



Kenya Chemical Workers Union v Kenya Flexgravure Limited (Cause E022 of 2023) [2024] KEELRC 640 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 640 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E022 OF 2023
DN NDERITU, J
MARCH 20, 2024**

**BETWEEN
KENYA CHEMICAL WORKERS UNION CLAIMANT
AND
KENYA FLEXGRAVURE LIMITED RESPONDENT**

RULING

I. Introduction

1. In a memorandum of claim dated 16th March, 2023, the claimant prays as follows -
 - a. This Honourable court be pleased to issue a Temporary Injunction restraining the Respondent from interfering with the employment of the locked out employees in any manner whatsoever either by itself and or servants and or agents and or any other with authority of the Respondent.
 - b. This Honourable court be pleased to issue a Permanent Injunction restraining the Respondent from interfering with the employment of the locked out employees in any manner whatsoever either by itself and or servants and or agents and or anyone with authority of the respondent.
 - c. This Honourable court be pleased to issue an order for the grievants/employees of the respondent to access the premises and continue with their work unconditionally with no interference from the respondent in any manner whatsoever either by itself and or servants and or agents and or anyone with authority of the respondent.
 - d. This Honourable court be pleased to grant any further orders that it might deem fit, fair and just.
 - e. The cost of this case be met by the respondent in favour of the claimant.



2. In a ruling delivered on 18th May, 2023, in respect of a notice of motion filed alongside the memorandum of claim, this court made the following orders –
 - a. That pending the hearing and determination of this cause or until such other or further orders of this court an interim order of injunction be and is hereby issued restraining the Respondent from terminating the affected employees on redundancy or in any other manner except in accordance with the law.
 - b. That pending the hearing and determination of this cause or until such further and or other order of this court and unless lawfully terminated on redundancy or otherwise, the affected employees shall continue to receive and the Respondent is ordered to pay their monthly salaries payable as at the time of lockout on 13th March, 2023.
 - c. That in default of (a) and (b) above the Claimant shall be at liberty to move the court as appropriate.
 - d. The costs of this application shall be in the cause.
3. In a notice of motion dated 3rd July, 2023 (the application) the claimant is seeking the following –
 1. Spent.
 2. That the Honourable court be pleased to issue summons and an order compelling and or directing Mahendra Chandulal Patel, Sonal Patel And Sejal Ashish Patel to appear before Court within the next seven (7) days and or such period as shall be directed by the Court to explain to the Court why they have failed and or refused to comply with this Honourable Court's Order given on 18th May, 2023.
 3. That the Honourable Court be pleased to commit the contemnors Hamendra Chandulal Patel, Sonal Patel And Sejal Ashish Patel to civil jail for a period of Six (6) months or any other period that the Honourable Court deems fit and or until they purge the contempt and or such further orders be made as maybe just.
 4. That the Contemnors Mahendra Chandulal Patel, Sonal Patel and Sejal Ashish Patel purge the contempt by obeying this Honourable Court's Orders given on 18th May, 2023 through paying the salaries of its employees as frfm 13th March 2023, and be estopped from further disobeying Orders issued by this Honourable Court.
 5. That the Costs of this Application be borne by the contemnors.
4. The application is expressed to be brought under Section 5 of the *Judicature Act*, Section 29 of the *Contempt of Court Act*, Order 40 Rule 4 of the Civil Procedure Rules, and all other enabling provisions of the law.
5. The application is based on the grounds on its face and supported with the affidavit of Peter Ouko Onyango, the national secretary general of the claimant, sworn on even date with one annexure thereto, being the ruling of this court delivered on 18th May, 2023.
6. The application is opposed and the respondent through Maiyo, Mbugua & Cheruiyot Advocates filed a replying affidavit sworn by Mahendra Chandulal Patel, a director of the respondent, on 3rd November, 2023.
7. With the leave of court, the claimant filed a supplementary affidavit on 25th January, 2024, sworn by Peter Ouko Onyango on 23rd January, 2024 with several annexures thereto.



8. When the application came up in court for directions on 6th November, 2023, it was by consent directed that the application be canvassed by way of written submissions. Counsel for the respondent, Mr. Maiyo, filed his written submissions on 4th December, 2023, and Mr. Mutongoi for the claimant filed on 25th January, 2024.

III. Analysis

A. Affidavits

9. Essentially, the applicant is seeking that the court finds the directors of the respondent, as named in the application, to be in contempt of the court orders issued on 18th May, 2023, and consequently, that the said directors be summoned to appear in court to show-cause why they should not be punished for being in contempt of the said orders, failure to which that the said directors be punished by way of serving six months of civil jail and or until such a time when they purge the alleged contempt.
10. In the supporting affidavit, it is deposed that the named directors of the respondent have failed, refused, and or neglected to obey the impugned court orders or at all and that they have even violated the same.
11. In the replying affidavit the respondent denies that it has ignored, disobeyed, and or in any other manner or way breached, violated, or failed to obey the impugned court orders.
12. In the supplementary affidavit it is alleged that in June, 2023, the respondent issued the grievants with letters of redundancy contrary to the court orders of 18th May, 2023.

