



**Kenya Private University Workers Union v Africa Nazarene University  
(Cause 900 of 2017) [2023] KEELRC 1982 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1982 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 900 OF 2017  
NZIOKI WA MAKAU, J  
JULY 5, 2023**

**BETWEEN  
KENYA PRIVATE UNIVERSITY WORKERS UNION ..... CLAIMANT  
AND  
AFRICA NAZARENE UNIVERSITY ..... RESPONDENT**

**RULING**

1. There are three applications before the Court for determination – the Respondent’s notice of motion application dated 18<sup>th</sup> July 2022 and the Claimant’s contempt application also dated 18<sup>th</sup> July 2022 as well as the Claimant’s notice of motion application dated 17<sup>th</sup> February 2023. The two applications will be dealt with sequentially.

**Respondent’s Motion Application dated 18<sup>th</sup> July 2022**

2. The Respondent/Applicant sought for Orders in their application that there be a stay of the conciliation proceedings in regards to the collective bargaining negotiations between the parties and any further conciliation proceedings thereafter, pending hearing and determination of this Application and its application before the National Labour Board. The Application was supported by the Affidavit of Regina Kamwenji and premised on the grounds that pursuant to the Court Order dated 4<sup>th</sup> March 2019, the Respondent entered into a Recognition Agreement dated 20<sup>th</sup> June 2019 with the Claimant Union and parties were yet to enter into any collective bargaining agreement (hereinafter “CBA”). That however since 20<sup>th</sup> June 2019, there had been a significant decline in the Claimant Union’s membership from the Respondent’s 131 unionisable employees, which number was below the simple majority representation threshold required by law. That subsequently by a letter dated 23<sup>rd</sup> March 2022, the Respondent issued the Claimant Union with a three (3) months’ notice of intention to terminate the said Recognition Agreement. That when the notice period lapsed without any response or communication from the Claimant Union, the Respondent wrote to the National Labour Board



applying for revocation of the said Recognition Agreement for the aforementioned reasons. Further, that notwithstanding the termination notice, the Claimant informed the Respondent of its intention to negotiate a CBA and notified it to attend conciliation meetings for the same. That that the decision of the National Labour Board was to determine whether the Recognition Agreement stood revoked and if so, there would be no basis for any CBA negotiations.

3. In response, the Claimant filed a Notice of Preliminary Objection dated 23<sup>rd</sup> September 2022 asserting that the Respondent's Application is untenable and an abuse of court process as the Court had dismissed a similar application dated 30<sup>th</sup> June 2022. That the Application had also been filed prematurely before parties had exploited alternative dispute resolution processes. It was further the Claimant Union's case that the said Application did not meet the threshold for granting interlocutory injunction and it prayed for the same to be dismissed with costs. To buttress its Preliminary Objection, the Claimant relied on the case of *Kenya Union of Printing, Publishing, Paper Manufacturers, Pulp & Packaging Industries v Raffia Bags (EA) Limited* [2014] eKLR on parties exhausting pre-industrial conciliation process before moving to court.

#### **Claimant's Contempt Application dated 18<sup>th</sup> July 2022**

4. The Claimant/Applicant sought for Orders:
  1. That, the Honourable court to find and CITE the Respondents' Administrators, being, Prof. Stanley Makhosi Bhebhe (Vice Chancellor), John Opiyo (Financial Director), & Regina Kamwenji (Director Of Human Capital) for Contempt of Court Orders, for violating, breaching, disregarding, disobeying, ignoring and blatantly defying the terms and contents of the final Orders of this Honourable Court issued on 4<sup>th</sup> March 2019.
  2. That, the Respondents' three (3) top administrators cited as contemnors, be fined an equivalent of Kenya Shillings One Million (1M) each and /or such other fine or amount as the Honourable Court may deem fit and reasonable.
  3. That upon finding Respondent's Administrators in Contempt of Court Orders, the Honourable Court to fine the Respondent's University Institution Five Million Kenya Shillings (5M) for engaging and putting in authority officers who are not ready to comply with lawful Court Orders, cited as contemnors, be committed to jail for six (6) Months and or such other duration as the Honourable Court may deem fit and just.
  4. That, the status quo of current employment contracts between the employer/employees should remain as they are until the Collective Bargaining Agreement is signed and registered in employment and labour court.
  5. An Order to be issued compelling the Contemnor/ Defendant to pay all outstanding union dues of 25 members who were sent home on false/ fake redundancy that the Claimant union lost Kshs. 536,716/- as revenue to date as the case on judgment is in the process.
  6. That, the Respondent Institution to purge the Contemnor, shall be compelled to sign Collective Bargaining Agreement with the Applicant Union within a period not exceeding 30 days as per various court orders issued and the final one being issued on 4<sup>th</sup> March 2019 where a recognition agreement was signed.
  7. That, any other such further reliefs and remedies or any other order the Honourable court may deem fit to grant for the ends of justice to materialize.



