



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & KIAGE, JJA) CIVIL APPEAL NO. 327 OF 2013 BETWEEN

THE KENYA NATIONAL UNION OF TEACHERS.....1ST APPELLANT

WILSON SOSSION.....2ND APPELLANT

MUDZO NZILI.....3RD APPELLANT

AND

THE TEACHERS SERVICE COMMISSION.....RESPONDENT

(Appeal from the Ruling and Order of the Industrial Court of Kenya at Nairobi (Linnet Ndolo, J.) Dated 22nd July, 2013 in

Industrial Court Petition No. 23 of 2013)

JUDGMENT OF THE COURT

This is an appeal arising from the Ruling of the Industrial Court of Kenya as it was then known, now the Employment and Labour Relations Court (ELRC), **Linnet Ndolo**, J. dated 26th June, 2017.

The background to the appeal is that in February, 2013, the appellants issued a notice for the strike prompting the Minister for Labour to appoint a conciliator who filed a certificate of disagreement after the conciliation proceedings failed. Following the collapse of the conciliation proceedings, the appellants called for a nationwide strike beginning 25th June, 2013. This is what prompted the respondent to file Petition No. 23 of 2013, simultaneously with a Notice of Motion seeking orders to restrain the appellants, and the 1st appellant's members from continuing with a nationwide strike, resulting in the ex parte court orders issued on the 1st of July, 2013, as follows:-

“(a) The petitioner and the Respondents are directed to decamp from their hardline position and proceed to the negotiating table in good faith. For the avoidance of doubt, these negotiations shall be limited to rationalization of remuneration due to the respondent’s members under legal Notice No. 534 of 1997 and legal Notice number 16 of 2003. The Negotiation meeting shall be convened by the cabinet secretary for Labour;

(b) The parties are directed to report the outcome of these negotiations to this Court at 9.00 am on Monday, 15th July, 2013;

(c) The Teachers are directed to report back to work by 8.00 am on Tuesday, 2nd July, 2013. Any strike beyond this time shall be unprotected and illegal;

(d) In order to preserve Industrial peace, the parties and/or their members and/or agents and or servants and or sympathizers are restrained from commenting on this matter outside the confines of the negotiation hereby ordered.”

The appellants never called off the strike prompting the respondent to file an application for contempt of court orders subsequently withdrawn on 9th July, 2013 by consent. According to the respondent, the withdrawal of the first application for contempt of court orders was in good faith and on the understanding and belief that the appellants would call off the strike.

The appellants however failed to call off the strike triggering the respondent's second application for contempt of court dated 10th July, 2013, substantively seeking orders *inter alia*, that the court do find that the appellants were in contempt of court orders issued on 1st July, 2013 as renewed on the 9th day of July, 2013 and grant appropriate remedies as prayed for in the said application.

The 2nd and 3rd appellants filed replying affidavits in rebuttal to the said application denying allegations of disobedience of the said court orders.

The learned trial Judge assessed and analyzed the record before her in light of the supportive facts of the opposing positions of the respective parties as well as the principles of law relied upon by either side, made observations there on, *inter alia*, that going by the content of a news article appearing in the Daily Nation of Tuesday, July 2, 2017, the appellants were aware of the orders issued on 1st July, 2013 but had resolved not to call off the strike; that apart from the 2nd and 3rd appellants contending in their replying affidavits separately sworn on 12th July, 2013 and the submission by their counsel that Newspaper reports have low probative value, the 2nd and 3rd appellants did not deny the words attributed to them in the said article.

With regard to the service upon the appellants of the orders allegedly transgressed, the Judge made findings that on the 9th and 10th July, 2013 the appellants counsel acknowledged in court that the orders issued by the court on 1st July, 2013 had been served on the appellants on 8th July, 2013; that it therefore followed that when the National Executive Council met on 14th July, 2013, and resolved to continue with the strike, they had full knowledge that the strike had been outlawed by the orders issued on 1st July, 2013 as renewed on the 9th of July, 2013.

