



Lewa Conservancy Limited & another v Kenya Game Conservancy, Tours & Safari Workers Union & another (Cause E016 of 2022) [2023] KEELRC 1131 (KLR) (5 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1131 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E016 OF 2022
ON MAKAU, J
MAY 5, 2023**

BETWEEN

LEWA CONSERVANCY LIMITED 1ST CLAIMANT

AGRICULTURAL EMPLOYERS ASSOCIATION 2ND CLAIMANT

AND

KENYA GAME CONSERVANCY, TOURS & SAFARI WORKERS

UNION 1ST RESPONDENT

J.M.NDOLO 2ND RESPONDENT

RULING

1. This ruling relates to the claimants' Notice of Motion dated 28th October, 2022 seeking the following orders:-
 - a. That this application be certified as urgent and service dispensed with in the first instance.
 - b. That this Honourable court do issue an order summoning the 2nd respondent, J.M Ndolo to appear before this Honourable court to show cause why he should not be cited for contempt for disobedience of Court Orders.
 - c. That this Honourable court do order the 1st and 2nd Respondent to comply with the court orders issued on 4th July 2022, particularly order No.1 and 2.
 - d. That this Honourable court do issue an order compelling the 1st and 2nd Respondents to enter and finalise negotiations on the Collective Bargaining Agreement for 2022/2023, in the next 30 days.
 - e. Costs of this application be provided for.



2. The application is premised on the grounds on the body of the motion and the Supporting Affidavit sworn on 28th October 2022 by the 2nd claimant's legal and IR Services Mr. Peter Kinyanjui. In brief the affiant deposes that this court entered judgment in this suit on 4th July, 2022 directing the parties to negotiate a Collective Bargaining Agreement (CBA) for the 2022/2023 but the 2nd respondent has deliberately refused to comply with the court decree until the 2nd claimant withdraws from the negotiation table. The said defiance by the 2nd respondent is without just cause and only aimed at denying the 1st claimant representation by an employers' organization of its choice. Further the 2nd respondent has persisted in refusing to recognize the 2nd claimant as the lawful representative of the 1st claimant and has resorted into insulting and threatening officials of the 2nd claimant which is unhealthy for good industrial relations.
3. The 2nd respondent is the General Secretary for the 1st respondent union and has sworn a Replying Affidavit dated 10th November 2022 to oppose the application. In brief he deposes that he is conversant with the facts of the dispute herein; that on 8th September, 2022 he made a proposal to the claimant on CBA negotiations; that on 16th September 2022 the claimant made a counter proposal; that they have previously negotiated 11 CBAs with the 1st claimant and they have signed a recognition agreement spelling out how they are supposed to nurture their relationship; that the parties to the dispute have not reached any disagreement on the CBA negotiations; that the file is premature since conciliation has not been invoked by the claimants; that the inclusion of the 2nd Claimant in this matter is bad in law since he is just a representative of the 1st claimant ; that the 1st respondent's position is that the matter be referred back to the Ministry of Labour for conciliation as provided by the Labour Relations Act; that the 2nd claimant should stop intimidating him and allow negotiations process to take its cause; and that he has not disobeyed the court orders and therefore he should not be punished for contempt.

Submissions

4. It was submitted for the applicants that they have satisfied all the requirements for punishing the 2nd Respondent for contempt of court. The judgment of the court is still in force; that the 2nd respondent is aware of the same; and that he has disobeyed the same deliberately.
5. For emphasis, reliance was placed on the case of *Shimmers Plaza Ltd v National Bank of Kenya Ltd* (2015) eKLR, *Econet Wireless Kenya Ltd v The Minister for Information & Communication of Kenya & Another* (2015) eKLR and *Dr.Ibrahim Haji Issak v Kenya Meat Commission & another* (2013) eKLR.
6. In view of the above matters, the court was urged to condemn the 2nd respondents to pay a fine of Kshs.1,000,000.00 and serve six months imprisonment to deter other like-minded persons from disobeying court orders. They also pray that the 1st respondent be fined Kshs.75,000.00 for abetting the blatant disobedience of court orders by its General Secretary. The court was further urged to consider that the respondents have totally failed to purge the contempt.
7. The 2nd respondent submitted that there is no relationship between the 2nd claimant and Wildlife and maintained his hard line position that he does not recognize the 2nd claimant as representing the Tourism sector; that the 2nd claimant has a Recognition Agreement with Kenya Plantation and Agricultural Workers Union (KPAWU) and they have a CBA; that the 2nd claimant has no interest in Tourism industry but only in Agricultural sector; that the 2nd claimant is interfering with the 1st respondent by telling employers not to sign CBAs with the union; that the 1st respondent have a Recognition Agreement with the 1st claimant and have concluded 11 CBAs up to 2021; that in 2022 the 2nd claimant brought problems without a cause of which the respondents rejected; and that the 2nd



claimant appeared in the CBA negotiation meeting claiming that the court had allowed them to do so but that was not true.

8. Further the 2nd respondent contended that he has been sick for a long time and he has to be carried around on a wheel chair. For the reasons set out in the above submissions, he prayed that Mr.Kinyanjui should respect good relations and first seek authority from the Ministry.