8. That, the costs of the Application be borne by contemnors/ Defendants jointly and /or severally or the Respondent Institution.
5. The Application was premised on the grounds set out thereat and supported by the Affidavit of the General Secretary of the Claimant Union, Mr. Peter Emisembe Owiti. Mr. Owiti averred that this Court issued a final Order on 4<sup>th</sup> March 2019 directing the Respondent to comply with section 48 and 54 of the Labour Relations Act, 2007 plus other prevailing laws. That the Contemnors complied through signing of recognition agreement but with a condition that the Claimant Union maintains at all time a 50 plus 1 percent of its membership, which clause has never existed in any recognition agreement in the world. He further averred that despite there being no other counter proposals on compliance with the said Court Order from the Respondent's Advocate on record, their Chapter Representative informed them that the Respondent was not ready to comply.
6. It was Mr. Owiti's averment that the Contemnors being the principal officers, were fully aware of the contents and terms of the Court Orders issued on 4<sup>th</sup> March 2019 but have remained defiant and deliberately refused to comply with the said Orders. That if the Contemnors are allowed to continue defying court orders or directives, the Claimant Union together with its members will suffer irreparable lose and damages, and the administration of justice will be brought to disrepute. Further, that the actions and or omissions of the Respondents, Contemnors/Defendants amounted to and constituted serious violations and blatant disobedience to valid and enforceable Court Orders and had prejudiced the Claimant. He asserted that the Orders issued on 4<sup>th</sup> March 2019 in the presence of both parties' Advocates were duly extracted and endorsed with Penal Notice and that service of the said Order was complied with before taking Contempt Proceedings. Mr. Owiti further averred that after signing the recognition agreement, the Contemnors came up with a fake redundancy process claiming that the Respondent institution was having financial problems. That the same was meant to reduce the Claimant Union's membership as its members were sent home and the Union had lost revenue which they demand payment for. He also averred that the Covid-19 Pandemic in March 2019 rendered the signing of the CBA impossible as all education institutions in the whole world closed and that it was not until mid-2021 when some opened for full operations. That on 19<sup>th</sup> November 2021, the Claimant Union wrote and forwarded a draft CBA copy to the Contemnors requesting them to issue a counter offer and both parties had a zoom meeting on 26<sup>th</sup> January 2022 in which a CBA was a major agenda. Whereas he confirmed that the Claimant received revocation notices from the Contemnors, he asserted that negotiation for a CBA was in process. That the Claimant Union thus reported a trade dispute for conciliation of the matter and the appointed conciliator called for meeting which the Contemnors failed to attend and kept postponing.
7. It was Mr. Owiti's contention that the Contemnors have rejected to sign a CBA because they are in process of altering the employment contracts at the institution for their own interest and without involving workers' representative. He prayed for the Claimant's Contempt of Court Application to be allowed in its entirety in the interest of justice and that the Respondent and Contemnors shall not suffer any prejudice if the Orders are granted as compliance with court orders is not a choice but a duty.
8. The Respondent opposed the Contempt Application through Grounds of Opposition dated 26<sup>th</sup> September 2022. It also filed a Replying Affidavit sworn on 7<sup>th</sup> November 2022 by Regina Kamwenji who averred that the Respondent had willingly participated in the conciliation proceedings with the aim of reaching an amicable solution. That due to the consequences of the Covid-19 pandemic on the economy and specifically on employers, the Ministry of Labour, the Central Organisation of Trade Unions (COTU) and the Federation of Kenya Employers (FKE) entered into a Memorandum of Understanding (MOU) dated 30<sup>th</sup> April 2020, on terms that included the suspension of negotiations