Turning to the standard of proof applicable in matters of contempt of Court orders, the Judge appraised herself of the threshold on the said standard of proof as set out in **Mutitika versus Baharini Farm Limited [1985] KLR 229, 234**; considered that threshold in light of various provisions of the constitution of the 1st appellant with regard to the designation, and assignments of duties of its national office bearers with special regard to those touching on strikes. The Judge observed *inter alia*, that from her assessment of the 1st appellant's constitution, it was obvious that the teachers did not just go on strike. They were called out by their union through its organs and officials. In the Judge's view, the same organs and officials were duty bound to call the teachers back to work upon being notified of the existence of the orders of the court issued on 1st July, 2013 and as renewed by the court on the 9th day of July, 2013 in the presence of counsel for the appellants in the matter; that the fact that the order to go back to work was addressed directly to the teachers did not take away the responsibility of the appellants to ensure compliance with those orders; that even if the Judge were to hold the view that the appellants only got to know of the court orders on 8th July, 2013 when personal service was effected upon them, there was no explanation as to why they took a whole six days to convene the National Executive Council to deliberate over the issue if indeed they had taken the orders of the court seriously. Lastly that when the National Executive Council finally met on 14th July, 2013, they took a decision to carry on with the strike knowing fully well that the court had outlawed it on 1st July, 2013 and renewed the order outlawing the strike on the 9th day of July, 2013; and that there was no evidence that the 2nd and 3rd appellants dissented from the decision taken by the National Executive Council on the 14th July, 2013.

On account of the above findings, the trial Judge found the appellants jointly and severally knowingly and willfully disobeyed the orders of the court issued on 1st July, 2013, and as renewed on the 9th day of July, 2013 and issued orders against them as follows:

“(a) The 1st respondent, that is to say the Kenya National Union of Teachers (KNUT) shall pay a fine of Kshs. 5,000,000 (read Five million Kenya shillings). The said fine shall be recovered by the Teachers Service Commission from Union dues deducted on behalf of KNUT and paid to court within the next 30 days from the date of this Ruling.

(b) The 2nd respondent that is to say Wilson Sossion shall pay a fine of Kshs. 500,000 (read Five hundred thousand Kenya shillings) and in default, the said Wilson Sossion shall be committed to civil jail for 30 days. This penalty takes effect immediately.

(c) The 3rd respondent that is to say MudzoNzili shall pay a fine of Kshs. 500,000 (read Five Hundred thousand Kenya shillings), and in default the said MudzoNzili shall be committed to civil jail for 30 days. This penalty takes effect immediately.

The appellants were aggrieved and filed this appeal citing ten (10) grounds of appeal which were subsequently condensed into five (5) major thematic grounds in the appellants' written submissions dated and filed on the 5th day of February, 2018. It is the appellant's complaints that the Judge erred in fact and law:-

“(1) By failing to correctly apply the applicable standard of proof, in matters of contempt of Court orders proceedings.

(2) By failing to find that newspaper reports relied upon by the respondent in support of the alleged disobedience of the court orders issued on 1st July, 2013 were unreliable and of little or no probative value.

(3) By failing to resolve the controversy surrounding the impugned affidavits of service of the process server, one Alex Mutua.

(4) By failing to appreciate that the court orders requiring teachers to return to work by 2nd July, 2013 was not directed at the appellants but at the teachers at large and that the said court order had a self-effecting default clause in that by the time the appellants were actually served with the said court order, the same had been overtaken by events and/or that the default clause had been effected and was therefore in capable of being complied with.

(5) By failing to allow for mitigation before handing down sentences against the alleged contemnor”

When the appeal was called out for hearing on the hearing date, only learned counsel for the appellants was in attendance. The Court being satisfied that the respondent had due notice of the date for the hearing of the appeal, allowed the appellants to prosecute their appeal, which was canvassed by way of written submissions filed on the 5th day of February, 2018, fully adopted and highlighted by learned counsel.

