



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 30 OF 2018

(Formerly High Court Miscellaneous Application No. 361 of 2018

at Nairobi in the Constitutional and Judicial Review Division)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE LABOUR RELATIONS ACT, 2007

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY FOR EAST AFRICA COMMUNITY

LABOUR AND SOCIAL PROTECTION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The Applicant in the Notice of Motion Application dated 1st October, 2020 prays for an order in the following terms: -

i. That this Honourable Court be pleased to order the Cabinet Secretary, Ministry of Labour and Social Protection, Hon. Simon Kiprono Chelugui be punished for contempt of Court and be committed to Civil Jail for disobedience of the Court orders issued on 19th July 2019 in Judicial Review Application No. 30 of 2018.

ii. That costs of the Application be borne by the 1st Respondent.

2. The application is premised on grounds set out on the Notice of Motion numbered 1 to 4 to wit, that the Order of mandamus issued by Byram Ongaya, J. on 19/7/2019 compelling the 1st Respondent to issue a gazette notice in favour of the Applicant as per section 48(2) of the Labour Relations Act, 2007 has not been obeyed by the 1st Respondent.

3. That the 1st Respondent is aware of the Court order and is in contempt of the order and should be punished as prayed.

4. The application is supported by an affidavit of Nahason Ndiema the Secretary General of the Applicant union in which the aforesaid grounds are restated.

5. The deponent states that the 1st Respondent has failed, declined and or neglected to comply with the Court's orders despite being aware of the same. That the 1st Respondent be committed to Civil jail for contempt of Court.

Response

6. The 1st Respondent filed a replying affidavit sworn to by himself on 20th November, 2020.
7. The 1st Respondent deposes that failure to sign the gazettment Notice in terms of the Court order dated 19/7/2019 was not deliberate and willful.
8. That the order was not personally served on the 1st Respondent and the Applicant does not allege personal service at all in the Notice of Motion or in the supporting affidavit.
9. That the said order was brought to the attention of the 1st Respondent once this application was filed.
10. That the issue of Gazettment of Union Dues and Agency Fees is a matter in progress. That the Ministry sought audience from Head of Public Service and the Attorney General and pursuant to their advice the Ministry prepared a concept paper and draft Cabinet Memorandum on the gazettment of Trade Union dues and Agency fees and the attendant security risks and circulated it vide a letter dated 7/9/2020.
11. That on 14/9/2020, the Attorney General rendered an advisory opinion, that the Ministry may proceed to amend the Regulations or repeal and replace the Regulations with new ones that address its concerns.
12. That the Ministry in conjunction with the Attorney General are in the process of developing the Labour Relations (Trade Union Dues and Agency Fees) Regulations 2020 which are to guide the procedure of gazettment of the orders.
13. That the gazettment of the orders by the Court will have to await the completion of the aforesaid process, hence the Ministry has not yet complied with the said Court Order.
14. That willful default of the Court Order has not been established by the Applicant on the standard required in contempt proceedings which are criminal in nature and is beyond reasonable doubt.
15. That the application be dismissed therefore.

Determination

16. The Applicant did not file a supplementary affidavit to join issue with the facts set out by the 1st Respondent in the replying affidavit.
17. It is therefore established that no personal service of the stated orders of the Court dated 19/7/2019 was done on the 1st Respondent.
18. It is also established that the implementation of the said order requires a process which has been clearly elaborated in the replying affidavit and the process is underway under the guidance of the Cabinet Secretary, Attorney General and the 1st Respondent.
19. The Court is also satisfied that no willful default and or disobedience of the Court Order dated 19/7/2019 has been established by the Applicant against the 1st Respondent beyond reasonable doubt which is the standard applicable in criminal proceedings such as contempt of Court.
20. This is the standard of proof set forth in the case of **Kenya Human Rights Commission –vs- Attorney General & Another [2018] eKLR.**
21. In **M.N. Mweru and Others –vs- National Land Commission and 2 Others [2020] eKLR** the Court stated: -

“It is essential for the maintenance of the Rule of law and order that the authority and the dignity of Courts is 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 unequivocal 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.”

22. In view of the above, and having found that the 1st respondent has not been proved to be in willful disregard of the Court order dated 19/7/2019, it is imperative that the 1st respondent is held to his words that he is in the process of finalizing Regulation that would lead to the gazettment of the Applicant’s Bank account held with Bank of Africa in compliance with the provision of Section 48 of the Labour Relations Act, 2007.
23. In this respect, the Applicant is enjoined by the Court to keep vigilance in this respect and if need be serve the stated order directly on the 1st Respondent to ensure timely compliance as promised by the 1st Respondent and revisit this issue again if the delay to implement it is inordinate. The application is dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2021

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearance

Mr. Ngila for Applicant

M/s Akuno for Respondents

Ekale – Court Assistant