Kenya Union of Commercial, Food and Allied Workers v Gusii Water & Sanitation Company (Cause 3 of 2022) [2025] KEELRC 1003 (KLR) (31 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 1003 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE 3 OF 2022

JK GAKERI, J

MARCH 31, 2025

BETWEEN

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS ..... CLAIMANT

AND

GUSII WATER & SANITATION COMPANY ..... RESPONDENT

RULING

1. Before the court for determination is the Claimant/Applicant's Notice of Motion dated 8th November 2024 filed under Certificate of Urgency seeking orders that:

    1. Spent.

    2. An order be issued summoning Ms. Lucy Wahito Wachira, the Respondent's Managing Director to personally attend open court to show cause why she should not be punished for disobeying the Judgment and orders of the court delivered and dated 18th July 2024.

    3. An order be issued lifting the corporate veil shielding Ms. Lucy Wahito Wachira, the Respondent's Managing Director, from personal responsibility for her disobedience of the Judgment and orders herein dated 18th July 2024.

    4. An order be issued committing the said M/s Lucy Wahito Wachira to serve Civil Jail term and/or any other appropriate sentence under the Laws of Kenya for her failure to honour the Judgment of the court.

    5. An order be issued directing the OSC Kisii Central Police Station to produce the said M/s Lucy Wahito Wachira in court should she fail to honour the summons of the court and should she fail to attend open court as may be directed by the court from time to time.

6. The Honourable court be pleased to fix a date when the said M/s Wachira should personally appear in the open court in respect of the summons.

7. The Honourable court be pleased to issue any other order deemed just and fit to meet the ends of justice.

2. The Notice of Motion is expressed under Section 5 of the *Judicature Act*, Sections 1A, 1B, 3A and 63 (c) of the *Civil Procedure Act* Laws of Kenya and the Employment and Labour Relations Court (Procedure) Rules, 2024 and is based on the grounds set out on its face and the Supporting Affidavit of Mr. George Obong'o sworn on 8th November 2024.

3. The affiant deposes that by a Judgment dated 18th July 2024, the court directed that the terms of service of the Respondent's unionisable employees would be as per the proposals "Marked A" for 24 months effective 1st July 2024 and the respondent was to align the terms of service with the proposals within 60 days of the Judgment. That on 9th August 2024 the applicant endorsed six (6) copies of the Draft Collective Bargaining Agreement (CBA) aligned with the Judgment of the court for the respondent's signature but the Managing Director of the respondent did not respond and subsequent follow ups yield no results.

4. That by letter dated 19th September 2024 the applicant addressed the Respondent's Managing Director requesting her to sign the Draft Collective Bargaining Agreement but she declined and had thus refused or neglected or ignored the Judgment.

5. That the said Managing Director was in the process of declustering the company with the sole intention to defeat the Judgment and evade signing the Collective Bargaining Agreement.

6. The affiant depones that all attempts to have the respondent's Managing Director sign the Draft Collective Bargaining Agreement had failed.

7. That the Judgment of the court was delivered in the presence of the Respondent's counsel and the respondent is thus aware of the Judgment and orders made and the period of time granted to the respondent to align the terms of service with the Judgment had lapsed and it was in the interest of Justice that the court grants the orders sought.

Respondent's case

8. By a Replying Affidavit sworn on 22nd November 2024, Lucy Wahito depones that she was the Managing Director of the respondent and the instant application was not served on her and was unaware of the hearing on 19th November 2024 and only learnt of the same when the orders was served on even date and Advocates of GIWASCO have been attending court and their failure to do so on 19th November 2024 was not deliberate.

9. The affiant further deposes that the court's Judgment adopted the proposal by the Applicant and ordered the respondent to adopt the same within 60 days. That the Judgment was limited to the terms of service of unionisable employees and the names ought to have been provided of the employees claiming that their terms of service had not been aligned as directed.

10. That the respondent's employees left the applicant and joined Kenya Union of Water and Sewerage Employees (KUWASE) and all are now unionised under KUWASE and the respondent has a Collective Bargaining Agreement with KUWASE which has been receiving union dues on behalf of its members.

11. The affiant avers that *the Constitution* of Kenya allows employees to join a trade union of their choice and the employer had no role to play. That the application for contempt and Kisumu ELRC No. E046

of 2024 are attempts by the Applicant to harass the respondent on account of the employees having left the union and there was no contempt as no employees are unionised by the applicant and had not provided a single name of an employee who had complained about terms of engagement.