With regard to the correct standard of proof applicable in contempt of court orders matters, learned counsel **Mr. John Mbaluto** urged us to fault the trial Judge, first for the failure to appreciate that there was no positive order directed at the appellants requiring them to call off the strike as the order relied upon by the respondent to cite the appellants for contempt of court order addressed the teachers directly; that the said order was also self-executory; and that the same had also lapsed at 8.00 am on the 2nd day of July, 2013 long before it was brought to the appellants' attention on the 8th July, 2013. In counsels' view, there was therefore no way in the circumstances the appellants could have been accused of knowingly and willfully disobeying the very court orders which had lapsed long before they were brought to their attention. Secondly, counsel also urged us to fault the Judge for the failure to appreciate the 2nd and 3rd appellants' explanations in their respective replying affidavits that it was not within their powers to call off the strike as that power lay with the National Executive Council (NEC) of the first appellant. Thirdly, we were also urged to fault the trial Judge for shifting the burden of proof onto the appellants to disprove the alleged disobedience of the court orders.

To buttress the above submissions, Counsel cited the case of **Mutitika versus Baharini Farm Ltd** (supra), on the threshold for the proof for contempt of court.

With regard to the appellants' complaints that the learned Judge failed to resolve conflicting evidence in the affidavits of service filed by the process server one **Alex Mutua**, as well as the Judge's alleged erroneous reliance on newspaper cuttings contrary to the holding by the court in the case of **IEBC versus NASA Kenya & 6 others** [2017] eKLR, that newspaper cutting were of low probative evidentiary value, we find these were relevant to the determination of the first application for contempt of court orders which was withdrawn on 9th July, 2013 by consent of both parties. There is therefore no need for us to set out the appellants' submissions with regard thereto.

As for the alleged existence of a self-executory clause in item (c) of the orders issued on 1st July, 2013, counsel cited the case of **Teachers Service Commission versus Kenya National Union of Teachers** [2015] eKLR and submitted that, given that the court order merely converted the strike into an unprotected and /or illegal strike in the event it continued beyond 8.00 a.m on the 2nd July, 2013, the same was incapable of being disobeyed by the appellants.

As for the alleged failure to allow for mitigation, before handing down penalties against the appellants, counsel relied on the case of **Joseph Wanambisi & 3 others versus Trans-Nzoia Investments Company Limited** [2012] eKLR, and submitted that contempt of court proceedings being quasi-criminal in nature, the trial Judge is required to call for, receive and consider mitigating factors, if any from the appellant before handing down sentences.

This is a first appeal. Our mandate as has been restated by the Court in the case of **Pipeline Kenya Ltd versus Oppong**[2009] KLR 442 is as follows:

“It is the duty of the court of appeal as a first appellate court, to analyze and evaluate the evidence on the record afresh and to reach its own independent conclusion but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanor and giving allowance for that”.

We have considered the above mandate in light of the record, the appellants' submissions as well as the principles of law relied upon by the appellants in support of their appeal. In our view, the following issues arise for our determination:

- (1) Whether the trial Judge failed to properly appreciate the correct standard of proof in matters of contempt of court orders thereby arrived at a wrong conclusion when she found the appellants culpable for disobedience of the court orders issued on the 1st day of July, 2013, as renewed on the 9th July, 2013.
- (2) Whether the Court order allegedly disobeyed by the appellants was self-executory and was therefore incapable of being disobeyed,
- (3) Whether the trial Judge fell into error when she failed to call for mitigation from the appellants before handing down sentences against them for contempt of court orders.

With regard to the first issue, it is now trite law that contempt of court proceedings as was explicitly stated in the case of **Mutitika versus Baharini Farming** (supra), are quasi-criminal in nature. The standard of proof applicable in such proceedings is therefore higher than that obtaining in ordinary civil claims which is on a balance of probabilities, but not as high as beyond reasonable doubt obtaining in criminal proceedings. See **Woburn Estate versus Margaret Bashforth**[2016] eKLR.