of CBAs during the pandemic. That nevertheless, the Claimant Union had through a letter dated 27<sup>th</sup> June 2022 acknowledged the Respondent's compliance with the Court Order of 4<sup>th</sup> March 2019 in respect of signing the Recognition Agreement and had further stated its intention to continue with the process of negotiating the CBA despite the Covid-19 pandemic. She further reiterated that the Recognition Agreement stood revoked as the Claimant Union had not met the statutory threshold of representing a simple majority of the University's unionisable workforce. She however deponed that the Respondent continued to engage the Claimant Union in the conciliation proceedings and when parties were unable to reach an agreement, the appointed Conciliator issued a Certificate of Unresolved Trade Dispute on 5<sup>th</sup> August 2022.

9. Ms. Kamwenji further averred that the Claimant Union have not adduced any evidence to prove that the Respondent coerced workers to withdraw from the Union and that the allegations of the Respondent altering employment contracts is false and misleading. In addition, that the allegations pertaining to the redundancy are sub-judice as the Claimant Union had filed an Application dated 5<sup>th</sup> October 2022 that was before Hon. Justice Nduma Nderi. She sought dismissal of the Claimant's Contempt Application for not satisfying the prerequisite requirements for this Court to grant the orders sought.

### **Claimant's Motion Application dated 17<sup>th</sup> February 2023**

10. The Claimant sought for Orders that the Respondent be directed to provide a counter proposal to the Union's proposal for a CBA and be compelled to continue with CBA negotiations having signed a recognition agreement with the Claimant Union. Further, that parties be ordered to conclude the CBA within 30 days and that the Court issues a prohibitory order for the Respondent not to victimise and coerce member employees to withdraw from the Claimant Union and not to bar others from joining the Union. It also sought for the Respondent to bear the costs of the Application.
11. The Application was supported by the Affidavit of Mr. Owiti who averred that the Claimant Union forwarded to the Respondent letters dated 19<sup>th</sup> November 2021 and 6<sup>th</sup> December 2021 attaching a draft CBA and requesting the Respondent to sign or send a counter proposal but the same was yet to be responded to. That when the Claimant Union noticed that the Respondent was not willing to negotiate a CBA, it reported a trade dispute and it to date rejects the Respondent's notice of termination of their signed Recognition Agreement. That the Conciliator's Certificate of Unresolved Dispute issued on 5<sup>th</sup> August 2022 has a recommendation on the last page.

### **Respondent's Submissions**

12. The Respondent submitted in support of its Stay Application dated 18<sup>th</sup> July 2022 and in opposition to the Claimant's Applications dated 18<sup>th</sup> July 2022 and 17<sup>th</sup> February 2023. It asserted that the following are the issues for determination before this Honourable Court:
  - i. Whether the Respondent should be granted the order for stay of the conciliation proceedings and any subsequent Court proceedings thereon under the *Labour Relations Act* pending the hearing and determination of its Application for revocation of the recognition agreement before the National Labour Board;
  - ii. Whether the Respondent's Officials are in contempt of the Court Order issued on 4<sup>th</sup> March 2019;
  - iii. Whether the Claimant is entitled to the other prayers sought in its Contempt Application; and
  - iv. Whether the Claimant is entitled to the Injunctive orders sought.



