



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)**

**CIVIL APPEAL NO. 56 OF 2015**

**BETWEEN**

**SIMON OTIENO ADEDE )**

**SAMSON OMONDI CHILO )**

**MARGARET AWUOR ODHIAMBO ) 1<sup>ST</sup> APPELLANT**

**FRANCIS OCHIENG OSURE )**

**CHRISPINE PUDO )**

**MEK SACCO LTD ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS .. RESPONDENT**

*(An appeal from the decision/order/ruling/findings of the Industrial Court of Kenya at Kisumu (Onyango, J.) dated 1<sup>st</sup> July, 2015*

**in INDUSTRIAL COURT CAUSE NO. 16 OF 2014)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. The appellants have challenged the ruling of the Employment and Labour Relations Court delivered on 1<sup>st</sup> July 2015 (M. Onyango, J.) directing the appellants to immediately reinstate employees of the 2<sup>nd</sup> appellant and pay all salary withheld; summoning the appellants to appear in that court; and ordering issue of a warrant of arrest and punishment by fine in the event of the appellants' failure to appear in that court.
2. In a ruling delivered on 6<sup>th</sup> November 2014, the Employment and Labour Relations Court ordered that the suspension of the employees of the 2<sup>nd</sup> appellant be lifted; that the employees be paid the arrears of half salary that had not been paid since their suspension from employment. That court also directed that any disciplinary process that had to be meted out to the employees

be fair, expeditious and should follow due process.

3. According to the respondent, the appellants breached the orders given on 6<sup>th</sup> November 2014. It therefore applied to the court, by a notice of motion dated 7<sup>th</sup> May 2015, for orders that leave be granted to commence contempt of court proceedings against the appellants “*for disobeying the Honourable Court’s Order issued on 6<sup>th</sup> November 2014.*” In making that application, the respondent invoked Sections 12 and 13 of the Employment and Labour Relations Court Act, 2014, Sections 5 and 6 of the Judicature Act and Articles 47, 50 and 162 of the Constitution of Kenya. The application was supported by an affidavit sworn by David Luttah, an assistant Secretary General of the respondent, who deposed that the appellants had breached the order of the court given on 6<sup>th</sup> November 2014; that they should be summoned to appear in court and either comply with the court order “*or be committed to jail term for such contempt.*”
4. The appellants filed separate replying affidavits in opposition to that application deposing, among other things, that the orders given on 6<sup>th</sup> November 2014 they were accused of breaching had never been served on them.
5. The manner in which the court dealt with respondent’s notice of motion dated 7th May 2015 appears from the impugned ruling itself where the court stated:

***“When the application came before me for hearing ex-parte, I directed that instead of the rigorous proceedings of contempt which is intended to punish the contemnors for failing to comply with a court order, the claimant should take the less combative option of summoning the named officials of the respondent to court to explain why they have not complied with the court order. Summons were subsequently issued and served upon Simon Otieno Adede, Chrispine Pudo, Francis Ochieng Osure, Margaret Awuor Odhiambo, and Samson Omondi Chillo to appear in court today.”***

6. The court then went ahead to make the orders to which we have already referred. That is the basis on which learned counsel Mr. Nyawiri appearing for the appellants complained before us that the procedure the learned Judge adopted was unfair and unjust; that the appellants were effectively condemned unheard; that the principles of natural justice were breached. He referred us to the constitutional provisions and to many authorities on the right to a fair hearing, including authorities on the practice and procedure pertaining to contempt of court proceedings, and the requirements for personal service before a person can be found to be in contempt.
7. On his part, Mr. Ateka, who represented the respondent, conceded that the application dated 7th May 2015 was not heard. He however argued that the procedure adopted by the learned Judge accorded with Section 20 of the Employment and Labour Relations Court Act; that the appellants were indeed heard before the orders complained of were issued; that that court has powers to devise its own procedures; that in any event the appeal is overtaken by events as the orders given on 6<sup>th</sup> November 2014 have since been complied with fully.
8. In our judgment, there is merit in the appellants’ complaints. The learned Judge was no doubt impelled by the overriding objective to expeditiously dispose of the matter and took the view that hearing and determining the “*rigorous proceedings of contempt*” in the nature of the application that was before her would detract from that objective. We think that the Judge fell into error in taking that approach. It is because of the dire consequences that contempt proceedings can result in that a rigorous process involving the requirement for leave, for instance, was put in place. Although we cannot say much at this stage lest we prejudice the determination of the application by the lower court, it was incumbent upon the Judge to deal with the application that was before her. She did not do so and adopted instead, a process that resulted in depriving the appellants of an opportunity to be heard on matters that may well have had an impact on the orders that the learned Judge made.

9. For those reasons, we allow the appeal and set aside the ruling and orders of the court given on 1<sup>st</sup> July 2015. The notice of motion dated 7<sup>th</sup> May 2015 shall be set down for hearing afresh before a Judge of Employment and Labour Relations Court, other than the Hon. M. Onyango, J.
10. Considering that the orders appealed from were made by the lower court on its own motion, we think the appropriate order regarding costs is for each party to bear its own costs of this appeal.

**Dated at Kisumu this 12th day of February, 2016.**

**D. K. MARAGA**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

.....

**JUDGE OF APPEAL**

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

.....

**DEPUTY REGISTRAR**