The reason for invoking contempt of court proceedings is to protect the dignity and authority of the court. See **Commercial Bank of Africa Limited versus Isaac Kamau Ndirangu** [1992] eKLR where **Muli, JA** stated:-

“It is imperative that orders of the court must be obeyed as a cardinal basis for endorsement of judicial authority and dignity.

To do otherwise would erode the dignity and authority of the courts.”

The obligation of an addressee(s) of a court order was explicitly stated by **Romer L.J in Hadkinson versus Hadkinson** [1952] ALLER 567 as follows:-

“It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is

shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenharm, L.C., said in Chuck versus Cremer (1) (1 Coop.temp.cott. 342):

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed".

The holding in the **Mutitika** case (supra), makes provision for tests to be applied by the court in the determination of whether the threshold for citing an alleged contemnor for contempt of court has been satisfied. The first test is the determination of the existence of the order (s) made by a court of competent jurisdiction and which were allegedly transgressed. In this appeal, we find this test satisfied as it is not disputed that the orders issued on the 1st July, 2013 and as renewed on the 9th July, 2013 and which formed the substratum of the respondent's 2nd application for contempt of court orders dated 10th July, 2013 were issued and renewed by a court of competent jurisdiction.

The second test is the identification of the addressee (s) of the order allegedly transgressed. In this appeal the addressees of the orders were the 1st appellant as the registered union representing teachers both in primary and tertiary institutions nationwide; the 2nd and 3rd appellants in their capacities as the National Chairman and Acting Secretary General of the first appellant respectively; the teachers who were addressed at large in their capacity as members of the first appellant; the Cabinet Secretary for the time being for labour who was addressed in his capacity as the convener of the negotiations forums as directed by the court; and lastly, the members, agents, servants and or sympathizers of the respective parties to the contempt of court proceedings who were directed not to comment on the matter outside the negotiations forums.

The 3rd test is the determination of whether the orders allegedly transgressed required the addressee (s) to do or to refrain from doing something. The appellants and the respondents were directed to decamp from their hardline positions and proceed to the negotiating table in good faith and negotiate for the rationalization of the remuneration due to the 1st appellant's members under legal notices number 5534 of 1997 and 16 of 2003 and report the outcome of the intended negotiations to court on the Monday of 15th July, 2013. The teachers who had been addressed at large were directed to report back to work by 8.00am on Tuesday 2nd July, 2013, with a rider that any strike beyond the stipulated time would be unprotected and illegal. The Cabinet Secretary for Labour was required to convene the negotiations forums. Lastly, the parties, their members, agents, servants and or sympathizers were restrained from commenting on the matter outside the confines of the intended negotiation forums.

The 4th test deals with the determination of the addressee's knowledge of both the existence of the orders as well as the requirements in such orders as to what the addressee (s) should or should not do. The appellants concede they were served on the 8th day of July, 2013. This is borne out by the court proceedings that took place on the 9th day of July, 2013, in the course of which learned counsel **Mr. Mbaluto**, appearing for the appellants went on record as saying that the appellants who had been served on the 8th day of July, 2013 were not opposed to the respondent's request to withdraw the first application for contempt, subject to payment of costs to them and time to take full and complete instructions on the matter. In reply to **Mr. Mbaluto's** representations, learned counsel for the respondent **Mr. Njoroge** intimated to the court categorically that if the appellants did not obey the court orders by the next day of 10th, July 2013, the respondent would not hesitate to file another application for contempt of court.

On 10th of July, 2013, the parties were back in court and the proceedings of what transpired on this date went as follows:-

"Odera: I filed a notice of appointment yesterday. I have just been served with an application.

Njoroge: The application filed this morning is for leave to commence contempt proceedings. We were in court yesterday.

Odera: The leave can be granted ex-parte as required under the Judicature Act. The applicant can then file a substantive motion upon which we will reply and come to argue the application.

