



**Bakery Confectionery Food Manufacturing & Allied Workers Union (K) v Mjengo Limited
(Cause 1844 of 2017) [2024] KEELRC 13277 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13277 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1844 OF 2017
B ONGAYA, J
NOVEMBER 28, 2024**

**IN THE MATTER OF AN APPLICATION ON BEHALF OF THE CLAIMANT AGAINST
RAJ MALDE AND RITESH PRVINCHANDRA THAKRAR FOR AN ORDER OF
COMMITAL TO CIVIL JAIL FOR DISOBEYING ORDERS OF THIS HONOURABLE COURT**

BETWEEN

**BAKERY CONFECTIONERY FOOD MANUFACTURING & ALIED WORKERS
UNION (K). CLAIMANT**

AND

MJENGO LIMITED RESPONDENT

RULING

1. For determination before this Honourable Court are the claimant’s contempt of court applications dated 26.04.2024 and 16.05.2024, both filed through Amalemba & Associates Advocates.
2. The first claimant’s notice of motion application dated 26.04.2024. It was under section 5(1) of the *Judicature Act*, Order 52 rule 3 of the *Rules of the Supreme Court of England 1965*, rule 17(1) of the *Employment and Labour Relations Court (Procedure) Rules* and all other enabling laws. The application sought the following orders:
 1. Spent.
 2. That pending the hearing and determination of the application herewith and/or until further Orders of this Honourable Court, there be an order of Status Quo to issue directing that there be no interference, alteration, transfer and/ or change of employment, employment status, particulars, terms and conditions of employment and engagement of all unionisable members of the applicant and/or any other unionisable staff within the meaning of section 2 of the *Labour Relations Act*, 2007 currently directly employed and/or engaged by the respondent.



3. That the respondent's directors; Raj Malde and Ritesh Prvinchandra Thakrar, being the directors of the respondent herein, be cited for Contempt of the Orders of this Honourable Court dated 22.07.2019 as extended vide Orders issued on 08.10.2019 and subsequently vide Orders issued on 12.11.2019.
 4. That an order of Committal to be made against the said Raj Malde and Ritesh Prvinchandra Thakrar directing their committal to prison for such period as this Honourable Court may deem fit for disobeying the orders of this Honourable Court dated 22.07.2019 as extended vide Orders issued on 08.10.2019 and subsequently vide Orders issued on 12.11.2019.
 5. That in enforcing the committal orders above, this Honourable Court be pleased to issue a warrant of arrest, directing the Officer Commanding Station, Thika Police Station to cause the arrest and presentation of the alleged contemnors Raj Malde and Ritesh Prvinchandra Thakrar (being the respondents' directors) to show cause why they should not be committed to civil jail and for sentencing.
 6. That having failed to exchange counterproposals to the CBA and or negotiate a CBA as directed by the orders of this Court, the claimant's CBA proposals be confirmed and adopted by this Honourable Court as a basis of a binding collective agreement with necessary modifications as the Court shall deem fit to be executed by the parties and/or the Deputy Registrar of this Honourable Court upon default by the respondent and be consequently deemed as registered in line with the provisions of section 60 of the [Labour Relations Act, 2007](#) and be enforced forthwith in accordance with its terms.
 7. That an order that costs of this motion be paid directly by the said contemnors.
3. The application was supported by the affidavit of Danchael Mwangure sworn on 26.04.2024. It was urged as follows:
- a. On 22.07.2019, this Court issued an Order by consent that the Union serves a draft CBA in seven (7) days for negotiations to take place and any disposes be recorded by the next mention date on 08.10.2019.
 - b. In compliance with the said orders, the claimant/applicant forwarded CBA proposals to the respondent vide a letter dated 25.07.2019 and scheduled a meeting for 06.08.2019 to negotiate the CBA. On the day of the meeting, the claimant's general secretary went to the respondent's offices where the respondent's management indicated that they were unaware of the said meeting. This was despite the respondent's advocates on record having been duly served with the letter scheduling the meeting for CBA negotiations as directed by Court.
 - c. The claimant/applicant scheduled a further meeting to be held on 22.08.2019 at the respondent's premises and requested for the respondent's CBA proposals within seven (7) days in anticipation of the meeting. However, the meeting, as scheduled, failed to take off at the instance of the respondent who cited a pending stay application filed in ELRC Cause No. 1720 of 2017, [Mjengo Limited vs. Bakery Confectionery Food Manufacturing & Allied Workers Union \(K\)](#). This was despite the Court's orders for negotiation of the CBA having been recorded by consent of the parties.
 - d. When the matter came up in Court for mention on 08.10.2019, the respondent requested for 30 more days to comply with the Court Orders after which a further mention date was set for 12.11.2019. Through a letter dated 25.11.2017, the claimant/applicant asked the respondent to comply before the next mention date in court.



