



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 429 OF 2017

KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT

v

KISUMU WATER & SEWERAGE CO LTD.....RESPONDENT

RULING NO. 2

1. For determination is a Motion dated 21 January 2021 by the Kenya County Government Workers Union (the Union) seeking orders:
 - (i) ...
 - (ii) THAT the Chief Executive Officer of the Respondent be summoned before this Honourable Court to show cause why he should not be committed to civil jail for blatantly failing to comply with the judgment delivered on 18 September 2019.
 - (iii) THAT on failing to show cause, the said officer be committed to prison for a maximum period of six (6) months for contempt of this Honourable Court's judgment delivered on the 18 September 2019.
 - (iv) THAT Officer Commanding Kisumu Police Station do execute Order 3 herein.
 - (v) THAT the Respondent be barred from addressing this Honourable Court in this matter unless and until it has purged itself of contempt.
 - (vi) Any other or further orders as this Honourable Court deems fit and appropriate.
 - (vii) THAT the costs of this application be borne by the Respondent.
2. The Managing Director of Kisumu Water & Sewerage Co Ltd (the Respondent) filed a replying affidavit in opposition to the Motion on 12 February 2021.
3. When the parties appeared in Court on 16 February 2021 for the giving of directions, the Court directed the parties to file and exchange submissions within agreed timelines.
4. The Union filed its submissions on 23 February 2021 and identified the Issues for examination as:
 - (i) Whether the Claimant has demonstrated sufficient cause to succeed in this civil contempt proceedings?
 - (ii) Whether the Respondent should be committed to civil jail?
 - (iii) Whether the Respondent should be excused for failing/refusing to obey this Honourable Court orders issued on 18 September 2019 and 17 December 2020 based on the Court of Appeals judgment in Civil Appeal No. 18 of 2013?
 - (iv) Whether the Respondent herein should bear the costs of this application?
5. The Respondent filed its submissions on 7 April 2021, and it raised the Issues as:
 - (i) Whether there is contempt regarding:

- a) Reinstatement of the Grievant Solomon Onyango Oguta.
 - b) On deduction and remittance of union dues vis a vis the judgment in Nairobi Civil Appeal No. 18 of 2013.
6. The Court has considered the Motion, affidavits and submissions.

Background

7. In a judgment delivered on 18 September 2019, the Court found and held as follows:

- (a) The summary dismissal of CW 1 by the Respondent was unlawful and unfair as it was on account of union activities by CW 1.
- (b) Refusal by the Respondent to deduct and remit union dues to the Claimant Union was unlawful and in violation of section 48(2) and (3) of the Labour Relations Act No. 14, 2007. The Respondent is directed to commence deductions and remit to the Claimant Union forthwith. Since three (3) years have not elapsed from the time of summary dismissal took place in October 2016, and as per section 49(3)(a) and (4) of the Employment Act, 2007, the Court directs the Respondent to reinstate CW 1 to his employment without loss of salary and benefits effective from the date of dismissal because CW 1 has not found an alternative job, the Labour Officer recommended immediate reinstatement of CW 1; CW 1 was victimised for union activities which conduct is to be discouraged by this Court. There is no evidence that the reinstatement is untenable since the Respondent is a public institution, and employment relationships are not and ought not to be personalised. Reinstatement is the most effective remedy to CW 1 in the circumstances of the case. Furthermore, CW 1 is presently the Branch Chairman of the Claimant Union and would be empowered by the reinstatement to better oversee the Union activities at the shop floor.
- (c) The Respondent to pay the costs of the suit.

The Union's case

8. The Union's case is that the terms of the judgment were clear and unambiguous; the judgment was served upon the Respondent who moved the Court to set aside the same, but the move was declined in a Ruling delivered on 17 December 2020; the Respondent was, therefore, aware of the orders and that the Respondent and the contemnor had deliberately failed to comply or implement the terms of the judgment.

