9. DR. BARCLEY ONYAMBU**
  - 10. PROF. HERMAN MANYORA**
  - 11. DR. MBIRA GIKONYO**
  - 12. MR. GEOFFREY NG'ETICH**
  - 13. PROF. ENG. JOHN MWERO**
  - 14. HON. PROF. JALDESA GUYO**
  - 15. PROF. PETER LARRY NDAGUATHA**
  - 16. MR. SAMSON MBUTHIA KINYANJUI**
  - 17. MS. VALERIE GAYA.....**
- .....CONTEMNORS**

## **RULING**

The Claimant/Applicant filed a notice of motion application dated 30/10/2023 seeking an order in the following terms: -

1. Spent
2. Summons be issued against the contemnors cited herein to appear before the court and show cause why they should not be committed to civil jail for such term as the court may deem just for blatant disobedience of this Honourable court's judgment and final order of 24<sup>th</sup> August 2023.
3. The Contemnors cited herein jointly and severally be and are hereby denied further audience by this Honourable Court save for showing cause why they should not be committed to civil jail for such term as the court may deem just for the blatant disobedience of the Honourable Court's order dated 24<sup>th</sup> August 2023.
4. Any other orders the court deems fit to grant.
5. Costs of this application be provided for.

The application is based on grounds '1' to '4' set out on the face of the application to wit that a mandatory final order was issued by the court on 24<sup>th</sup> August 2023 directing the Respondent to execute the draft Recognition Agreement presented to it within 30 days of the judgment. That the Contemnors were served with the copy of the judgment on 28<sup>th</sup> September 2023 and despite knowledge of the order they have failed to comply with the same.

That unless the orders of the court are enforced by way of alleged summons to the served on the cited Contemnors to show cause why they should not be jailed for deliberate defiance of the court orders, the Applicant will suffer loss and prejudice and the court will be placed in disrepute the consequence of which is undermining the authority of the court and the Rule of law.

That the application is buttressed by a supporting affidavit of Dr. Davji Bhimji the National Secretary General of the Claimant/Applicant attached to the application. The deponent reiterates the grounds set out in the application in his deposition and prays the court grants the orders sought.

The Respondent meanwhile filed a notice of motion dated 3/10/2024 seeking that there be a stay of enforcement of the judgment of 24<sup>th</sup> August 2023 as partly reviewed by the Ruling delivered and orders made on 27<sup>th</sup> June 2024 in this matter.

The Respondent depose that the Honourable Court in its ruling dated 27<sup>th</sup> June 2024, reviewed its previous orders of 24<sup>th</sup> August 2023 as follows:

***“The 1<sup>st</sup> Respondent is directed to negotiate and execute a recognition agreement within thirty days of judgment.”***

The Respondent depose that in line with that Ruling of the court, the 1<sup>st</sup> Respondent scheduled a meeting with the Claimant’s officials on 12<sup>th</sup> September 2024, at the Respondent’s premises with a view to commence negotiations in the matter. That in the said meeting, the Claimant demanded that the Respondent execute the Recognition Agreement

without giving any room for negotiations. That this was contrary to the Ruling of the court which allowed parties to engage in negotiations prior to signing the agreement.

That there has been no willful or deliberate disobedience of the court order by the proposed Contemnors. The negotiation contemplated by the court order had reached an impasse and the Claimant/Union had demonstrated that it was not willing to come to the negotiation table in good faith.

That the standard of proof in contempt application has not been met as set out in the case of *Katsuri Limited versus Kapunchard Deper Shal [2016] eKLR* as follows: -

***“...Although the proceedings are civil in nature; it is well established that an Applicant must prove the elements not beyond reasonable doubt but at least higher than the standard in civil cases. The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the Applicant to prove that the defendant’s conduct was deliberate in the sense that he or she deliberately or wilfully acted in a manner that breached the order.”***

The Respondent further cites the case of *Mary Chitile Mengich and Co. Advocates and another versus Joseph Mabwa and 10 others [2018] eKLR*, where the court stated: -

***“A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly believe him or herself entitled to act in the way claimed to constitute the contempt.”***

That the Respondent is still desirous of negotiating the clauses referred to at paragraph 7 of the replying affidavit as follows: -

***“(a) At clause 2(k) the draft recognition agreement creates obligations for management staff who are not unionisable. The corresponding clause in the standard form in the Industrial Relations Charter creates obligations for security and sanitary staff.***

***(b) Clause 4(b) (ii) of the draft agreement requires parties to engage in negotiations and if they do not agree within a month the claims shall be processed in accordance with the Labour Relations Act. The prescribed form under the Charter does not provide for the one-month limit for negotiations.”***

That the Respondent being aggrieved by the judgment of the court and the Claimant’s refusal to engage in negotiations, moved to the Court of Appeal seeking orders for stay of execution of the judgment pending appeal. That the application was filed on 3/10/2024 and was heard and determined by the Court of Appeal which dismissed the application in a ruling delivered on 20<sup>th</sup> June 2025.

That the Claimant having initiated the negotiations, it cannot be said beyond reasonable doubt that there has been wilful disobedience of the court orders by the Respondent and the alleged Contemnors.