13. The Respondent submitted that section 12 (3) of the *Employment and Labour Relations Court Act* provides the power for this Court to grant the orders sought by the Respondent. The Respondent asserted that such power is exercised discretionary and in line with the well settled principles. It submitted that in the instant case, the Claimant had neither rebutted the fact that it failed to attain the simple majority representation for purposes of recognition by the Respondent nor provided any evidence in the form of check-off forms to contradict this position. That in this regard, it had challenged the legitimacy and validity of the recognition agreement and there was no basis for the parties herein to engage in the CBA negotiations until the issue of revocation of the recognition agreement is determined by the National Labour Board. In support of this submission, the Respondent relied on the case of *Banking, Insurance & Finance Union (Kenya) v Taifa Sacco Society Ltd* [2014] eKLR wherein Abuodha J held that negotiations as to the terms of the CBA could not by law be properly embarked on prior to resolving the recognition dispute and thus ordered the parties to refer the issue of recognition to the National Labour Board for determination within 60 days from the date thereof, as required by Section 54(5) of the *Labour Relations Act*. The Respondent further relied on this Court's decision in the case of *Olivado (EPZ) Limited v Isaiah Bundi Kirigwa, Chairperson National Labour Board & another* [2019] eKLR to stay the case for 2 months to enable the National Labour Board make a determination of the recognition dispute before it. It was the Respondent's submission that from the foregoing, it is therefore only just that this Honourable Court stays the CBA negotiations and any subsequent Court proceedings in respect of the negotiations until the hearing and determination of the issue of union representation by the National Labour Board.
14. The Respondent also cited the case of *Bakery, Confectionery, Food Manufacturing and Allied Workers Union [K] v Mombasa Maize Millers Limited & 3 others* [2016] eKLR wherein Rika J held that section 4 of the *Labour Relations Act* and Articles 36 and 41 of *the Constitution* of Kenya grant employees the freedom of association, including the right to belong or not belong to an association. It submitted that its employees will greatly suffer prejudice if the stay orders are not granted and their constitutional right to association is enforced on them rather than allowing them to independently exercise this right. That the decision on whether the employees wish to be members of the Claimant Union can only be determined during the revocation proceedings. Furthermore, that the employees' constitutional right to association greatly outweighs the Claimant's interests. The Respondent, in light of the foregoing, thus urged this Court to exercise its discretion and grant the stay orders sought pending the hearing and determination of the revocation proceedings before the National Labour Board.
15. On the second issue for determination, the Respondent submitted that the contempt application is premised on the *Contempt of Court Act*, 2016 which, in the case of *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR, was declared unconstitutional and invalid on 9<sup>th</sup> November 2018 for inter alia lack of public participation as required under articles 10 and 118(b) of *the Constitution*. It further submitted that the Claimant Union had relied on other legal provisions that do not relate to Contempt of Court proceedings whatsoever and urged this Court to dismiss the application with costs to the Respondent. Without prejudice to the foregoing, the Respondent submitted that the power to punish for contempt of Court is discretionary and should be used sparingly because contempt proceedings are criminal in nature as they seek to limit a person's right to liberty that is guaranteed under *the Constitution*. That this is the reason why it is now well-established law that proof of contempt of court against a contemnor is higher than that of balance of probability as affirmed by the Court in the case of *Silverse Lisamula Anami v Justus Kizito Mugali & 2 others* [2017] eKLR relying on the Court of Appeal's decision of Gatharia K. Mutikika v Baharini Farm Limited [1985] KLR 227. It further submitted that the elements that must be proven in order to succeed in



an application for contempt of court were outlined by the Court in *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR that:

- “(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.”

16. That based on the elements stated above, the Claimant Union had not proven that the Court Order clearly and ambiguously directed the Respondent to sign the CBA, to sustain its contempt proceedings herein. That a literal reading of the said Court Order clearly directed both parties to sign the recognition agreement and thereafter conclude the CBA but did not compel the Respondent to sign the CBA. That it was therefore incorrect for the Claimant to allude that the Respondent's failure to sign the CBA constituted wilful disobedience of the Court Order by its officials. The Respondent relied on the case of *Alken Connections Limited v Safaricom Limited & 2 others* [2013] eKLR wherein Odunga J (as he then was), observed as follows:

“...In my view, it is upon the applicant to convince the court that even without “reading in” the order was so clear about what the respondent was meant to do that it cannot be an excuse to raise the omission as warranting non-compliance thereto...”

17. In addition, the Respondent submitted that the Claimant had not proven that the Respondent acted in breach of the terms of the Order. That the mere fact parties did not reach an agreement during the CBA negotiations did not mean that the Respondent's officials were in contempt of Court. That in the absence of proof of breach of the subject Court Order, the Contempt Application cannot succeed. It relied on the case of *Sheila Cassatt Isenberg & another v Antony Machatha Kinyanjui* [2021] eKLR in which the Court stated that the applicant must prove wilful and deliberate disobedience of the court order if he were to succeed.