12. That the applicant had not particularized terms of the Collective Bargaining Agreement that have not been aligned and the affiant cannot be accussed of not implementing a Collective Bargaining Agreement in favour of unknown employees as employees of the respondent are not members of the union. That the application is incompetent and vexatious.

13. By a further affidavit in support of the respondent's case sworn by Mr. Stephen Bosire Rosana on 2nd January 2025, the affiant depones that following the conclusion of the Recognition Agreement with KUWASE, union dues were being deducted and remitted to the union as the employees resigned from the applicant's union and joined KUWASE without coercion or threats hence the presence of two unions.

14. In a rejoinder sworn on 20th December 2024, Mr. George Obong'o deposes that the respondent had unionidable employee in its employment and are the one covered by the Recognition Agreement and the respondent never demanded the list of unionisable employees. That the respondent availed no evidence to prove that its employee revoked their union membership and no checkoff forms had been provided as evidence of the new union membership purportedly signed with another union is dated 8th February 2022 and was not availed in court.

15. That the respondent was engaged in a futile attempt to defeat the Judgment by approaching another union and no evidence of a new Collective Bargaining Agreement was availed. That the respondent has recognized two unions by choice.

16. Strangely, the affiant commented on the chances of success of ELRC Case No. E460 of 2024 which is not part of the instant suit.

17. That the applicant and the respondent signed a Recognition Agreement on 2nd February 2015 and parties engaged in Collective Bargaining albeit in vain, leading to the Judgment dated 17th July 2024.

18. According to the affiant, the court's adoption of the proposals made those proposals part of the Collective Bargaining Agreement, hence the forwarding of the Collective Bargaining Agreement for signature.

19. That the respondent would align the terms of its employees by incorporating the terms of the Judgment in a Collective Bargaining Agreement.

Applicant's submissions

20. Mr. Boniface M. Kikuvi, the General Secretary of the Claimant union isolated no specific issue for determination but argued that the parties have a Recognition Agreement dated 2nd February 2015 and rehashed the provisions of Section 54 (1) and 57 (1) of the *Labour Relations Act* to argue that the respondent declined to engage in Collective Bargaining and the conciliation process was unsuccessful.

21. Reliance was made on the sentiments of the court in the Judgment delivered on 21st September 2024.

Respondent's Submissions

22. As to whether the respondent disobeyed the Judgment, the respondent's counsel submitted that Judgment was particular that terms of service were with respect to unionisable employees and the union had not in its application provided particulars of the names, position of the employees or the new terms of service that had not been effected in accordance with the Judgment and the court was left

to guess the number or assume all employees were unionisable as no single affidavit from an employee was attached.

23. Counsel submitted that the dearth of information on the actual disobedience shows that the application does not meet the threshold for granting the orders sought as no evidence of wilful or mala fide disobedience had been shown.

24. That the subject of the Judgment are employees unionised by the Claimant not every worker and no details have been provided thus failing to prove contempt.

25. Reliance was placed on the sentiments of the court in Sheila Cassatt Insenberg & Watoto World Centre V Antony Macharia Kinianjui (2001) KEHC 5692 (EA) on the standard of proof in contempt proceedings, to urge that the Claimant had failed to prove that M/s Lucy Wahito Wachira is guilty of contempt.

26. In its supplementary submissions dated 20th December 2024, the Claimant/Applicant union added the issue of the alleged withdrawal of union membership from the applicant and recognition of another union by the respondent.

27. On the former, the applicant cited the provisions of section 54 (5) of the *Labour Relations Act* on revocation of a Recognition Agreement to urge that the respondent ought to treat the two unions equally.

28. Reliance was also made on the provisions of Section 48 (6) (7) and (8) of the Act on deduction of union dues, to submit that the applicant had no union membership withdrawal notices.

29. The applicant argued that the friendly union ought to have utilized the provisions of Section 54 (6) and (7) of the *Labour Relations Act* as it was aware of the applicant's existence.

Analysis and determination

30. It is common ground that the applicant and the respondent concluded a Recognition Agreement on 2nd February 2015 but the road to a Collective Bargaining Agreement (CBA) turned out to be rather bumpy and no Collective Bargaining Agreement was concluded and by a Judgment dated 21st September 2021, the Learned Judge directed the parties to engage and conclude a Collective Bargaining Agreement within 60 days and the court would place a tag on the negotiations and issue further orders, if negotiations failed.

