



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 99 OF 2020**

*(Before Hon. Lady Justice Maureen Onyango)*

**KUDHEIHA WORKERS**

**CLAIMANT**

**VERSUS**

**THE DIRECTOR RIARA GROUP OF SCHOOLS**

**RESPONDENT**

**RULING**

Before me, for determination is a Contempt Application dated 18<sup>th</sup> May 2020 seeking the following orders THAT:

1. Spent.

2. That the Court be pleased to stay the proceedings in the matter herein and commence contempt of court proceedings against the Respondents.

3. That this court be pleased to cite the following persons severally and individually or their agent for contempt of court and be committed to civil jail for 6 months for contempt of court by disobeying court orders issued by a court of competent jurisdiction.

(i) *JUJU GACHUKIA – DIRECTOR, RIARA GROUP OF SCHOOLS*

(ii) *VICTORIA N. SHIGOLI – GROUP HUMAN RESOURCE MANAGER, RIARA GROUP OF SCHOOLS*

(iii) *STEPHEN G. KARIUKI MANAGER – SENIOR HUMAN RESOURCES MANAGER*

4. That the Claimant recruited about 206 employees out of about 300 from the Respondent establishment which for purpose of recognition translates to about 68.67%. After serving the employer with check off system forms and on expiry of the notice to sign the recognition and deduct union dues the Respondent failed and or refused to do so as mandatory required doing prompting the substantive application by claimant.

5. That at the ex-parte hearing, the claimant obtained orders to protect members from victimization on account of union membership and activities pending hearing of the substantive matter in respect to recognition and signing of the recognition agreement.

6. That the orders are dated 19<sup>th</sup> February 2020 and were issued on 20<sup>th</sup> February 2020.

7. That the said orders are specific, clear, and easy to comply with.

8. That the orders were never vacated; contested and or varied hence they stand valid, alive and well.

9. That the only route to dishonour an order is by either vacating and or varying the same.

10. That none of the above happened in the said matter.

11. That in a deliberate attempt to defeat the recognition case the respondent embarked on serious victimization of claimant members in blatant violation of the orders

12. That out of 206 members, a number of them were issued with intimidation and victimization letters, an example of such letters been those filed on 5<sup>th</sup> March 2020 within the main cause by the claimants.

13. That some of our members' salaries had been stopped subsisting orders notwithstanding.

14. That instead of the Respondent employer signing the recognition agreement, and deduct trade union dues at the expiry of the notice after service, they embarked on unfair labour practices to defeat the union and workers in pursuit of recognition for collective bargaining. The Respondent actions are against Kenya constitution Article 2, 27, 28, 35 36, 41(5), 47 and Sections 4, 48, 54 and 57 of the labour Relations Act 2007, Section 19 of the Employment Act 2007, beside several other enabling provisions of the law.

15. That the orders issued on 20<sup>th</sup> February 2020 were duly served to the Respondent employer on 21<sup>st</sup> February 2020 and an affidavit of service filed in court to confirm service.

16. That the Respondent's actions have since exposed the Claimant to a possibility of losing members who have since threatened to withdraw their membership should the Respondents be allowed to continue with disobedience of the court and the court orders.

17. That respect to rule of law is not a matter of choice and therefore the Respondents should be invited to show course why they should not be cited for contempt of court and committed to civil jail for disobedience of court orders.

That this is as exemplified in the case of Lord **Johnson v Grant 1923 SC 789 AT 790** that –

*“The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court, which is offended. It is the fundamental supremacy of the law, which is being challenged. It is extremely unfortunate that at this time and age one can attempt to disobey a court of law and gather confidence to go back to the same court seeking relief. That is being too daring and unprecedented.”*

The Application is based on the grounds as set out on the face of the Notice of Motion Application and supported by the affidavit of Mr. Albert Njeru, the Secretary General of the Applicant, sworn on the same date.

The Respondent opposes the application, vide a Replying Affidavit sworn on 9<sup>th</sup> June 2020 by Stephen G. Kariuki, a Senior Human Resource Officer of the Respondent. He avers that the Application is defective and misconceived as the Respondent had not disobeyed the Court orders issued on 20<sup>th</sup> February 2020.

He avers that the Respondent had complied with the First Order restraining the Respondent from intimidation or victimization. That the decision to write to some employees seeking confirmation of union membership was to help it honour and comply with the Second order, which was compelling the Respondent to deduct and remit union dues. That this was necessitated by allegations of forgery of signatures by some employees as contained in the membership forms. As such, he avers that the Claimant has egoistically interpreted the confirmation of the membership as intimidation and victimization and disobedience of the court order.

The Respondent avers that the second order did not have a time frame within which to comply and as such it states that it cannot be said to have disobeyed the court orders. It adds that the order requires financial adjustments in the payroll system and that taking this into consideration, the earliest the same could be factored in was in March 2020.

The affiant avers that the orders had been extended on 5<sup>th</sup> March 2020 when the Application had come up for mention and the Respondent had been granted leave to file its Replying Affidavit. However, the onset of the COVID-19 pandemic saw the Government's directive on the closure of all learning institutions which directive negatively affected its operations and compliance with the second order in reasonable time. In addition, compliance with the second order was also frustrated by the uncertainty of the Union membership due to the duplication of member names and allegations of forgery.

The Respondent avers that the alleged withdrawal of the lunch benefits to its employees was not discriminative and in isolation to employees who had joined the union. This allowance was withdrawn for all employees and not in any way in perpetration or disobedience of the court order. This discontinuation of the lunch benefit was one of the measures the Respondent took to counter the negative effects of the pandemic and in an effort to remain afloat. That the uncertainty on resumption of learning, continues to impact the Respondent negatively as it relies on school fees paid for its operations and sustenance.

In conclusion, the Respondent prays for absolution and the Court's indulgence to allow the issue of the union membership, which is the bedrock of the order and the substratum of the main claim to be resolved.

### **Submissions**

The Claimant submitted that its members had been subjected to intimidation and victimization despite the existence of the orders. That its member's salaries were reduced by 63% by the Respondent who was leaning on the COVID 19 situation. The letters shared indicated that the Respondent was to deduct 40% of the salaries.

The Claimant submitted that Section 10(5) of the Employment Act requires that any change in the terms of employment must be consultative and involving the individual employee and or the representative body. It submitted that there was no such consultation to warrant such actions and that the Board of Management was making this decision to punish union members and cow them to abandon union membership.

The Claimant submitted that the Respondent's failure to sign the Recognition Agreement and deduct trade union dues while embarking on unfair labour practices was against Articles 2, 27, 28, 35, 36, 41(5) and 47 of the Constitution; Sections 4, 48, 54 and 57 of the Labour Relations Act and Section 19 of the Employment Act.

The Claimant submitted that respect to the rule of law is not a matter of choice and therefore Respondents should be invited to show cause why they should not be cited for contempt of court. This was exemplified in case of **Lord Johnson v Grant 1923 SC 789 AT 790** where the court held that:

*“The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is being challenged.”*

Further, in the case **Robertson v Her Majesty's Advocate, 2007 HCAC63**, Lord Justice Clerk stated that:

*“contempt of court is constituted by conduct that denotes wilful*

*defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings ... the power of the court to punish for contempt is inherent in a system of administration of justice and that power is held by every judge.”*

In the case of **Board of Governors – Moi High School Kabarak v Malcolm Bell & Another (2013) eKLR** the Supreme Court of Kenya observed that the power to punish for contempt is a power of the court to safeguard itself against contemptuous or disruptive intrusion from elsewhere. Further reliance was placed on the case of **Mitu Bell Welfare Society v AG and others HCC Petition No. 164 of 2014** the court reiterated that it is critical for this country to strive to abide by court orders and protect the dignity and authority of the court of law which courts should jealously guard by being firm on any person who deliberately disobeys court orders or attempts to scuttle the court process. The claimant submitted that the refusal to comply with court orders is like forcefully and telling the workers and their unions to abandon rights afforded to them by the constitution of Kenya.

The claimant in conclusion submitted that the court should cite the respondent management in contempt of court and further commit them to civil jail for 6 months.

The Respondent submitted that the fundamental duty of the court is to do justice between parties and that the inherent power has not been conferred on the court and that it is a power inherent in the Court by virtue of its duty to do justice between the parties before it.

The Respondent submits that the Application before this court is brought under Sections 4(1)(a) and 6(c) of the Contempt of Court Act. This Act, the Respondent submitted was declared unconstitutional prior to filing of the Application and the reliance on the impugned Act renders the application defective.

Further, the Respondent submitted that the Certificate of Urgency which the Application is riding on makes reference to The Pandemic Response and Management Act, April 2020 which it deems as alien and as such, the Applicant cannot rely on it.

The Respondent cited the **Kenya Human Rights Commission v Attorney General & Another (2018) eKLR** case, which declared the Contempt of Court Act, unconstitutional. It submitted that upon the declaration, the Court of Appeal held that the Applicable law in matters Contempt of Court is as provided in Section 5 of the Judicature Act.

The Respondent submitted that the case of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others (2014) eKLR** laid down the principles that in an Application for contempt of court, leave is no longer required. That in line with Section 5(2) of the Judicature Act, the court, in punishing for contempt exercises criminal jurisdiction and it is therefore paramount that the procedure for instituting such proceedings be scrupulously followed and that due to the gravity of such proceedings, the same cannot be heard ex-parte. The Respondent submitted therefore that the application is misconceived, bad in law and the grounds relied on do not warrant the court to exercise its discretion under Section 3A, and 63(e) of the Civil Procedure Act. The Application is omnibus and should therefore be dismissed.

On whether the orders issued on 20<sup>th</sup> February 2020 were clear and ambiguous, the Respondent submitted that Clarity of orders in contempt proceedings is paramount. Reliance was placed on the Court of Appeal case of **Ochino & Another v Okombo and 4 Others (1989) KLR** where the Court held inter alia the court will only punish as contempt a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous. It submitted that the order was ambiguous to the extent on compliance with the first order and lacked clarification in the check off forms, which was the basis of compliance with the second order.

It submitted that the Claimant has lashed out at and intimidated the

Respondent for seeking clarification on the membership list. That deducting and remitting union dues based on the forms presented would lead to losses for the Respondent's, the members themselves and unjust enrichment by the Claimant. It urged the court not to find it or its officers guilty of contempt.

The Respondent submitted that the degree of proof in contempt of court proceedings is almost beyond reasonable doubt but definitely higher than balance of probability. The Respondent further relied on the Court of Appeal pronouncement in the case of **Mwangi H.C Wangonde v Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998** which cited the case of **Ochino & Another v Okombo & 4 Others (1989) eKLR** that the threshold of proof required in contempt matters is higher than in normal civil cases and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

In the same breath, the Respondent submitted that no concrete evidence has been adduced before this court to leave no doubt that the orders were breached. That the question of salary reduction is secondary in the Application as the Claimant has neither presented the quantified amount that ought to have been paid, nor the rate and the span to be covered and that the number of members on whose behalf the dues were to be deducted and paid has not been presented.

The Respondent submitted that in addition to the high threshold of proof required, there are four essential elements that must also be proved while relying on the case of **Samuel M. N. Mweru & Others v the National Land Commission & Others**. The court held that:

*“Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-*

*“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) 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.”*

The Respondent submitted that the Claimant has neither proved the four elements nor demonstrated the breach of the said orders to warrant the court to exercise its jurisdiction in the claimant’s favour.

The Respondent submitted that the Respondent appreciates that its employees’ rights to join the union is constitutional and has no intention of taking it away. It submitted that based on the circumstances of this case, the court should order for re-recruitment of the members to the union as this would retain a cordial working relationship between the Union and itself.

The respondent prays for absolution and the Court’s indulgence to allow the issue of union membership which is the bedrock of the Orders and the substratum of the main claim to be resolved. That the interim orders granted ex parte renders the main claim nugatory and locks the door on verification of membership. That according to the Claimant the dispute of membership is a cut and dry issue and the only remaining issue for the Court, is the signing of the recognition agreement. The Respondent submitted that if deduction and remittance of union dues is enforced, the issue of membership will be obsolete, leading to automatic execution of the recognition agreement.

### **Analysis and Determination**

I have considered the application, affidavits and the submissions by the parties in this matter. The claimant seeks the citing and committal to civil jail for 6 months for contempt of court of three members of staff of the Respondent.

The orders granted on 19<sup>th</sup> February 2020 read as follows:

***i. In the meantime, the Respondent is restrained from intimidating or victimizing its employees who have signed check-off forms or from discriminating the said employees with a view to coerce them to withdraw union membership pending inter parties hearing of this application,***

***ii. That the Respondent is further hereby compelled to deduct and remit union dues for all employees who have signed the check-off forms and as provided in Section 48 of Labour Relations Act and Section 19 of the Employment Act***

***iii. The orders herein to be served together with a penal notice.***

**Black’s Law Dictionary (Ninth Edition)** defines contempt of court as:

*“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”*

The courts have clearly come out and affirmed that the essence of contempt proceedings is to safeguard the supremacy of the law. In the matter of **Johnson v Grant, 1923 SC 789 at 790 Lord President Clyde** stated that;

*“...The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.”*

The reason why courts will punish for contempt of court then is to safeguard the rule of law, which is fundamental in the administration of

justice. It has nothing to do with the integrity of the Judiciary or the Court or even the personal ego of the Presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.

In the matter of **Collins Odumba [2016] eKLR** Marete J. stated:-

*“A court order is not a mere suggestion or an opinion or a point*

*of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option”*

The Claimant has stated that the Respondent has not complied with all the provisions of the order. The Respondent argues that the first order was complied with and given reasons why the second order was not complied with. It argues that there was a need to seek confirmation on the membership as there were allegations of forgery of signatures by some employees.

Additionally, the Respondent has raised concern on the laws relied on by the Applicant being the Contempt of Court Act and the Pandemic Response and Management Act, 2020. The Respondent submits that the Contempt Act was declared unconstitutional and Pandemic Act is alien. Having looked at the application, I have not seen any reference to the Pandemic Response and Management Act. On the matter of the Contempt of Court Act, the same has been deemed unconstitutional as per Mwita J. in the **Kenya Human Rights Commission v Attorney General & Another Case (supra)**.

However, this court will fall back on the provisions of Article 159(2)(d) of the Constitution which provides that: **“Justice shall be administered without undue regard to procedural technicalities.”** This court also notes that the submissions against the application were not raised in the replying affidavit. Counsel for the Respondent is bringing new arguments in submissions which is not acceptable. This is as per the decision in **Alfred Pengo Mamboleo v Oserian Development Co. Ltd & another [2018] eKLR** where the court held:

*“Further it is trite law that submissions cannot be treated as evidence or take place of evidence as stated by the **Court of Appeal in Daniel Toroitich Arap Moi & Another -v- Mwangi Stephen Murithi & Another (2014) eKLR** when it held that:*

*“Submissions cannot take place of evidence. The Respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid---Submissions are generally parties “marketing language”----”*

From the foregoing, I shall address the contempt allegations based on the responses in the Affidavits.

The Respondent has stated that the reason for its non-compliance was that the order had no time limit within which the Respondent was supposed to comply with. It also stated that the reason why it did not comply was in order to confirm the membership list and the authenticity of the signatures.

In the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828, Ibrahim, J** (as he then was) stated that:

*“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. 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 void”.***

[Emphasis added]

There is no dispute that the orders of this court were served upon the Respondent. Indeed, service has not been contested in the replying affidavit. It is therefore my finding that the Respondent and contemnors were aware about the orders.

In the replying affidavit of STEPHEN. G. KARIUKI, the Senior Human Resource Officer at the Respondent, he states as follows paragraphs 5 – 9: -

*“5. That the Respondent complied with the first Order, restraining the Respondent, “from intimidating or victimizing its employees who have signed check-off forms or from discriminating the said employees with a view to coerce them to withdraw union membership pending inter parties hearing of this application.”*

*6. That though the Respondent wrote to some employees seeking confirmation of union membership, the same was neither in disobedience of the Court Orders, nor meant to intimidate, victimize or coerce the employees with a view to withdraw from the union, but rather to help the Respondent to honour and comply with the second Court Order, which was compelling the Respondent to deduct and remit union dues.*

7. That the confirmation of union membership was necessitated by allegations of forgery of signatures by some employees as contained in the membership forms.

8. That the Claimant/Applicant has egoistically interpreted the confirmation of the union membership as intimidation and victimization of its alleged members and in disobedience of the Court Order.

9. That the second Court Order required the Respondent to, "deduct and remit union dues for all employees who have signed the check-off forms and as provided in Section 48 of Labour Relations Act and Section 19 of the Employment Act."

These are admissions that the Respondent and the cited officers were aware of the provisions of the orders.

By asking the employees to confirm membership, they were disobeying the very unequivocal and unambiguous orders of this court, that they stop intimidation of employees who had signed check off forms pending inter partes hearing. The court did not give the Respondent the leeway to confirm who had signed and who had not signed. The court directed that deductions be made in respect of all those who had signed the check off forms that were before the court as they were.

The excuse given by the Respondent that there were allegations of forgery is not backed by evidence. In any event, the Respondent required leave of the court to deviate from the very clear orders that had been issued.

Section 48 of the Labour Relations Act is clear that deduction of union dues must commence on the month following receipt of the check off forms. Since the orders were made on 19<sup>th</sup> February 2020, the deductions should have commenced in March 2020.

The Respondent has not demonstrated that any of the employees who had signed the check off forms were not in its payroll of March 2020 to prevent it from complying with the orders to make the deduction. The instant application was filed on 26<sup>th</sup> May 2020 and by that time the Respondent had still not complied.

The other excuse that the order did not have timelines and that the Respondent still had time to comply. As at 9<sup>th</sup> June 2020 when the replying affidavit was sworn, the Respondent had still not complied. This is a further admission that as at that date, the Respondent was in disobedience of the court order, and that the disobedience was indeed very deliberate as the Respondent has even requested that fresh recruitments be done by the Claimant/Applicant, which implies it has no intention to comply.

**For the foregoing reasons, I find that the Respondent and its officers named herein under wilfully and deliberately disobeyed this court's orders and are guilty of contempt.**

**1. JUJU GACHUKIA – DIRECTOR, RIARA GROUP OF SCHOOLS**

**2. VICTORIA N. SHIGOLI – GROUP HUMAN RESOURCE MANAGER, RIARA GROUP OF SCHOOLS**

**3. STEPHEN G. KARIUKI MANAGER – SENIOR HUMAN RESOURCES MANAGER**

**I order that they ALL PERSONALLY APPEAR in court on 4<sup>th</sup> May 2021 for sentencing.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF APRIL 2021**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**