



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: ASIKE-MAKHANDIA, SICHALE & KANTAI, JJ.A)**

**CIVIL APPLICATION NO. 114 OF 2019**

**BETWEEN**

GEOFFREY KATHURI KISON.....1<sup>ST</sup> APPLICANT  
ROMAN LENJHO MWACHANYA.....2<sup>ND</sup> APPLICANT  
MARY MAMAYIO LENGUES.....3<sup>RD</sup> APPLICANT  
EMILY JEBET SUGUT.....4<sup>TH</sup> APPLICANT  
DANIEL LAU KITUMBO.....5<sup>TH</sup> APPLICANT  
MUKARI LEWUNTAI KULEI..... 6<sup>TH</sup> APPLICANT  
PATRICK KIPKURUI LANGAT.....7<sup>TH</sup> APPLICANT  
ELIJAH KITHUKA KAMAINGI.....8<sup>TH</sup> APPLICANT  
SOLOMON UYAGO ODUOR.....9<sup>TH</sup> APPLICANT  
SAIYIORE OLE LEMUNYEE.....10<sup>TH</sup> APPLICANT  
CHRISTOPHER J. WARATHO.....11<sup>TH</sup> APPLICANT  
DENNIS FRANKLIN MUNGATHIA.....12<sup>TH</sup> APPLICANT

**AND**

EAST AFRICAN PORTLAND CEMENT CO. LTD.....1<sup>ST</sup> RESPONDENT  
KUNGU GATABAKI.....2<sup>ND</sup> RESPONDENT  
SARONE OLE SENA.....3<sup>RD</sup> RESPONDENT  
SIMON PETER NKERI.....4<sup>TH</sup> RESPONDENT  
SHEILA KAWIRA KAHUKI.....5<sup>TH</sup> RESPONDENT  
JOSEPH KINYUA.....6<sup>TH</sup> RESPONDENT

(An application for contempt of Judgment of the Court of Appeal at Nairobi)

*(G.B.M. Kariuki SC, F. Sichale & S. Ole Kantai, JA.) dated 6<sup>th</sup> September, 2017*

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**RULING OF THE COURT**

Before us is a motion on notice dated 8<sup>th</sup> April, 2019 in which the applicants pray that this Court be pleased to cite the 2<sup>nd</sup> to 6<sup>th</sup> respondents respectfully for contempt of court and commit them to prison for a period of six months. The applicants also pray that the same respondents be ordered to purge the contempt by immediately paying all the dues to contract employees named in the Collective Bargaining agreement (CBA) 2012-2015 numbering 693 in compliance with the judgment and decree of the Employment and Labour Relations court, (ELRC) Cause No. 2119 of 2014. The said respondents are the directors and accounting officers of the 1<sup>st</sup> respondent

The application is brought under Section 5(1) of the Judicature Act and is premised on the grounds that: the said respondents have failed, refused and/or ignored to honour both judgments of the ELRC and this Court; they were to comply with the said judgments in their capacity as directors and accounting officers of the 1<sup>st</sup> respondent; the subject of the dispute was voluntarily negotiated by the 1<sup>st</sup> respondent and the applicants' union, Kenya Chemical & Allied Workers Union; ("the union"); the 1<sup>st</sup> respondent's directors were to implement the negotiated CBA 2012-2015 but for no justifiable reasons have refused to honour it and are engaging in dismissal of contract staff; judgments and court orders are not given in vain and this Court should punish the contemnors until they purge their contempt; and that non-compliance of court orders by the 2<sup>nd</sup>-6<sup>th</sup> respondents is a clear indication that the 1<sup>st</sup> respondent has no intentions of complying with the orders of the court.

The application was further supported by an affidavit sworn by the 1<sup>st</sup> applicant on his own behalf and on behalf of the other applicants. He deposed that: they were all contract employees of the 1<sup>st</sup> respondent and beneficiaries of the negotiated CBA 2012-2015; the 2<sup>nd</sup>-6<sup>th</sup> respondents had declined to enforce the CBA for no apparent reasons; negotiations to have the dispute settled out of court failed prompting the applicants to commence court proceedings before the ELRC; the ELRC determined the claim in their favour; the respondents proffered an appeal to this court which appeal was however unsuccessful as this court upheld the decision of the ELRC; the respondents were employing delaying tactics to deprive the applicants the enjoyment of the fruits of the judgment; their efforts to execute the decree were thwarted by an objection from Kenya Commercial Bank to whom the respondents had charged their assets; it has been four years since judgment was delivered and yet the respondents have not fully satisfied the decree; hence it was necessary to protect the integrity and dignity of the court by punishing the contemnors.