That the alleged Contemnors were not made aware of the court order citing the case of ***Vimalthimar Bhimji Depar Shah and another versus Stephen Jennings and 5 others [2016] eKLR*** where the court observed that: -

***“The order allegedly disobeyed must be in existence, it must be clear in its terms it must have been served upon the Respondent or the Respondent must have actual or constructive knowledge of the order together with an endorsed personal notice warning of the consequences of disobedience.”***

The Respondent states therefore, the alleged Contemnors were not made aware of the existence of a clear and unambiguous court order. That the alleged Contemnors named in the application consists of members of the Board of Directors and several employees of the Respondent who did not participate in the proceedings that led to the judgment.

That the Applicant has not annexed proof of personal service to the Contemnor Mr. James Nyamongo. The Applicant does not state the position of Mr. James Nyamongo in the Respondent's organization and whether or not the said Mr. James Nyamongo was personally served the court order of 24/8/2023 relied upon in this application.

The Applicant does not also disclose on the face of the application and the supporting affidavit of Dr. Davji Bhimji Attallah the status of other alleged Contemnors listed in the application and whether they were personally

served with the court order dated 24<sup>th</sup> August 2023 or had knowledge of the same.

The Applicant in the notice of motion dated 30/10/2023 which was filed before the variation of the judgment in the ruling of the court dated 27<sup>th</sup> June 2024, does not for that obvious reason address the matter of the meeting, the Claimant was invited to negotiate in and execute the recognition agreement upon by the respondent. As such the Claimant has not proved on a balance of probability that the alleged Contemnors had personal knowledge of the court order.

That the directors and employees of the Respondent are protected under the corporate veil and as such they can't be held personally liable for the acts of the Respondent or be held in contempt unless the veil is lifted, and that the application should fail on this ground alone.

That the application lacks merit in the whole and should be dismissed with costs.

## **DETERMINATION**

The court has considered the depositions and submissions filed by the parties and the issues for determination are: -

- (i) Whether the Applicant has proved wilful disregard of the court order dated 24<sup>th</sup> August 2023 as varied in the Ruling of the court dated 27<sup>th</sup> June 2024.
- (ii) What other suitable order may be issued to meet the ends of justice.

The Claimant/Applicant in the application dated 30<sup>th</sup> October 2023 initially cited only Mr. James Nyamongo as a contemnor.

The Applicant has not rebutted the deposition by the Respondent that the Claimant refused to negotiate the stated clauses in the draft recognition agreement especially the issue of demarcation so as to define what cadre of staff are unionisable and who are not for the purposes of collective bargaining.

The onus of prove that the Respondent and alleged Contemnors are in deliberate, willful and contumelious defiance of the court order lies on the applicant on a standard not beyond a reasonable doubt, but above a balance of probabilities for the reason that the liberty of the alleged Contemnors is at stake.

The Applicant did not attach an affidavit of service with indication that the Respondent and in particular the named Contemnors had personal knowledge of the court order of 24<sup>th</sup> August 2023 as varied by the order dated 27<sup>th</sup> June 2024, to satisfy the court that they are guilty of contempt of court.

Accordingly, the Applicant has not satisfied the standard set out in the case of ***Northern Tetu Farmers Company Limited versus Joseph Nderitu Wanjohi [2016] eKLR*** that: -

1. ---
2. The Defendant had knowledge of or proper notice of the terms of the order.



3. The Defendant has acted in breach of the terms of the order; and
4. The Defendant's conduct was deliberate.

The application has therefore not been proved to the required standard and is dismissed with no order as to costs.

In terms of prayer 4 in the application ***“Any other orders the court deems fit to grant” and in view of the fact that this application was filed initially before the review order by the court in its ruling of 27<sup>th</sup> June 2024 that***

***“13(b) the 1<sup>st</sup> Respondent is directed to negotiate and execute a recognition agreement within thirty days of this judgment.”*** the court orders that the parties submit to the Labour office to facilitate the resolution of the issue of demarcation of employees within the organization of the Respondent in terms of clause 2(k) of the draft recognition agreement read with clause 4(b)(iii) of the same draft agreement within 30 days of the ruling and the Respondent is to execute the draft recognition agreement as directed by the court order dated 24<sup>th</sup> August 2024, immediately upon expiry of the stated 30 days from the date of this ruling.

Each party to file submissions to the Labour office within 10 days of this ruling and the Labour office to conduct the demarcation exercise and report to the parties within 20 days from the date of receipt of submissions by the parties.

For the avoidance of doubt, the aforesaid directives are meant to facilitate implementation of the varied order made by the court in the Ruling dated

27/6/2024 and is not meant to absolve the Respondent from obeying the judgment of the court dated 24<sup>th</sup> August 2025.

Dated at Nairobi this **20<sup>th</sup> Day of November 2025.**



**Mathews Nduma**  
**JUDGE**

**Appearance:**

Mr. Wasike for Claimant/Applicant

M/s. Kahidi for Respondent/Contemnors

Mr. Kemboi – Court Assistant