Odera: We are aware of the orders of the court issued on 1st July, 2013.

Court: Upon hearing counsel for the applicant, I certify the matter urgent and also grant leave to the applicant to file contempt proceedings. The application for contempt to be served on the respondents advocate today. Application to be heard inter-partes on Monday 15th July, 2013 at 10.30 a.m."

The above proceedings buttressed the respondent's assertion that the appellants had knowledge of the court orders both as at the 9th July, 2013 when learned counsel, **Mr. Mbaluto** appeared in court on their behalf and acknowledged that they had personally been served with those orders on 8th July, 2013; and also as at 10th of July, 2013, the date when the respondent sought and was granted leave to file the second application to cite the appellants for contempt of those orders.

The above position was also confirmed by the appellants' own counsels' admission on record that as at 9th July, 2013, they had been served with all the relevant papers and were simply seeking time to seek full instructions from their clients on how to react to the application. While on the 10th of July, 2013, the appellants' counsel is on record as having categorically stated that they were aware of the orders allegedly breached; that they had no objection to the application for leave to cite the appellants for contempt of court and that they would respond appropriately when served with the intended application.

In light of the foregoing, it is our conclusion on this point that as at 10th July, 2013, when the respondent filed the 2nd application for contempt of court, all the appellants had full knowledge of the orders issued on 1st July, 2013 as renewed on the 9th July 2013.

Turning to the obligation of the court upon establishing that the contemnors had knowledge of the order(s) allegedly transgressed; the trial court is obligated to invite the alleged contemnors to respond to the allegations pertaining to the alleged disobedience. In this appeal, the Judge complied with this prerequisite when she gave the appellants an opportunity to file a replying affidavit in response to the application of contempt, whose contents we shall revert to shortly.

The next obligation of the court is to determine whether the threshold on the burden of proof in contempt of court proceedings was met and or discharged by the party seeking to cite the alleged contemnors for contempt. The reason for exercising such caution before finding a contemnor guilty of contempt of court orders was highlighted in the **Mutitika** case (supra) and reiterated in many decisions of the court. See also **Woburn Estate Limited versus Margaret Bash-Forth** (supra), wherein, the court made the following statement:-

"We reiterate that contempt proceedings being of quasi-criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning in Re Bramblevale Ltd [1970] 1CH 128 at page 137 that:

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

The 2nd and 3rd respondents response is contained in their replying affidavits in which they deposed *inter alia*, that clause (a) of the order was complied with as they dutifully, diligently and in obedience to the said clause attended negotiations meetings on the 2nd, 5th, 8th and 9th July, 2013; that clause (b) was incapable of compliance at that point in time as it was futuristic; and that clause (c) was incapable of compliance by them as it was directed at the teachers at large. It was also time bound, which time had lapsed long before the appellants were served with the order. They had also not commented on the issue since being served with the court orders on the 8th day of July, 2013 in obedience to clause (d) thereof.

With regard to the call for compliance to call off the strike, the appellants deposed in paragraphs 9 & 10 of their respective replying affidavits that clause (c) did not direct them to call off the strike, and even if it did, the power to do so did not vest in them as the 1st appellant's National Chairman, and Acting Secretary General, respectively. To their knowledge, such power was vested solely in the 1st respondent's National Executive Council ("NEC"), which was the ultimate authority within the 1st respondent's constitutional framework. On that account, the 2nd and 3rd appellants contended that they were not in contempt of court orders as cited.

Considering the above opposing positions on the issue of compliance, the trial Judge, after assessing the record, arrived at the following conclusion thereon:

"61 From the foregoing provisions of the 1st respondent's constitution, it is obvious that the teachers did not just go on strike. They were called out by their union through its organ and officials. The same organ and officials were duly bound to call the teachers back to back (sic) work upon their knowledge of the existence of the orders of this court issued on 1st July, 2013. The fact that the order to go back to work was addressed to the teachers does not take away the responsibility of the respondent to ensure compliance.