- e. On the next court mention date on 04.12.2019, the Court recorded that the respondent was yet to comply with the orders of the court and granted the respondent a further 21 days to comply. The said Order was duly extracted and served upon the respondent's advocate on record.
 - f. Through a letter dated 04.12.2019, the claimant/applicant scheduled a meeting for 17.12.2019 to deliberate on the CBA and requested the respondent to furnish their counterproposals to the CBA before the said date. The meeting set for 17.12.2019 did not take place again at the instance of the respondent and it became apparent that the respondents were unwilling to negotiate the CBA while citing the pending stay application in the Court of Appeal.
 - g. Although the respondent filed a stay application in Civil Application No. 296 of 2019, *Mjengo Limited vs. Bakery Confectionery Food Manufacturing & Allied Workers Union (K)* seeking to stay these proceedings, the same was dismissed by Court in a ruling delivered on 18.06.2021. As such, there was no lawful excuse to delay the deliberation and negotiation of the CBA.
 - h. The respondent continues to frustrate trade union activities within its enterprise by seeking to unlawfully terminate the claimant/applicant's members' employment. The respondent has further issued a general notice to its workforce indicating its intention to outsource labour, which the claimant/applicant is opposed to. Sometime in April 2024, the respondent issued notices to individual employees of the respondent in regular employment indicating an intention to transfer their services to an unknown and unnamed outsourcing agent effective May 2024, thereby effectively terminating their direct employment with the respondent. Furthermore, the claimant is aware that the respondent recently engaged 45 newly outsourced employees who are meant to replace unionisable employees within the production chain of the respondent.
 - i. There is no other way in which the claimant/applicant can enforce the said orders of this Court other than through the contempt application herein. Since the respondents have not sought to set aside the said Court Orders, their actions invite sanction from this Court through this application.
4. In opposing the motion application dated 26.04.2024, the respondent filed the grounds of opposition dated 08.05.2024 through TripleOKLaw, LLP Advocates, on the following grounds:
- i. The application is an abuse of the court process as it raises similar issues pleaded by the claimant in ELRC Cause No. E134 of 2024 – *Bakery Confectionery Food Manufacturing & Allied Workers Union (K) vs. Mjengo Ltd*, which suit was stayed by Hon. Justice Rika on 05.03.2024 pending conclusion of the conciliation process;
 - ii. The application is defective and bad in law as the impugned Orders, the basis for commencing contempt of Court proceedings, do not contain a Penal Notice as held by the binding decision of the Court of Appeal in *Shimmers Plaza Ltd vs. National Bank of Kenya Ltd* [2015] eKLR; and
 - iii. The application is misconceived and should be dismissed with costs to the respondent.
5. The respondent also filed a replying affidavit and supplementary affidavit, both sworn by Raj Malde on 23.05.2024 and 11.06.2024 respectively through TripleOKLaw, LLP Advocates. It was urged as follows:
- a. For one to prove contempt of court, four (4) essential elements must be demonstrated that: the terms of the order were clear, unambiguous and binding on the respondent; the respondent



had knowledge of or proper notice of the terms of the order; the respondent has acted in breach of the terms of the order; and the respondent's conduct was deliberate.