Issues for determination

9. The application basically seeks for citing of the 2nd respondent for contempt of court. The issues for determination herein are:
 - a. Whether the court has made any orders which binds the respondent.
 - b. Whether the respondent is aware of the said orders.
 - c. Whether the respondent has failed to comply with the said orders.
 - d. Whether the respondent should be cited for contempt.

Existence for court orders

10. There is no dispute that on 4th July, 2022 the court entered judgment by consent of the parties. The judgment was basically adoption of the recommendations made by the conciliator in a Report dated 8th June 2022. The parties were further ordered to adopt strict compliance on the terms of the report. The said judgment and the said further orders have not been challenged by appeal or review and therefore they remain in force and binding on the parties to the suit.

Knowledge of the orders

11. The 2nd respondent admits in his Replying Affidavit that he is fully conversant with the dispute herein. Further the judgment was entered and the further orders were made in the presence of the representative of the respondents. The respondents were therefore aware of the judgment and the further orders of the court, as pronounced on 4th July, 2022. I gather support from the case of Shimmers Plaza, supra, where the court held that:

“We now revisit the issue of service. Was there service of the order said to have been disobeyed on the respondent? There is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect.

In that respect, this case can be distinguished from *Justus Kariuki Mate & Another vs Hon.Martin Wambora* on the other hand however, this court has slowly and gradually moved from the position that service of the order along with penal notice must be personally served on a person before contempt can be proved. This is in line with dispensations covered under 81.8 (1) supra Kenya’s growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings.

For instance, Lenaola J in the case of *Basil Criticos vs Attorney General & 8 others* (2012) eKLR pronounced himself as follows

...the law has changed and as it stands today knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a court order; the strict requirement that personal service must be proved is rendered unnecessary”



Disobedience of the court orders

12. The 1st respondent has denied that he disobeyed the court orders and avers that he commenced the negotiation for the new CBA by sending a proposal to the 1st claimant, who made a counter proposal. However, when a meeting was convened for negotiations, the 2nd claimant attended as a representative of the 1st claimant. The respondent was not comfortable with the presence of the 2nd claimant in the negotiations because it has no interest in the tourism industry, and has been advising employers in the sector not sign CBAs with the 1st respondent.
13. The 2nd respondent further avers that the 2nd claimant has recognition agreement and CBA with KPAWU and as such its interest is in Agriculture and not Wildlife and Tourism. The 2nd respondent therefore does not recognize the 2nd claimant as correct representative of employers in the tourism sector and has only come on board to interfere with the representation of the tourism sector by the 1st respondent. He also deems the proceedings herein to be premature and prays that the dispute should be referred to the Ministry of Labour for conciliation.
14. The claimants are of a contrary view and want to see the 2nd respondent punished for contempt and the 1st respondent punished for abetting the contempt by its General Secretary. According to the claimants, the 2nd respondent is deliberately breaching the court orders.
15. The proceedings before the court turns on the rights of an employer under Article 36 and 41 of *the Constitution* of Kenya. Article 36 (1) provides that:-

“Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.”
16. Article 41 provides that:-

“(3) Every employer has the right-

 - e. to form and join an employers organization; and
 - f. to participate in the activities and programs of an employers organization.

5) Every trade union, employers’ organization and employer has the right to engage in collective bargaining.”
17. The above rights have been amplified under the Labour Relations Act and a purposive interpretation of the said provisions is that both employees and employers have equal right to form and join unions for collective bargaining. Further trade unions and employers’ organization enjoy equal rights in representing their members in collective bargaining and none of them should bar or deny the other the right to represent their members in negotiating terms and conditions of service under CBAs.
18. Having said that, the court finds no legal basis or right upon which the respondents, can demand that the 2nd claimant an employer’s organization in which the 1st claimant is a member, should not to represent the said employer. Consequently, I find and hold that walking away from the negotiations of the CBA was a violation of the judgment of this court dated 4th July, 2022 and the further orders made thereunder. The refusal to recognize the 2nd claimants for purposes of negotiating the CBA is also a violation of the claimants rights guaranteed under Article 36 and 41 of *the Constitution* of Kenya.



It further impacts negatively on the members of the trade union and the employers organization by delaying the negotiations.

Citing for contempt

19. There is no dispute that the failure to comply with the said court judgment and orders is deliberate because the 2nd respondent is aware of the same and had without any legal basis walked out of the CBA negotiations and maintained that he does not recognize the 2nd claimant as an organization with interest in the Tourism Industry. Although he alleges in his submission that he has been sick, that sounds like an afterthought. Therefore, I hereby cite the 2nd respondent for contempt of court for disobeying the judgment and the orders pronounced by the court on 4th July, 2022. I further order the 2nd respondent to physically attend this court on 25th May, 2023 to show cause why he should not be punished for disobeying the said judgment and orders of the court.

DATED, SIGNED AND DELIVERED AT NYERI THIS 5TH DAY OF MAY, 2023.

ONESMUS N. MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

