



**Kenya Civil Engineering Workers Union v M/S Crom Impex (K) Limited  
(Cause 279 of 2019) [2024] KEELRC 379 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 379 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 279 OF 2019  
NZIOKI WA MAKAU, J  
FEBRUARY 28, 2024**

**BETWEEN**  
**KENYA CIVIL ENGINEERING WORKERS UNION ..... CLAIMANT**  
**AND**  
**M/S CROM IMPEX (K) LIMITED ..... RESPONDENT**

**RULING**

1. Before this Honourable Court for determination are the Claimant’s Notice of Motion Application dated 20<sup>th</sup> December 2023 for contempt of Court Orders and the Respondent’s Notice of Motion Application dated 21<sup>st</sup> December 2023 for stay of execution and review of the Judgment and Decree of the Court.
2. In the Notice of Motion Application dated 20<sup>th</sup> December 2023, the Claimants/Applicant sought the following Orders:
  - a. Spent.
  - b. That, the Honourable Court deem fit and be pleased to issue an Order against the Respondent’s Director, Hussein Zein to appear in Court to show cause why he should not be held in contempt of Court Orders and/or directions to the OCS of Industrial Area Police Station to arrest and produce him in the Honourable Court for sentencing to civil jail.
  - c. That, the cost of this suit be provided for by the Respondent.
  - d. That, any other Relief the Honourable Court may deem fit to grant.
3. The Application was premised on the grounds set out on the face thereon and supported by the Affidavit of Mr. Wycliffe A. Nyamwata, who averred that the Applicant and her members shall suffer irreparable damages if the Orders sought herein are not granted. He stated that this Court issued Orders in the Judgement delivered on 21<sup>st</sup> September 2023 directing the Respondent herein to pay



unpaid union dues amounting to Kshs. 108,535/- and cost of Kshs. 20,000/-, to effect deduction and remittance of union dues and to sign a recognition agreement. That the said Judgment and Decree were then properly served upon the Respondent through the authorized Court process server and acknowledged for through signing on the same. He noted that the earlier Court Orders for compliance on union dues issued on 15<sup>th</sup> November 2019 were also served through the Court process server and an Affidavit of Service filed in Court but the Respondent declined to comply with the same. It was Mr. Nyamwata's averment that the Claimant wrote to the Respondent on 14<sup>th</sup> December 2023 and forwarded a signed copy of the Recognition Agreement while also demanding for full compliance of the Court Orders. That however, the Respondent totally declined or refused to comply with Court Orders and continued to disobey the same with impunity without even seeking for stay of execution of the Court Judgement and or Orders.

4. In response, the Respondent filed a Replying Affidavit sworn by Mr. Hussein Zein on 19<sup>th</sup> January 2024. Mr. Zein averred that Judgment of 21<sup>st</sup> September 2023 was delivered in the absence of the Respondent's Advocates as no Judgment Notice was served and/or issued upon them. That the said Judgment was also delivered after the matter had proceeded for hearing in the absence of the Respondent's Advocates since no hearing notices were ever issued and/or served upon them. That considering the foregoing, the Proceedings, Judgment and consequent Orders ought to be set aside because the Respondent were condemned unheard and without proper interrogation of the facts. Mr. Zein further averred that the Respondent was only notified of the Judgment and Decree of the Court through the Claimant's letter dated 14<sup>th</sup> December 2023 and the Respondent then subsequently filed the Application dated 21<sup>st</sup> December 2023.
5. The Respondent further filed its Notice Motion Application dated 21<sup>st</sup> December 2023 seeking for Orders:
  - a. Spent.
  - b. That there be an Order for stay of execution of the Judgment delivered on 21<sup>st</sup> September, 2023 and Decree issued on 3<sup>rd</sup> October, 2023 by this Honourable Court pending the hearing and determination of this Application inter-parties.
  - c. That the Decree issued by this Honourable Court on 3<sup>rd</sup> October, 2023 be reviewed and set aside on the ground that there is a mistake and/or error apparent on the face of the record.
  - d. That costs of the application be provided for.
6. The Respondent's Application was supported by the Affidavit of Mr. Hussein Zein sworn on 21<sup>st</sup> December 2023. Mr. Zein reiterated his averments made in his Replying Affidavit dated 19<sup>th</sup> January 2024 as set out herein above and further averred that the Application for stay had been filed without delay. He averred that the suit herein was filed on the premise that the persons listed at page 15 of the Memorandum of Claim dated 25<sup>th</sup> April 2019 were its employees and members of the Claimant Union yet from those listed thereat, the Respondent had received Notices of Resignation from the Union from three persons, Resignation Letters from two persons, and three other persons left the Respondent's employ in April 2019, September 2019 and March 2021. He notified the Court that the said resignation and termination letters were filed in Court vide the Replying Affidavit sworn on 6<sup>th</sup> June 2019 and filed on 10<sup>th</sup> June 2019. Mr. Zein fronted that as such, the Claimant's membership did not and does not meet the statutory threshold of a simple majority of unionisable employees to warrant execution of a Recognition Agreement and to claim deduction of union dues. He urged the Court to this review the Decree issued on 3<sup>rd</sup> October 2023 and allow the Respondent's Application in the interest of justice. That there is an error apparent on the face of record to warrant review of