The applicants admit though that the 1<sup>st</sup> respondent had since partly satisfied the decree by paying Kshs. 90,000,000/= to 465 claimants leaving a balance of Kshs 1,311,585,364,228.80 due to the other applicants. They further assert that since the 1<sup>st</sup> respondent has shown goodwill in settling partly the money owed they should now be compelled to settle the balance.

In opposing the application the 1<sup>st</sup> respondent on its own behalf and on behalf of the other respondents contended that the two judgments ordered it to implement wage payments to contract employees who had been paid less than permanent employees hence the judgments were not money decrees. The claimant during proceedings leading to the two judgments was the union and not the applicants. That the union certified Kshs. 1,401,585,364.40 as the money payable in the ELRC judgment. The 1<sup>st</sup> respondent further argued that there was no order citing it for contempt and whereas committal orders against a company are executed against directors or officers of the company, the application must in the first instance seek to cite the said company for contempt. That since no prayers have been sought against the 1<sup>st</sup> respondent, it follows that it cannot be cited for contempt and so committal orders cannot be made against its directors or officers. The 1<sup>st</sup> respondent further argued that the applicants did not have the locus standi to bring this application since they were not parties to the proceedings that have led to the instant application, the claimant having been the union. Lastly, the 1<sup>st</sup> respondent conceded that it was in the process of implementing the judgments and had since paid out Kshs. 90,000,000/= of the money due.

We have carefully considered the record, submissions by the parties and the law. The issue for determination is whether the respondents are in contempt of court.

It is trite that to commit a person for contempt of court, firstly, the court must be satisfied that the person has deliberately and willfully disobeyed a court order that he was aware of. Secondly, the order of the court that is alleged to have been disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or refrain from doing. (See: **A.B & Another v R.B [2016] eKLR**). Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. In **Mutitika v Baharini Farm Limited [1985] KLR 229**, the court stated that:

**“... the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”**

And Lord Denning in **Re Bramblevale Ltd [1970] 1 CH 128** stated that:

**“A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”**

It is common ground that the applicants are members of the union which filed the suit before the ELRC on their behalf seeking wage payments to contract employees who were being paid less than the permanent employees. The suit was determined in union's favour and this Court on appeal by the respondents upheld the said decision. Nowhere in all these proceedings were the applicants' parties in their personal capacities. The applicants having not been parties to the proceedings from which the present application has the origins, they have no *locus standi* to commence these proceedings nor cite the respondents for contempt. The right party to do so would have been the union.

We also note that the 2<sup>nd</sup> to 6<sup>th</sup> respondents cited for contempt are directors and officers of a corporate entity not cited in the application, which begs the question whether in such case the directors of a company will be personally liable for contempt committed by and in the name of the company. In the persuasive authority of **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR**, the High Court (Mativo, J.) in considering contempt by a director of a company observed and rightly so in our view that:

**“The alleged contemnor is a director of the company. He is not a party to these proceedings in his personal capacity. The company is a legal entity. The proper procedure for the applicant was first to apply to lift the corporate veil then go for the directors in their personal capacities.”**

It follows therefore that failure by the applicants cite the 1<sup>st</sup> respondent for contempt and to lift the corporate veil of the 1<sup>st</sup> respondent denied them the chance to cite the 2<sup>nd</sup> to 6<sup>th</sup> respondents for contempt as directors or accounting officers of the 1<sup>st</sup> respondent

Further the respondents have since forked out Ksh 90,000,000/= in partial satisfaction of decree. This being the case how can the respondents be accused of willfully and deliberately disobeying court orders?

It is quite clear to us therefore that the applicants have failed to provide proof of alleged willful and deliberate disobedience of the court orders to the required standard. Accordingly, the application being bereft of merit, is dismissed with no order as to costs.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of January, 2021.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY**

**REGISTRAR**