31. However, the respondent's non-co-cooperativeness precipitated the application dated 15th July 2022 for orders directing the respondent to co-operate with the Ministry of Labour and the order was issued and by a Judgment dated 18th July 2024, the court issued the following orders:

> Consequently, the claim is allowed in the following terms:-
>
> a. The Claimant's proposal marked "A" attached to the claim are adopted as terms of service for the respondent's unionisable employees for 24 months from 1st July 2024.
>
> b. The respondent is directed to align the terms of service with the adopted proposals within 60 days of this Judgment.
>
> c. In the interest of Social Partnership, parties are ordered to bear their own costs"

32. These are the orders that precipitated the instant application for contempt against the respondent's Managing Director.

33. While the Applicant/Claimant submitted that the respondent's Managing Director has refused, neglected or ignored the court's directions, the respondent submitted that it has not as the applicant inter alia has no members in the respondent's employ and thus it has not proved disobedience with any court order.

34. The singular issue for determination is whether the Applicant/Claimant's Notice of Motion is merited.

35. Significantly, the applicant admits that after the Judgment was delivered on 18th July 2024, it forwarded six (6) copies of the Draft Collective Bargaining Agreement to the respondent's Managing Director for signature on 9th August 2024 and she did not do so.

36. Although the applicant does not state so, the instant application is a consequence of the Respondent's Managing Director's failure to sign the Draft Collective Bargaining Agreement.

37. Did the court direct the respondent to sign a Collective Bargaining Agreement with the Claimant/Applicant union?

38. In the court's view, the short answer is in the negative for the reason that although the parties were negotiating a Collective Bargaining Agreement and had been in negotiations for a long time, the court adopted the "Claimant's proposal Marked ";A" as terms of service for the respondent's unionisable employees for 24 months effective 1st July 2024.

39. Contrary to the Applicant/Claimant's submission that adoption of the proposals by the court made them part of the Collective Bargaining Agreement the court did not state so and only adopted them as progressive terms of service for unionisable employees granted that the parties had failed to conclude a Collective Bargaining Agreement.

40. In this Court's view the learned Judge was filling a gap created by the absence of a consensus between the Claimant/Applicant and the respondent.

41. The rationale for the foregoing is that a Collective Bargaining Agreement is an agreement between the parties thereto on terms and conditions of service but unlike other agreements, it must be in writing and registered by the Employment and Labour Relations Court at the instigation of the parties and becomes enforceable after registration. (Section 59 (5) of the Labour Relation Act). Before registration, the parties have a draft or proposed Collective Bargaining Agreement.

42. Section 2 of the *Labour Relations Act* provides: -

> "Collective Agreement means a written Agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organization of employers.
>
> As the courts have held, "These are instruments provided by law to enable employers and trade unions agree on terms and conditions of employment and that is why it is referred to as a Collective Agreement and the court is not party to that agreement as its mandate is to register the agreement."

43. In Amalgamated Union of Kenya Metal Workers V Kenya vehicles Manufacturers Ltd (2018) eKLR, the court held:

> "The Court cannot descend to the arena of negotiations of terms of employment at the work place. This court guided by the Court of Appeal decision in Teachers Service Commission

(KNUT) & 3 others (2015) eKLR has no business setting terms of a Collective Bargaining Agreement."

44. In the Teachers Service Commission v KNUT & 3 others (supra) the Court of Appeal lad it bare that:

> "The very essence of a Collective Agreement is that the terms and conditions thereon contained are voluntarily agreed upon between the employer and the union...
>
> If the Labour Court fixes basic salary in a Collective Agreement as the Labour Court, the Collective agreement ceases to be a Collective agreement as envisaged by the Law."

45. In the words of Odek JA

> "It is my considered view that Collective Bargaining is neither compulsory nor automatic. It is the source of voluntarily negotiated terms and conditions of service for employees. Collective Bargaining is a platform upon which trade unions can build to provide more advantageous terms and conditions of service to their members. The right is grounded on the concept of social dialogue, freedom of contract and autonomy of parties in Collective Bargaining...
>
> The Article emphasizes the ability of employer and trade unions to operate as partners not adversaries... The constitutional recognition of the right to collective bargaining is not a right to blackmail a party into Collective Bargaining."