(B) Submissions By Counsel

13. On the one hand, the claimant reiterates the claims and allegations made in the application and the supporting affidavit. The decision in Samuel M. N. Mwweru & Others v National Land Commission & 2 Others [2020] eKLR is cited in support of the ingredients of contempt of court. It is submitted that the cited directors of the respondent were aware or had knowledge of the terms of the impugned orders of the court and that they deliberately and notoriously failed, refused, and or neglected to obey or comply therewith and instead allegedly violated the same.
14. Further, it is submitted that after the court had issued the impugned orders the respondent purported to terminate the grievants through a redundancy process that did not comply with the provisions of Section 40 of the *Employment Act* (the Act). The claimant has cited David Omutelema et al v Thomas De La Rue [2013] eKLR and Kenya Airways Limited v Aviation & Allied Workers Union & 3 Others [2014] eKLR on the steps and procedure that shall be undertaken in declaring employees redundant. It is submitted that the respondent failed to comply with the law as ordered by the court and the named directors should be held in contempt of the impugned court orders.
15. On the other hand, counsel for the respondent has isolated two issues for consideration and determination by the court – Whether the claimant has proved its claim to the requisite standards; and, Whether the claimant is deserving of the orders sought.
16. Counsel for the claimant has submitted that no evidence has been availed on how the respondent has failed to comply with the impugned court orders as to call upon the court to punish the named directors. It is submitted that no particulars of the alleged breach, violation, or contempt of the said court orders have been evidenced as to call upon the respondent to respond thereto. It is submitted that the generalized allegations of contempt by the claimant are not adequate and cannot suffice to subject the named directors to the serious legal and penal consequences of contempt of court.



17. Counsel has cited Samuel M. N. Mweru & Others v National Land Commission (Supra) on the ingredients of contempt of court on what an applicant must prove.
18. It is submitted that the grievants in this cause are not named and or disclosed and none of them has sworn an affidavit in support of the application in confirmation of the alleged contempt.

IV.Determination

19. The court has carefully and dutifully gone through the pleadings filed herein starting with the memorandum of claim, the ruling dated 18th May, 2023, the application that is the subject matter of this ruling, the supporting and replying affidavits thereto, and the written submissions from both sides. To a large extent, the respective positions taken by the parties are articulated in the summaries of the affidavits and submissions in the foregoing part of this ruling.
20. There is only one issue for determination in this application – Is the respondent in contempt of the orders of the court issued on 18th May, 2023 as to compel this court to issue the orders sought for in the application?
21. The primary and overriding objective and indeed duty of this court is to do justice in accordance with Article 159 of *the Constitution*, Sections 1A and 1B of the *Civil Procedure Act*, and Section 3 of the *Employment and Labour Relations Court Act*, amongst many other provisions of the law.
22. In my understanding of the entire contents and circumstances of this application, the claimant's case is that after the court issued the orders of 18th May, 2023, the respondent engaged in what the claimant considers to be an illegal and unlawful process which culminated in the grievants being declared redundant. On the other hand, the respondent takes the position that it has complied with the law and that it is not in contempt of the impugned court orders. It is the respondent's position that the application is misconceived and an abuse of the court process.
23. The court has observed that this cause has one major flaw. While the claimant pleads that it represents workers in the chemical and allied industries in Kenya, there is no disclosure as to who the grievants are in this cause. There is also no evidence of membership of the purported grievants with the claimant. There is no argument that the claimant has filed this cause in a representative capacity for and on behalf of some grievants and not in any other manner or capacity. It is the finding and holding of this court that where a union or an employers' organization brings to court an action in a representative capacity, the grievants or the members thereof shall be disclosed and named. That way the likelihood of representative suits being abused or violated shall be eliminated.
24. It is illustrative that none of the grievants has signed any document filed in court and more so an affidavit to confirm any of the allegations made. While the secretary general of the claimant may swear an affidavit (s) deposing to facts within his knowledge or on information, it should be even more positive and appropriate for grievants to confirm and affirm the situation and circumstances on the ground by deposing to facts as they see and perceive them.
25. While it is true and correct that the court issued the impugned orders of 18th May, 2023, it did not prohibit the respondent from terminating the grievants in accordance with the law. Through this application, unfortunately, the claimant is calling upon the court to determine if the redundancy process that followed the said orders was carried out in accordance with the law. In my considered view, this can only be done with proper evidence being presented to court from both sides. In fact, the issue of redundancy or declaration thereof is not one of the issues or prayers pleaded by the claimant in the memorandum of claim dated 16th March, 2023.



26. It is the grievants who should come to court and tender evidence on whether salaries have been paid as ordered by the court in the impugned orders and also on how and when and how the alleged redundancy process was conducted and executed.
27. In this application, it was upon the claimant/applicant to prove the four ingredients set out in Samuel M. N. Mweru & Others v National Land Commission & Others (Supra) which borrowed from the Book Contempt in Modern New Zealand. The four ingredients that should be proved are –
 - a. the terms of the order (or injunction or 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.
28. Now, without the evidence on how and when the declaration of redundancy was carried out it is not legally, reasonably, or logically possible for this court to opine if the respondent is in contempt of the impugned court orders or not.
29. Contempt proceedings are serious quasi criminal proceedings with serious legal and penal consequences for a convicted contemnor. While the standard of proof is not beyond reasonable doubts, as is in criminal cases, it is nonetheless higher than on a balance of probabilities, as is required in civil cases. In my considered view, with the materials placed before me, there is no adequate evidence to hold the respondent is in contempt of the impugned court orders.
30. In the circumstances, the application as filed and pleaded by the claimant shall fail.
31. It is advisable for the claimant to consider amending the pleadings so as to disclose the names of the grievants and update the prayers in the memorandum of claim so as to reflect the appropriate orders that the claimant is at this point seeking for and on behalf of the grievants.

V.Costs

32. There is no order as to costs on this application.

VI.Orders

33. For all the foregoing reasons, the notice of motion dated 16th March, 2023 by the claimant is dismissed with no order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 20TH DAY OF MARCH, 2024.

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DAVID NDERITU

JUDGE