We have given due consideration to the conclusion reached by the Judge and it is our finding that the 2nd and 3rd appellants in their replying affidavits did not controvert the respondent's assertion that the first appellant represents all the teachers both in Primary and tertiary institutions nationwide and that they, the 2nd and 3rd appellants were at the material time, officials of the 1st appellant. They did not also controvert the respondent's assertion that it is they who had called the teachers into an industrial action by inviting them to participate in the strike and that the respondent had moved to court to compel them to call off the strike. All that the appellants did by paragraphs 9 & 10 of their replying affidavits as already highlighted above was simply to push the blame on to the 1st appellant's NEC without attaching any proof to that effect.

It is our view, that it is the failure of the appellants to attach such requisite proof that it is only the 1st appellant's NEC that could call off the strike that led the Judge to interrogate the 1st appellant's constitutional framework to establish which organ of the 1st appellant had the mandate to do what was required of the 1st appellant by the orders of the 1st July, 2013 as renewed on the 9th July, 2013. The Judge arrived at the inescapable conclusion that it was the appellants who had called the teachers to strike and that they were the very persons who were mandated by their own constitutional framework to call off the strike. It is therefore our finding that the Judge not only properly appreciated the threshold on the standard of proof in matters of contempt of court proceedings, but also applied it correctly to the facts on the record and arrived at the correct conclusion when she pinned apportioned responsibility to the appellants for the failure to call off the strike.

As to whether clause (c) of the order directing the teachers to go back to class was self-executory and incapable of being disobeyed, we adopt our reasoning herein above that indeed the first limb of item (c) of the orders issued on 1st July, 2013 was self-executory and lapsed on the 2nd day of July, 2013 at 8.00am. The second limb of the said clause did not however lapse and was part of the orders that were renewed by the court on the 9th day of July, 2013. It was capable of being transgressed and was in fact so transgressed when the appellants failed to call off the strike. It therefore forms part of the substratum of the second application for contempt.

Turning to the alleged lack of an opportunity to mitigate before penalties were imposed against the appellants, we reiterate the observations of the court in **Woburn Estate Limited versus Margaret Bashforth** (supra) that contempt of court proceedings being quasi-criminal in nature, each stage and step of the procedure must be scrupulously followed and observed. We also bear in mind the decision of the court in

Joseph Wanambisi & 3 others versus Trans Nzoia Investment Company Ltd (supra), for the observation that, it is good practice that upon finding a contemnor culpable for contempt of court orders, he/she should be accorded an opportunity to mitigate before handing down an appropriate penalty against him/her. In the circumstances of this appeal, it is not disputed that the penalties for contempt of court orders were handed down against the appellants as soon as the finding that they were culpable for the contempt of court orders issued on 1st of July, 2013 and renewed by the Court on 9th July, 2013 was made. They therefore had no opportunity to mitigate before the penalties were handed down against them. The failure of the trial Court to observe the above apparent best practice notwithstanding, we find it prudent in the circumstances of this appeal not to remit the matter to the trial court with directions for it to observe that procedure before handing down penalties against the appellants. Our reason for finding so is because no miscarriage of justice or prejudice was suffered by the appellants for the trial court's failure to observe the above procedural best practice, as none was raised by the appellants in their submission before us. Neither was any issue raised by the appellants that the penalties handed down against them were not within normal permissible limits for similar transgressions.

In the result, and for the reasons given above, we dismiss the appeal against the orders adjudging the appellants guilty of contempt of court orders issued on 1st July, 2013 and as renewed by the Court on 9th July, 2013, and affirm the decision of the trial court in that regard.

The respondent will have costs of the appeal.

Dated and delivered at Nairobi this 26th day of October, 2018.

R.N. **NAMBUYE**
.....
JUDGE OF APPEAL

W. **OUKO**
.....
JUDGE OF APPEAL

P.O. **KIAGE**
.....
JUDGE OF APPEAL

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