



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.E004 OF 2021

(Before D.K.N.Marete)

THE KENYA NATIONAL UNION OF NURSES.....APPLICANT/CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF MERU.....1ST RESPONDENT

MERU COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

R U L I N G

This is an application by way of notice of motion dated 4th February, 2021 and comes out as follows;

1. *THAT this Application be and is hereby certified as urgent and to be heard on priority basis.*
2. *THAT the respondents be denied audience of court until they purge the contempt.*
3. *THAT the secretary/CEO Meru County Public Service Board, Claire Kagwiria be committed to civil jail for a period of 6 months for contempt of court.*
4. *THAT the Chief Officer for Health, Meru County Government, Dr.James Kiriimi be committed to civil jail for a period of 6 months for contempt of court.*
5. *THAT the County secretary and head of county public service Meru County Government, Mr.Rufus Miriti be committed to civil jail for a period of 6 months for contempt of court.*
6. *THAT any other order the court may grant to meet the ends of justice.*
7. *THAT costs of this application be borne by the respondents.*

The Claimant/Applicants in her written submissions dated 6th April, 2021, submits a case of contempt of court. It is her case and submission that despite personal service of the valid orders of the court and the application, the Respondent intentionally and willingly disobeyed the orders of court.

The Claimant/Applicants further submits that a court order is valid and commands obedience from inception. In the circumstance of this case the Respondents cited for contempt her Human Resource Functions and therefore duty bound to implement the court order by victimizing members of union on accusation of participating in the strike. She puts it thus;

12. That, it is our submissions that discrimination was also defined in the court of appeal case of **Barclays Bank Kenya Limited & another vs. Gladys Muthoni and 20 others (2018)e KLR** in which the learned Judges relied on in the Supreme court judgment of Kenya in **Petition No.4 of 2019 between Law Society of Kenya vs The Attorney General** where it was held as follows;

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions.....whereby persons of one such description are subjected to ...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex... a failure to

treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

The Claimant's further submissions move on as follows;

- That the dismissal of 500 member of the union was legitimate as the Respondent has been served and ignored a strike notice and that these members were genuinely on strike.
- On 29th January, 2021 the applicant ordered her workers to resume work unconditionally and to date 600 nurses are not on the payroll.
- That the Respondent filed ELRC Cause No.E002 of 2020 and ELRC Cause No.E006 of 2020 but despite an issue of court orders not all members were allowed back but only about 500.
- The rest of the 600 nurses were turned away from work and late caused to sign a purported reinstatement letter which stated that they were reinstated on humanitarian grounds, all this action in breach clear orders of this court.
- The supplementary affidavit of the 1st March, 2021 by the Meru KNUN Branch Secretary is a demonstration of breach of court orders through victimization.
- Discriminative payment of the salaries of some nurses whereas others were not paid at all.
- There was no disciplinary process or the process, if at all was never notified to the members to appear and defend themselves.
- The refusal to deduct union dues for the month of January and February from some members of the union amounts to interfering with the right to belong to a trade union and its unfair and unjust treatment of the members.
- The arbitrary issue of transfer letters by the Respondents and forcing nurses not on the payroll was stage managed in favour of their dismissal and amounts to a breach of valid orders of court.
- The Respondents have not demonstrated that some union members did not participate in the strike.

The Claimant/Applicant in her quest for a case of contempt of court further submits and relies on the authority of **Shimmers Plaza Limited and National Bank of Kenya Limited in Civil Appeal No.33 of 2012** where the court held as follows;

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not, for as Theodore Roosevelt, the 26th President of the United States of America once said;

“No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour.”

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this important message across.”

Further,

26. That removing members from the payroll despite the court restraining the respondents from recruiting nurses afresh in the view of replacing those that participated in the strike is in breach of the orders obtained by the respondents as interviews were conducted and they may have been replaced since removing employees from the payroll and issuing purported termination letters shows deliberate effort to circumvent court orders and replace some members who were on strike.