- b. The respondent is a separate and distinct legal entity and this Court has not lifted the corporate veil for contempt of court proceedings to be commenced against the alleged contemnors in their personal capacity. The contempt of court proceedings against Ritesh Prvinchandra Thakrar and Raj Malde are therefore defective and should be struck out.
- c. The required standard for contempt of court proceedings is higher than the normal balance of probabilities because contempt of court proceedings is quasi-criminal in nature. Where reasonable doubt exists about any essential ingredient, the Court should uphold personal liberty and not commit a person to civil jail or mete any sanctions arising from such contempt of court proceedings.
- d. On 18.12.2019, the respondent filed an appeal at the Court of Appeal, being Civil Appeal No. 630 of 2019 – *Mjengo Ltd vs. Bakery, Confectionery, Food Manufacturing & Allied Workers Union (K)* seeking to set aside the impugned Judgment and Decree issued in [ELRC No. 1720 of 2017](#) (*supra*) between the parties herein. The appeal is pending hearing and determination by the Court of Appeal.
- e. Notwithstanding the pending appeal, in order for parties to negotiate a CBA, the Union is enjoined by law to represent a simple majority of the respondent's unionisable employees and bears the burden of proving the same. The respondent's case is that the claimant does not represent the simple majority of the respondent's unionisable employees for purposes of CBA negotiations.
- f. The claimant's prayer in the interim, for an order of status quo to stop the respondent from outsourcing its labour, amounts to an abuse of the court process and has no nexus with the matters pleaded in this claim as can be inferred from the substantive prayers sought in the claim.
- g. In filing the application, the claimant/applicant failed to disclose to this Court that it had reported a trade dispute to the Labour Officer vide a letter dated 24.02.2024 raising the same issues pleaded herein and that the conciliation process on the above issues was ongoing. It also failed to disclose the claim it had filed in ELRC Cause No. E137 of 2024 (*supra*) between the parties herein, seeking inter alia for an order of permanent injunction to issue restraining the respondent from interfering with the employment status, terms and conditions of unionisable members who have joined the claimant union or from replacing them with outsourced employees or placing them under outsourced agents.
- h. The claimant filed the instant application to circumvent the Order of 05.03.2024 made by Rika J. in ELRC Cause No. E137 of 2024 whilst the conciliation process was ongoing. The claimant is therefore guilty of forum shopping and any orders obtained because of non-disclosure of material facts should be set aside in the interest of justice.
- i. Parties completed the conciliation process and the conciliator, J.H. Ouko, submitted his Report dated 20.05.2024, in which he found there was no victimization, perpetration of unfair labour practices and unlawful mass terminations of union members as alleged by the claimant. The conciliator also directed the claimant to serve the respondent with check-off forms of its valid members.
- j. The claimant misrepresented facts to some employees and caused them to join the trade union. Some of the employees confirmed they did not append their signature on the check-off forms submitted by the claimant to the respondent. Furthermore, 23 employees have since



voluntarily resigned from the union thereby causing the claimant not to have a simple majority of the respondent's unionisable employees.

- k. Consequently, the claimant lacks the locus standi to maintain this suit and the application seeking negotiations and registration of CBA. In effect, the claimant has not met the threshold set under the law for negotiation and registration of a CBA with the respondent.
6. The second notice of motion application dated 16.05.2024 sought the following orders:
 1. Spent.
 2. That the respondent's directors; Raj Malde and Ritesh Prvinchandra Thakrar, being the directors of the respondent herein, be cited for contempt of Court for contravening and violating the Orders of this Honourable Court dated 09.05.2024.
 3. That an order of Committal to be made against the said Raj Malde and Ritesh Prvinchandra Thakrar directing their committal to prison for such period as this Honourable Court may deem fit for disobeying the orders of this Honourable Court dated 09.05.2024.
 4. That in enforcing the committal orders above, this Honourable Court be pleased to issue a warrant of arrest, directing the Officer Commanding Station, Thika Police Station to cause the arrest and presentation of the alleged contemnors Raj Malde and Ritesh Prvinchandra Thakrar (being the respondents' directors) to show cause why they should not be committed to civil jail and for sentencing.
 5. That an order that costs of this motion be paid directly by the said contemnors.
 7. The application was supported by the affidavit of Danchael Mwangure sworn on 16.05.2024. It was urged as follows:
 - a. On 09.05.2024, this Court issued an Order directing, among other things, that the respondent's employees in line of production said to be under maintenance and who were locked out, be allowed to resume duty forthwith and pending further orders of the Court.
 - b. The said Order of the Court was served upon the respondent on 13.05.2024 together with an accompanying Penal Notice and was duly received and stamped by the respondent's staff under the direction of the respondent's directors as per the affidavit of service sworn on 14.05.2024 and filed in court on 16.05.2024.
 - c. Immediately the said Orders were issued, the applicant's members received letters through their Whatsapp platforms directing them to proceed on leave and to fill the requisite leave forms at the respondent's premises. Only the employees who had been locked out and were the beneficiaries of the said Court orders were advised to proceed on leave in an act that was discriminatory.
 - d. The respondent has persisted with its breach of the orders of this Court and as at 16.05.2024, about 200 of the union's members had been locked out by the respondent.
 - e. When the matter went for conciliation, the Labour Officer purported to circulate a report dated 10.05.2024 in which he recommended that the respondent has complied with outsourcing procedure and directed the union to convince its members to execute the said contracts by the outsourcing agent despite the illegalities perpetrated by the respondent. The claimant thus has no confidence that the labour office will assist on resolving the matters at hand.