9. The union cited *Samuel M.N. Mweru & Ors v National Land Commission & 2 Ors* (2020) eKLR.

Respondent's rebuttal

10. Defending itself, the Respondent through the Managing Director asserted that it could not implement or comply with the judgment because the findings therein were explicitly inconsistent with the findings of the Court of Appeal in Nairobi Civil Appeal No. 18 of 2013, *National Union of Water & Sewerage Employees & 3 Ors v Nairobi Water & Sewerage Co & Ors* {reported as *National Union of Water & Sewerage Employees & 3Ors v Nairobi Water & Sewerage Co Ltd* (2018) eKLR} where the Court of Appeal purportedly prohibited the Kenya County Government Workers Union from recruiting and/or representing the interests of employees drawn from the water sector.

11. In the submissions, the Respondent also cited the decision of this Court, differently constituted *In the Matter of Registration of a Collective Bargaining Agreement No. 34 of 2020* in which the Principal Judge stated that the Union lacked the capacity to represent employees of water companies. However, a copy of the decision was not placed before the Court.

12. Secondly, that the Court had stayed the judgment on 11 November 2019 and that it was only on 17 December 2020 that the stay orders were discharged.

13. Lastly, it was deposed that CW 1 had never reported for deployment after the discharge of the stay orders on 17 December 2020.

Reinstatement of Solomon Oguta

14. The Court stayed the judgment delivered on 18 September 2019 on 11 November 2019 pending the determination of an application by the Respondent to set aside the Judgment.

15. The stay orders were only discharged on 17 December 2020. Contempt in respect of the reinstatement could therefore only arise after 17 December 2020.

16. The deposition by the Managing Director that Mr Solomon Oguta had not reported for deployment after 17 December 2020 was not responded to.

17. The Court is, therefore, unable to find any deliberate failure to comply with the reinstatement order. The said Mr Oguta should report to the Respondent with dispatch for deployment.

Deduction of union dues

18. The Court had directed the Respondent to commence the deduction of trade union dues from its employees who had joined the Union in the judgment.

19. The order was equally stayed on 11 November 2019 and were discharged on 17 December 2020.

20. Contempt of this limb of the order could only arise after that date. The Respondent cited the Court of Appeal decisions mentioned in paragraph 10 hereinbefore as a vitiating factor.

21. The Court has keenly perused the judgment of the Court of Appeal.

22. Whereas the Court of Appeal appreciated that one of the Issue in the judgment which was appealed against was the question:

who between the KLGWU and NUWASE is the lawful representative of the unionisable employees of the Nairobi City Water Services? It is a matter of great importance, touches on the constitution and right of employees to join a union of their choice as read against S. 54 of the Labour Relations Act. That is a fundamental point.

this Court is unable to find or locate anywhere in the body of the judgment where the Court of Appeal made a finding prohibiting *the Kenya County Government Workers Union the Claimant herein from recruiting and or representing interests of employees drawn from the water sector* as deposed in paragraph 5 of the Respondent's replying affidavit.

23. However, a reading of the excerpts of *In the Matter of Registration of a Collective Bargaining Agreement No. 34 of 2020* in the Respondent's submissions suggest that the Union was ordered out of the water sector by this Court differently constituted.

24. The capacity of the Union to represent employees in the water sector appears to be unclear. The Court cannot, therefore, find deliberate disobedience of the judgment of 18 September 2019 in respect to union dues.

Conclusion and Orders

25. From the foregoing, the Court finds no contempt of court orders of 18 September 2019, but in the spirit of good faith in industrial relations and fidelity to the rule of law, Mr Solomon Oguta should report to the Respondent forthwith for deployment and in any case within 7- days.

26. No order on costs as the dispute emanated from social partners.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 26TH DAY OF MAY 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Union Benard Odero & Co. Advocates

For Respondent Omondi, Abande & Co. Advocates

Court Assistant Chrispo Aura