28. That it is our submissions that turning away nurses from health centre then denying them due salaries which are budgeted for having had participated in the strike as stated in our application is unjust treatment and harassment and the officers responsible should be punished for contempt.

In the penultimate, the Claimant /Applicants submit a case of contempt of court and prays that this application is granted by this court.

The Respondent in a Replying affidavit dated 15th February, 2021 opposes the application and prays that the same be dismissed with cost.

The Respondents submit that on 14th December, 2020, the claimant and her member entered into a Return to Work Formulae. In as much, only about 500 out of possible 1200 of the employees refused to resume work thereby forcing the 2nd Respondent to commence disciplinary proceedings against them.

The 1st Respondent, disabled in its mandate to execute devolved function of health services due to the absence of her nurses opted to recruit new employees. She placed adverts for the same, thereby attracting applications.

The Respondents further case is that on 28th January, 2021, the Claimant/Applicant obtained order stopping the recruitment. The interviews were to commence on 9th February, 2021 but on 8th February, 2021, these were stopped through a notice on her website thus complying with the subsisting court order.

The Respondent again avers that the union and her members ignored the agreement of 14th February, 2020 and these were dismissed upon the disciplinary process against them.

It is the Respondent's other case that the claimants have approached the court with unclean hands for breach of the return to work formulae. This is by entertaining continued industrial action of their members even after the return to work agreement.

The Respondents in their written submissions dated 16th June, 2021 oppose the application. It is their case that she did not conduct the interviews scheduled for 9th February, 2021 in compliance with the court orders of 28th January instant. The Respondents further submits that there is no evidential prove that the interviews took place and the applicants has not brought in any affidavit by an interviewee in this case.

Further, there is no demonstration that any person was replaced after the order of 28th January, 2021.

The Respondent further submits that the prove of disobedience of the court order lies with the applicant as the allegee. She seeks to rely on the authority of Section 107 of the Evidence Act, Chapter 80 of the Laws of Kenya which provides as follows;

“he who alleges must prove. Further the court have held on numerous occasions that contempt proceedings are quasi-criminal in nature and proper procedure ought to be followed and as such, the burden of proof is that one that is higher than in civil cases i.e. that of a balance of probabilities.

The Respondents further seeks to rely on the authority of **Mutitika vs Baharini Farm Limited (1985) KLR 229, 234**, where the court of appeal held thus;

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt.... The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

Therefore on the issue of interviews with a view of replacing the claimant's members'' we submit that the said allegation has not been proved and we urge the court not to find the C.E.O of C.P.S.B Meru County or any officer of the Respondents to be in contempt of the order No.2 of 28/1/2021.

The Respondents further submits that the Claimant /Applicant has not adduced evidence to demonstrate that the salaries of her members were withheld. There is no documentary prove of any semblance of it by the Claimant/Applicant in such proof. The application therefore must fail for want of proof by the Applicant.

The claimant in the circumstances of this application submits a case of being all wronged by the Respondent. She however does not in any way demonstrate this by way of evidence. Contempt and contempt proceedings take an interesting place in litigation and other courts proceedings. This is because disobedience of the court orders or other mischief must be arrested in order to retain the mainstay of the administration of justice.

Contempt proceedings, like submitted by the Respondent call upon the alleging party to put in a high degree of proof, beyond a balance of probabilities. This is because of its quasi criminal nature and the consequential effect of affecting the fundamental right to liberty. The Applicant is therefore called upon to discharge his burden of proof in so far as the allegation of contempt of court is concerned.

In the present circumstances, this burden of proof remains wanting. It is not discharged by the Claimant/Applicant. The application must therefore fail.

I am therefore inclined to disallow the application with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MARCH, 2022.

D.K.NJAGI MARETE

JUDGE

APPEARANCES

1. MR. KINOTI FOR THE CLAIMANT UNION

2. MR.MWIRIGI INSTRUCTED BY MWIRIGI KABURU & COMPANY ADVOCATES FOR THE RESPONDENTS.