- f. The Court should issue the Orders of Contempt sought against the directors of the respondent company, as they are responsible in the running of the day-to-day affairs of the company.
8. In reply, the respondent filed a replying affidavit sworn by Raj Malde on 25.06.2024 through TripleOKLaw, LLP Advocates. Mr. Malde reiterated his averments as pleaded in the first motion application herein. He further averred that the respondent has not terminated any employee subject of the Order of 09.05.2024 by reason of outsourcing or at all and that there was no proof of the said allegation. That the employees who went on annual leave have suffered no prejudice as the respondent has continued to pay them their full dues. That the claimant has not demonstrated breach of the impugned Order and is mainly seeking to avoid ADR.
9. Thereafter, the claimant filed its further affidavit sworn by Kelvin Mwangi, the Shop Steward, on 05.07.2024 through Amalemba & Associates Advocates. Mr. Mwangi urged that despite the Court Order of 09.05.2024, employees reporting to the company premises daily have always been denied access to the premises by the respondent's management. That the employees asked to proceed on leave were denied entry to the workplace to apply for leave as per procedure and after the leave days of some having expired, they have still not been allowed back to the work premises. Furthermore, salaries for May 2024 reflected deductions based on unjustified absenteeism yet the employees reported to work daily but denied access. Some unionisable employees that were locked-out have also not received their salaries for May and June 2024 even though they continue to report to work on a daily basis.
10. The parties filed their respective written submissions and highlighted the same before this Honourable Court.
11. The Court has considered the material on the two applications. The Court returns that the two applications must fail upon the following grounds:
- a. The orders were directed to the respondent as the employer. The respondent is a limited company and as urged for the respondents, the corporate veil not having been lifted it would be unfair to move against the directors as proposed and prayed for. The applicant has not shown that the orders said to be disobeyed by the respondent cannot be enforced by way a contempt application citing the respondent and for appropriate orders such as a sequestration order.
 - b. The prayers in the initial application beyond the contempt prayers appear to be beyond the scope of the instant suit. There is no dispute that the issues of outsourcing are in the earlier suit before Rika J. It appears that indeed the interim orders were obtained upon non-disclosure of that material fact - that there was an earlier substantive suit that had been filed before Rika J and conciliation had been directed to proceed. The respondents' submissions are upheld in that respect.
 - c. The Court further considers that once the consent order issued the respondent employer became aware of it as of own knowledge. The prevailing jurisprudence being that once the respondent employer entered the consent order it became aware of its terms accordingly and want of a penal notice would not bar commencing and continuing contempt application against the employer - as the respondent was already bound by the consent order and was aware of it.
 - d. While making the findings, the Court nevertheless finds that it was misconceived when it was urged and submitted for the respondents that the applicant needed to show that it had simple majority of unionisable staff as a precondition to negotiate and conclude a collective agreement per the consent order on record. The requirement on simple majority recruitment of unionisable staff was a precondition for recognition under the [Labour Relations Act](#) and



consequential to such recognition, parties should proceed to conclude a collective agreement per the consent order.

- e. Parties are in a continuing recognition agreement and in conciliation in the other suit before Rika J. Each will bear own costs of the two applications.

In conclusion, each of the two applications is dismissed with orders each party to bear own costs of the applications.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 28TH NOVEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