18. The Respondent further submitted that it is trite law that contempt of Court is an enforcement measure of last resort where no other civil remedy is available. However, the Claimant Union had instituted contempt proceedings against the Respondent's officials despite there being a civil remedy available under Part IX of the *Labour Relations Act* 2007, on the procedure for determining trade disputes. On this submission, it relied on the case of *Joshua Mutua Kitbiuma v Angelina Mutheu Mutua* [2022] eKLR wherein the Court relied on the holding of the Court of Appeal in *Gatharia K. Mutikika v Babarini Farm Limited* (supra) that, “recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice.” It was the Respondent's submission that the Claimant had failed to prove its evidential burden of proof of the alleged contempt of Court by the Respondent's officials and that this Court ought to thus dismiss the Contempt Application with costs to the Respondent. With regard to prayers 2 and 3 of the Contempt Application, the Respondent submitted that it would be punitive for the Claimant to seek orders of fines against the alleged Contemnors who are not parties to these proceedings in their personal capacity, but are carrying out their duties on behalf of the Respondent in their official capacity. That whereas prayer 4 of the Contempt Application was unclear and sought to interfere with the Respondent's prerogative rights over its employees, the Claimant had not provided any legal grounds or basis to justify the said prayer. For prayer 5, the Respondent submitted that issues of the unpaid leave in May 2020 were fully addressed by Radido J in his ruling delivered on 7<sup>th</sup> August 2020, and are also the



subject of current proceedings in ELRC No. 227 of 2020 - Kenya Private Universities Workers Union v African Nazarene University before this Honourable Court. That the Claimant is not entitled to prayer 6 since the proceedings in respect of the revocation of the recognition agreement before the National Labour Board is yet to be determined.

19. As regards the fourth and last issue for determination, the Respondent submitted that the Claimant is not entitled to the injunctive orders sought to compel the Respondent to negotiate the CBA having failed to attain the majority representation requirement. That in the case of *Transport Workers Union v African Safari Adventure* [2015] eKLR, the Court declined to grant the prayer for direction that parties sign a CBA in view of the finding that the threshold set by section 54 of the *Labour Relations Act* had not been met. The Respondent further submitted that the Claimant Union failed to take any remedial action in respect of its lack of majority representation despite the three months' notice issued to it on the Respondent's intention to terminate the recognition agreement. In addition, that the Claimant had not produced any evidence before this Court to support the grave allegations that the Respondent victimized or coerce its members to withdraw from the Union and/or barred its employees to join the Union. It relied on the *Transport Workers Union v African Safari Adventure* case (supra) in which the Court dismissed the prayer for injunction for lack of evidence and found that there should have been evidence from the victims of the said harassment in order for the order to issue. In the upshot, the Respondent asked this Honourable Court to grant the stay orders sought in the Application dated 18<sup>th</sup> July 2022 and to dismiss the Claimant's contempt application dated 18<sup>th</sup> July 2022 and the Claimant's injunctive application dated 17<sup>th</sup> February 2023.
20. The Claimant has the task of demonstrating the officials of the Respondent are in contempt of the court. Having obtained orders to negotiate a CBA, it is the Claimant's position that the Respondent has obstructed the same deliberately. On its part, the Respondent asserts that the CBA could not be concluded on account of Covid-19 pandemic and the resultant MOU freezing any conclusions of CBA and other bargaining elements as determined in the MOU. The Respondent further asserts it has sought the revocation of the recognition agreement before the National Labour Board.
21. Granted that the dispute in regard to revocation was properly before the National Labour Board, this Court would be usurping the role of the National Labour Board if it determined the revocation process prematurely. As such, the Court will not wade into the murky waters and direct parties to conclude the process before the National Labour Board. Once the determination is made by the National Labour Board, parties will be bound to report to the Court in order for the Court to grant further direction in the matter as well as determine the motions before the Court. It is unfortunate that the Claimant is also before another Court where both parties are articulating similar issues. It is not appropriate to give any further orders herein other than one staying the proceedings pending the determination before the National Labour Board.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY 2023**

**NZIOKI WA MAKAU**

**JUDGE**

