



Kenya Medical Practitioners, Pharmacists & Dentists Union v Director, Human Resource, KNH & another; Kaugiria & 65 others (Interested Party); Kamuri & another (Contemnor) (Cause E418 of 2021) [2022] KEELRC 14639 (KLR) (13 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 14639 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E418 OF 2021
NZIOKI WA MAKAU, J
DECEMBER 13, 2022**

BETWEEN

KENYA MEDICAL PRACTITIONERS, PHARMACISTS & DENTISTS UNION CLAIMANT

AND

DIRECTOR, HUMAN RESOURCE KNH 1ST RESPONDENT

KENYATTA NATIONAL HOSPITAL 2ND RESPONDENT

AND

ALEXANDER KAUGIRIA & 65 OTHERS INTERESTED PARTY

AND

EVANSON KAMURI CONTEMNOR

WINNIE MWANGI CONTEMNOR

RULING

1. The motion before me is the notice of motion application by the Claimants/Applicants who seek the committal to civil jail of the 1st and 2nd Alleged contemnors who are the Chief Executive Officer and Director Human Resources respectively, at the 2nd Respondent. The Applicants assert the Court issued an order on June 9, 2021 which was in the nature of a mandatory injunction directing the Respondents to allow the 66 Interested Parties to continue working in their current positions under their current terms of engagement pending the hearing and determination of the main claim. The Applicants assert that despite knowledge of this order, the 2 Alleged Contemnors issued letters denying extension of contract to the 1st, 6th and 7th Interested Parties – namely Dr Alexander Kaugiria Thurair, Dr Rebecca



Mzungu Mbuche and Dr Brenda Kiende. The Applicants thus seek the punishment of the 2 Alleged Contemnors for their contempt.

2. In reply, the 2 Alleged Contemnors each swore an affidavit replying to the motion. The salient facts therein are that the 2 Alleged Contemnors deny committing any contempt of court and assert that they have faithfully adhered to the Court order aforesaid in that they have allowed all the Interested Parties herein to continue working in their current positions under their current terms of engagement as required. They both aver that on June 30, 2022, the contracts under which the 1st, 6th and 7th Interested Parties were employed lapsed and the Respondents were not in a position to extend the said contracts per the terms therein.
3. In a further affidavit, Dr Davji Bhimji Atella depones that the Contemnors agree that the Order was clear stating that the Interested Parties continue working in their current positions under their current terms of engagement pending hearing and determination of the main claim. He asserts further that the main claim has not been heard and determined thus failure to extend contracts for the 1st, 2nd, 5th, 6th, 7th and 38th Interested Parties is contemptuous and ought to be punished.
4. The parties filed submissions in support and opposition of the motion. The Applicants submit that the issue of contempt of court is one of a criminal character and thus requires to be proved to a particular degree. They submit that the elements that must be proved to make a case for civil contempt were outlined in the case of *North Tetu Farmers Company Limited v Joseph Nderitu Wanjohi* [2016] eKLR as:
 - i. The terms of the Order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;
 - ii. The Defendant had knowledge of or proper notice of the terms of the Order;
 - iii. The Defendant has acted in breach of the term of the Order; and
 - iv. The Defendant's conduct was deliberate.
5. The Claimants therefore submit that the 2 Alleged Contemnors only offer the defence that a court order cannot supersede the terms of the Interested Parties employment contracts and thus upon lapse of the contracts, the Respondent and Contemnors had nothing further to do to give effect to the Orders. The Claimants submit that the 2 Contemnors deliberately chose to not comply with Orders binding on the Respondents and their officers. It is submitted that this is outright and deliberate disregard of the authority of the court. The Claimants cite the case of *Hadkinson v Hadkinson*, (1952) ALL ER 567, where Romer, LJ stated:

“It is the plain and unqualified obligation of every person against, or in respect of, whom an Order is made by a court of competent jurisdiction to obey it unless and until that Order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an Order believes it to be irregular or even void. Lord Cottenham, L.C., said in *Chuck v Cremer* (1) (1 Coop temp Cott 342):

“A party, who knows of an Order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an Order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an Order, which was null or irregular, and who might be affected by



it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed...”