46. The court is bound by the foregoing sentiments of the Court of Appeal.

47. See also Kenya National Private Security Workers Union V Wells Fargo Ltd (2020) eKLR, Nairobi City County Government V Kenya County Government Workers Union; SRC (Interested Party (2019) eKLR and Social Services League, M. P. Shah Hospital KUDHEIHA (2018) eKLR among others.

48. The Jurisprudence emerging from these decisions is emphatic that a Collective Agreement is a contract between the party thereto and the Employment and Labour Relation Court has no role in the negotiation of a Collective agreement and cannot insert terms therein.

49. For the foregoing reasons, the court is satisfied that the learned Judge was not incorporating the Claimant's proposal into a Collective Bargaining Agreement. The Judge did not state so. The three Orders made by the Learned Judge on 18th July, 2024, in the court's view are unambiguous. The Court adopted the proposal as an order of the court which made the terms and conditions therein terms of service for unionisable employees of the respondent.

50. The Applicant/Claimant accuses the Respondent's Managing Director for disobeying the Judgment and order of the court delivered on 18th July 2024.

51. Ground Nos. 2,3, 4 and 5 and 7 of the Notice of Motion are based on the Managing Director's failure to sign the draft Collective Bargaining Agreements sent to her on 9th August 2024.

52. Ground 6 of the Notice of Motion makes reference to de-clustering.

53. The pith and substance of the applicant's case is that one M/s Lucy Wahito Wachira is guilty of contempt of court for disobeying court orders by failing to sign copies of the Collective Bargaining Agreement dispatched to her on 9th August 2024 and de-clustering of the respondent company.

54. In Republic V Ahmad Abuljathi, Mohamed & Another (2018) eKLR, the Supreme Court held; -

> "Authorities on the necessity to punish contempt are legion. We have considered those provided by the respondent and also cite the following in affirmation of the principle".

55. In Econey Wireless Kenya ltd V Ministry of Information & Communication of Kenya and another (2005) IKLR 828, Ibrahim J (as he then was) relied on the Court of Appeal decision in Gulabchand v Popatlal & another Civil Appeal No. 39 of 1990 (unreported), where the Court of Appeal stated as follows: -

> "It is essential for the maintenance of the rule of law and order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnor..."

56. See also Hadkinson V Hadkinson 2ALLER 567, Josephine Mueni Mutunga V Energy Regulatory Commission & another (2016) eKRL, Silas Ngare V John Akama & Another (20160 eKRL and Teachers Service Commission KNUT & 2 others (2013) eKRL.

57. The principles that govern contempt proceedings are well settled.

58. In Samuel M. N. Mweru & Others V National Land Commission & 2 Others (2020) eKLR the Court held: -

> It is an established principle of law that in order to succeed in Civil Proceedings, the applicant has to prove
>
> i. The terms of the order
>
> ii. Knowledge of these terms by the respondent.
>
> iii. Failure by the respondent to comply with the terms of the order.

59. Upon proof of these requirements the presence of wilfulness and bad faith on the part of the respondent would normally be inferred but the respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of Civil Contempt was stated by the learned authors of the book Contempt in Modern Newzealand who succinctly stated:

> There are essentially four elements that must be proved to make the case for Civil Contempt. The applicant must prove to the required standard in Civil Contempt cases which is higher than Civil Cases that: -
>
> a. The terms of the order (or injunction is undertaking were clear and unambiguous and were binding on the defendant.
>
> b. The defendant had knowledge of or proper notice of the terms of the order.
>
> c. The defendant has acted in breach of the terms of the order; and
>
> d. The defendant's conduct was deliberate."

60. See Katsuvi Ltd V Kapurchand Depar Shah (2016) eKLR, Mahinderjit Singh Bitta V Union of India & Others I No. 10 of 2020, Republic V Attorney General & Another Exparte Mike Kamau Mamoina.

61. On the burden of proof, the matra that he who alleges must prove as encapsulated by the provisions of Section 107, 108 and 109 of the *Evidence Act* apply. The applicant must prove that the respondent is guilty of contempt of court and deserves punishment.