the said Decree and the Claimant will not be prejudiced in any manner if the Orders sought in the Respondent's Application dated 21<sup>st</sup> December 2023 are granted.

7. Responding to the Respondent's Application, the Claimant filed a Replying Affidavit sworn by Mr. Nyamwata dated 17<sup>th</sup> January 2024. Mr. Nyamwata averred that the Respondent's allegations that no service was effected upon them is unfounded and that the Respondent's Application does not meet the legal threshold for review. He asserted that the Respondent's Application dated 21<sup>st</sup> December 2023 is an afterthought meant to derail the Claimant's Application dated 20<sup>th</sup> December 2023 for contempt of Court Orders.

### **Claimant's Submissions**

8. The Claimant submitted that the issues for determination by the Court are:
  - a. Whether it is true that the Respondent was never served.
  - b. Whether the Respondent's Application meets the threshold for review.
  - c. Whether the Claimant's Application is merited.
9. In regards to both Applications before Court, it was the Claimants' submission that the Respondent was indeed served with the Memorandum of Claim together with the Application under Certificate of Urgency and Notice of Summons but chose to only file a Replying Affidavit and Submissions on the Application and failed to respond to the main Claim. Moreover, that the Respondent was always served with Mention Notices as shown on page 11 of the Claimant's Replying Affidavit dated 17<sup>th</sup> July 2024, which bear the stamp of the Respondent's Counsel.
10. On the threshold for review, the Claimant submitted that Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provides that:
  33.
    - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
      - a. if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
      - b. on account of some mistake or error apparent on the face of the record;
      - c. if the judgment or ruling requires clarification; or
      - d. for any other sufficient reason.
11. Further, the Claimant argued that the withdrawal letters filed by the Respondent do not meet the requirements set out at section 48(6), (7) and (8) of the *Labour Relations Act* (Cap 233), with section 48(8) being in mandatory terms from the use of the word 'SHALL' to effect that, [a]n employer shall forward a copy of any notice of resignation he receives to the trade union. It was the Claimant's submission that since the alleged Resignation Notices have never been forwarded to the Union, they are null and void.



12. On issue (iii), the Claimant submitted that its Application dated 20<sup>th</sup> December 2023 is merited because this Court pronounced itself on the suit while the Respondent had chosen not to file any response or participate in the litigation. That even if this Court were to set aside the Judgment and Decree, the Court Orders issued on 15<sup>th</sup> November 2019 still remain as they have neither been challenged nor complied with by the Respondent. The Claimant further submitted that the Respondent cannot talk of an error on the face of a decree when it has not provided the information to the Court. That the Respondent should have signed the Recognition Agreement then applied to the National Labour Board, as required in law, for revocation of the same considering no proof was filed in Court on the alleged 14 employees either at the time of filing this suit or at the time the Judgment was delivered. The Claimant thus prayed for its Application dated 20<sup>th</sup> December 2023 to be allowed and the Respondent's Application to be dismissed with costs to the Claimant.

### **Respondent's Submissions**

13. According to the Respondent, this Court is called upon to determine the following issues:
- a. Whether an Order should issue against the Respondent to appear in court to show cause why he should not be held in contempt of court orders.
  - b. Whether the Decree issued on 3<sup>rd</sup> October 2023 ought to be reviewed and set aside on the basis of mistake and/or error apparent on the face of the record.
14. The Respondent submitted that the Claimant's membership did not meet the 51% threshold to warrant signing of a recognition agreement as at the time of filing suit because the Claimant's members were only four (4) and the Respondent had over 14 employees. It further submitted that there was no proof of service or an affidavit of service on record showing how the Respondent was served and in particular, service upon the Respondent's Advocates on record. Moreover, that there is also no proof of service of the Judgment Notice and as such, any omission by the Respondent was not deliberate. It was the Respondent's submission that the Claimant's Application must thus fail as it had not met the threshold required for an application for contempt as it bears, considering that an applicant must prove that the disobedience of an order was wilful and in bad faith based on knowledge of court orders per *Samuel M. N. Mweru & others v National Land Commission & 2 others* [2020] eKLR.
15. The Respondent submitted that there was a mistake and/or error apparent on the face of the record because the Judgment and Decree of the Court was based on inaccurate facts on the Claimant having realised the required threshold for membership to warrant a recognition agreement, and that the Union's alleged members were employees of the Respondent and/or had agreed to be members of the Claimant. The Respondent asserted that it is unable to remit any dues to the Claimant Union as the said alleged members are either no longer members of the Claimant and/or no longer in the Respondent's employ. In seeking that the Judgment and Decree of the Court be reviewed and set aside, the Respondent relied on the case of *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR wherein the Court of Appeal held that:

“The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgment is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant



has reasonable defence which is usually referred as whether the defence is filed already or if a draft defence is annexed to the application, raises triable issues...

... In this case before us, the defence and counterclaim was already in the file when the matter was heard ex parte and the trial Magistrate stated that she considered the same and dismissed it. We do not appreciate how she could have dismissed the same defence and counterclaim when the appellant was not in Court to put forward its case. Further, it appears to us that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input. For example, the appellant alleged that although the respondent pleaded that the subject vehicle was worth Kshs. 40,000/-, the vehicle had been valued at Kshs. 21,000/-. This was in our view a reasonable triable issue and did entitle the appellant to be heard on his defence.

The learned judge of the Superior Court did with respect fall into the same trap when she held that as the magistrate was satisfied that the defendant was served and had earlier held in the judgment that the vehicle was unlawfully sold and defendant was liable to pay damages, the magistrate had exercised her discretion rightly in refusing to set aside the ex parte judgment because she had dismissed the defence and counterclaim, on the evidence adduced before her of the monies paid towards the claim in the defendant's counterclaim. We are of the humble opinion that in so holding, the learned judge of the Superior Court did not apply the right approach to the issues that were raised before her. The respondent had a judgment which was not obtained by consent or as a consequence of a full trial. Both before the Trial Court and the Superior Court, the applicant's counsel laid a lot of emphasis on the argument that there were several triable issues raised by the defence in its defence and counterclaim which was before the Court and urged the Trial Court to set aside ex parte judgment to allow the appellant ventilate the same issues, and further urged the Superior Court to allow the appeal on that ground. What we feel the Trial Court should have done when hearing application to set aside ex parte judgment, was to ignore her judgment on record and look at the matter afresh considering the pleadings before her (i.e. plaint, defence and counterclaim) and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised then, whether the reason for the applicant's appearance were weak, she was in law bound to exercise her discretion and set aside ex parte judgment so as to allow the appellant to put forward its defence..."

16. It was the Respondent's submission that based on the documents already on record, the Judgment and Decree of the Court ought to be reviewed and set aside, for lack of proper service and mistake and/or error apparent on the face of the record. It prayed that the Claimant's Application dated 20<sup>th</sup> December 2023 be dismissed with costs and the Respondent's Application dated 21<sup>st</sup> December 2023 be allowed.
17. The issues for determination in my considered view are as follows:-
  - a. Was the Respondent duly served with summons?
  - b. Does the motion by the Respondent meet the threshold for review?
  - c. What orders are to issue?
  - d. Who is to bear the costs?
18. The Claimant instituted the claim on 26<sup>th</sup> April 2019 and from the record before the Court, the Respondent was served and the Respondent entered appearance and filed a reply to the application that accompanied the claim on 6<sup>th</sup> June 2019 but never filed a defence. The record before me shows



there was service of process on various dates and the Respondent was properly served for hearing per the record.

19. The *Employment and Labour Relations (Court) Procedure Rules* 2016 give the parameters for review. The motion by the Respondent does not assert the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the Respondent. Neither did the Respondent show the alleged error apparent on the face of the record as the record is clear on service both upon the Respondent and its Counsel. The long and short of the foregoing is that the motion by the Respondent does not meet the threshold for review and is accordingly dismissed.
20. The law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The alleged contempt of court is stated to have been committed sometime last year. The Court being mindful of the high bar one has to surmount in proving contempt, I find that the contempt of court asserted herein does not meet the threshold for grant of the order for committal. The Director of the Respondent is not shown to have been personally served with the order of the court and that he wilfully disobeyed it. having so found the court does not find him to be in contempt.
21. The Claimant was successful in resisting the application for review and setting aside and is thus entitled to costs. Costs be agreed or taxed.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY 2024**

**Nzioki wa Makau**

**JUDGE**