6. The Claimants thus submit that the Respondents and its officers being the Contemnors acted deliberately to not comply the Orders of the court and that first and foremost, the Court ought to clothe itself with dignity and respect by ensuring that the intended effect of the Orders of June 9, 2021 are achieved. They argue that to this end, it is necessary to reverse the effects of the contemptuous acts of the Respondents and their officers as anything less would give credence to the contemptuous actions of the Respondents and Contemnors and give impetus to parties disobeying court orders with the knowledge that their actions would not be reversed. The Claimants urge that summons be issued against the Contemnors cited herein jointly and severally to appear before this court and show cause why they should not be committed to civil jail for such term as the court may deem just for blatant disobedience of this Honourable Court’s Order dated June 9, 2021. The Claimants submit the Respondents and Contemnors cited herein be denied further audience by this Honourable Court save for showing cause why they should not be committed to civil jail. The Claimants also seek costs of the motion as well as any other order the Court may deem just and fit to grant.
7. The respondents’ to the motion submissions are to the effect that they are opposed to the said application and submit that the same is a ploy to abuse the court process by inviting the Court to arbitrarily extend their now lapsed contracts by provoking this Court under the presence that the Alleged Contemnors have acted in contempt of the Order by sacking the 1st, 6th and 7th Interested Parties. The Alleged Contemnors submit that have not done so and are therefore unworthy of this Honourable Courts’ wrath. The Alleged Contemnors pray that this Honourable Court declines this invitation and submit that the issues for determination are whether the second affidavit by Dr Atella is properly on record and whether the Applicants have proved their case to have the Alleged Contemnors cited for contempt of Order Number 2 issued by this this Honourable Court on June 9, 2021 to the required standard. They submit that the further affidavit sworn by Dr Davji Bhimji Atella on July 13, 2022 is not properly on record as pleadings had closed once the Alleged Contemnors filed their respective affidavit. They submit there was no leave of the Court granted nor consent of the Alleged Contemnors obtained.
8. The 2 Alleged Contemnors further submit that the further affidavit sworn by Dr Davji Bhimji Atella introduces new facts from the 2nd, 5th and 38th Interested Parties to which the Alleged Contemnors do not have an opportunity to respond as there was no leave to file a supplementary affidavit. On the issue as to whether the Applicants have proved their case to the required standard, they submit that relying on the case of *James Gachiri Mwangi v John Waweru Muriuki & 3 others* [2020] eKLR which set out the criteria that must be met for an application for contempt of Court orders to succeed, it is submitted that an Applicant must meet the following requirements;
 - a) Whether an order was granted
 - b) Whether service was effected
 - c) Whether the order was clear, unambiguous and unequivocal
 - d) Whether there was disobedience of the said Court order
9. The Alleged Contemnors submit that only the first two elements of the four factorial tests stated above were met, that is:
 - a. First, the Court issued an order on June 9, 2021 and;
 - b. Second, the Respondent was aware of the said order.



The Alleged Contemnors submit that the third and fourth test were not met. The Alleged Contemnors submit that the application before Court ought to be dismissed because Order Number 2 was not clear and precise. The respondents to the motion argue that the crux of the Application by the Applicants is a divergence of interpretation of the said unclear order by the Applicant, on one side and the 1st, 6th and 7th Interested Parties along with the Alleged Contemnors on the other hand. They submit that according to the Applicants, the Respondents were bound to renew the Interested Parties contracts once the same lapsed. On the other hand, the Alleged Contemnors aver that the 2nd Respondent's interpretation of the order is that the Respondent was bound to let the 66 Interested Parties live out their contracts of employment with the 2nd Respondent and that this was done. The 2 Alleged Contemnors submit that the Applicants have not claimed that the Alleged Contemnors terminated any of the 66 Interested Parties contracts.

10. The Alleged Contemnors submit that the fact that the 1st, 6th and 7th Interested Parties wrote their respective letters seeking extension of their contracts to the 2nd Respondent illustrates that Order Number 2 issued was unclear. For had it been clear that the court directed the 2nd Respondent to automatically renew their contracts indefinitely pending the hearing and determination of this suit, they would not have written their letters seeking to renew their contracts as the same would have been automatic. The Alleged Contemnors submit that by making applications for extension of respective contracts the 1st, 6th and 7th Interested Parties' action confirm that they knew the order would go no further than the terms of their prevailing contracts which lapsed on 30th June 2022. They cite the case of *Amos Mathenge Kabuthu v Simon Peter Mwangi* [2015] eKLR where Aburili, J held:

“Ambiguity consists in an order having unclear meaning or lending itself capable of different interpretations. The law of contempt as earlier stated requires that for one to be cited and punished for contempt of court there must be proof that is much more than on a balance of probabilities, close to beyond reasonable doubt but not exactly beyond reasonable doubt. Not only is the court supposed to be satisfied that there was an order which was disobeyed but that the order was clear and unambiguous and incapable of different interpretations.”

11. They also cite the case of *Joseph Mburu Ndekei v Ruth Njeri Mutema* [2017] eKLR where the Court cited the case of *Bramblevale Ltd* 1970 CH 128 at Pg 137, where Lord Denning MR stated;

“A contempt of Court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him”.

They submit the Court held that as the offence of contempt of court is quasi-criminal in nature the proof the same is on a high standard, that is beyond reasonable doubt, but higher than balance of probabilities. Further, the Alleged Contemnors rely on the trite principle of law that a Court of law cannot rewrite a contract on behalf of the parties but only to enforce the same. The Alleged Contemnors rely on the cases of *South Nyanza Sugar Co Ltd v Leonard O Arera* [2020] eKLR and *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* [2001] eKLR where the Courts held that a court of law cannot rewrite a contract between the parties. The 2 Alleged Contemnors submit that Order Number 2 is unclear as adoption of the Applicants interpretation suggests that it was to rewrite and renew their contracts. The Alleged Contemnors submit that they faithfully complied with the Court order as they did not interfere with the 66 Interested Parties' contracts for employment.

12. The determination of the Court upon assessing the facts, the law and the arguments made herein, it is clear that the 2 Alleged Contemnors were aware of the contents of the Court order. What the Court



is to determine is whether there was wilful disobedience of the Court order. The pertinent part of the court order provided as follows:-

That a mandatory injunction be and is hereby issued against the Respondents directing them to allow the Interested Parties to continue working in their current positions under their current terms of engagement pending hearing and determination of the main claim. The foregoing phrase means this, the Interested Parties were to continue working in their current positions under their current terms of engagement pending hearing and determination of the main claim. That phrase did not, in my view, re-write the contracts of the Interested Parties. The employees were to continue working under their current terms of engagement. That phrase did not mean that where a contract was lapsing it would be renewed automatically on account of the Court order. If this were so, the 1st, 6th and 7th Respondents would not have applied for extension or renewal of their contract which lapsed on June 30, 2022. From the foregoing, it is clear that the 2 Alleged Contemnors did not breach the Court order by allowing the Interested Parties to continue serving under the terms of their contracts with the 2nd Respondent until those contracts lapsed. In fact, they complied with the order by not bringing the contracts to an end prematurely. The upshot of the foregoing is that the motion is therefore not well taken and is thus only fit for the singular fate it deserves: dismissal albeit with no order as to costs as there is no contempt of court that is proved against the 2 Alleged Contemnors.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2022.

NZIOKI WA MAKAU

JUDGE