62. Significantly, the standard of proof is however, higher than in ordinary civil cases for obvious reasons.

63. In B V Attorney General (2004) IKLR 43 Ojwang J (as he then was) stated:

> "It is therefore evident that not only do contemnors demean the integrity and authority of the court, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt is well established." In the case of Mutitika V Baharini Farm Ltd (1985) KLR 229 at 234, the Court of Appeal held that:
>
> > "In our view, the standard of proof in contempt proceedings must be higher than proof on a 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."
> >
> > The rationale for this standard is that if cited for contempt and the prayer sought is for committal to jail the liberty of the contemnor will be affected. "As such the standard of proof is higher than the standard in Civil Cases. This power to commit a person to jail must be exercised only as last resort. It is of utmost importance therefore for the respondents to establish that the alleged contemnor's conduct was deliberate in the sense that he or she wilfully acted in a manner that faulted the court order."

64. In the instant application, and as adverted to elsewhere in this Ruling, the respondent's Managing Director is being accused of refusal to sign copies of the draft Collective Bargaining Agreement, which in the court's view, does not amount to contempt of court for reasons outlined earlier in this Ruling.

65. The learned Judge did not direct or order the parties to sign the Collective Bargaining Agreement or any Collective Bargaining Agreement. It adopted the proposals as its order making them the terms and conditions of service for unionisable employees of the respondent.

67. The Applicant/Claimant's case herein was to prove that the proposals were not implemented within 60 days as directed by the court and the refusal was deliberate and no scintilla of evidence to that effect was adduced.

68. As contended by the respondent, the applicant has not attached any verifiable evidence to show that the employees of the respondent who are its members had complained, as no affidavit to that effect was filed, or that the terms of service they are enjoying were different from those in the proposal marked "A".

69. On De-clustering of the company, the applicant adduced no evidence to demonstrate that it was the Managing Director's initiative and was principally conceived and designed to frustrate the Judgment of the Court.

70. In particular, the Applicant did not file a copy of the Gazette Notice No. 11785 dated 13th September 2024 which appear to have appointed a Taskforce with terms of reference or objectives or evidence that the respondent's Managing Director appointed the Taskforce single handedly, without reference to the Board of Directors of the respondent company and purposely to circumvent court orders.

71. It is also notable that in Kisumu ERLC E046 of 2024, the Applicant/Claimant union is suing the Respondent for outstanding union dues for several years excluding the 2nd half.

72. It is also evident that the amount claimed of 2023 and the 1st half of 2024, yet the suit was filed on 31st May, 2024. This would appear to suggest that the Applicant/Claimant had other information which informed its decision to file another suit as it was already in court in an on-going matter between the same parties. An application for payment of outstanding dues would have been sufficient as opposed to filing anew suit.

73. Finally, and as submitted by the Applicant/Claimant the Recognition Agreement between it and the respondent remains in force, as it has not been revoked in accordance with the provisions of the *Labour Relations Act* and ought to have receiving union dues from the respondent from its members.

74. However, the Applicant/Claimant union did not file a list of its current membership to embellish its case by showing that its membership was yearning for implementation of the court Orders.

75. This was an essential requirement because the Orders made by the learned Judge on 18th July, 2024 affected unionisable employees effective 1st July, 2024 for 2 years.

76. The Recognition Agreement notwithstanding, the Applicant/Claimant union had to demonstrate that it still had members among the unionisable employees of the respondent.

77. Notably, the respondent raised the issue of the presence of another union and adduced evidence to show that its employees had moved on to KUWASE, effective early 2024, a reality the Applicant/Claimant union did not wish to acknowledge.

78. Regrettably, unions have descended to the discreditable arena of competing for membership or at the worst enticing employees to leave one union in favour of another with the connivance of the employers for seldomly disclosed benefits.

79. Although workers are Constitutionally empowered to join trade unions of their choice, the employer has no role to play and ought not to be involved or perceived as having been privy to the shift or contributed to it as it denies trade unions their right to autonomy and to represent workers effectively. It weakens the trade union movement and is undoubtedly a zero sum game and a race to the bottom.

80. Needless to emphasize, a vibrant and progressive trade union movement plays a key role in economic development by championing the interests of workers and engaging stakeholders to ensure industrial harmony and speedy resolution of disputes when they arise among others.

81. For the foregoing reasons, it is the finding of the court that the Applicant/Claimant has failed to discharge the onerous burden of proof that the respondent's Managing Director, M/s Lucy Wahito Wachira violated any court order(s) or is otherwise guilty of contempt of court.

82. In the upshot, the Applicant/Claimant's Notice of Motion dated 8th November 2024 is unmerited and it is accordingly dismissed with no orders as to costs.

83. It is so Ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 31ST DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE