



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 23 OF 2020

KENYA UNION OF SUGAR PLANTATION

& ALLIED WORKERS.....CLAIMANT

VERSUS

KIBOS SUGAR & ALLIED INDUSTRIES LIMITED.....RESPONDENT

RULING NO. 2

1. For determination is a Motion dated 22 December 2020 by the Kenya Union of Sugar Plantation & Allied Workers against Kibos Sugar & Allied Industries Ltd (the Respondent) seeking orders:

(i) ...

(ii) THAT the Respondent herein is held to have disobeyed and breached Court orders of the Ruling by this Honourable Court on 11th December 2020 before Union representative and advocate of the Respondent and whose content the Respondent is well aware of.

(iii) THAT this Honourable Court be pleased to issue an arrest warrant for the Human Resource Manager Mr David Odongo Moli of the Respondent and be detained and/or imprisoned for a period up to six months for disobeying/contempt of Court orders.

(iv) THAT the costs of this application be provided for by the Respondent.

2. On 14 January 2021, before the Court could give directions on the Union's Motion, the Respondent filed a Motion seeking orders:

(i) ...

(ii) A stay of execution of the orders made of this Court made and issued on the 11th December 2020 is hereby granted.

(iii) The Court be pleased to find and hereby finds that based on the new and additional evidence placed before it, the circumstances and facts currently on the ground on the cause of action herein are such that it is not possible for the Respondent/applicant to comply with the Court order of reinstating the Grievants.

(iv) An alternative order is made in lieu of the order for reinstatement of the Grievants.

(v) Costs of this application be provided for.

3. When the Union's application was placed before the Court on 27 January 2021, it directed that summons be issued directing Mr David Odongo Moli to appear in Court together with the Respondent's advocate for further directions.

4. The parties appeared on 2 March 2021, and the Court directed them to attempt an out of court settlement under the leadership of the Federation of Kenya Employers.

5. Despite meeting, the discussions did not bear any fruit, and on 28 April 2021, the Court directed the parties to file and exchange submissions on the contempt application (the Respondent had caused 3 replying affidavits to be filed on 13 January 2021).

6. The Union filed its submissions on 7 May 2021, while the Respondent filed its submissions on 10 May 2021.

7. The Court has considered the Union's Motion and the Respondent's Motion and will consider the Respondent's Motion as part of the response to the Union's contempt motion.

Union's assertions

8. In support of the contempt application, the Union contended that the Court had on 11 December 2020 ordered the Respondent to unconditionally reinstate some 5 Grievants, namely Benard Ochieng Abuto, Michael Abiero Agallo, Charles Guya Orondo and Elly Onyango Odero and further that the Respondent files an affidavit of compliance within 5 days, but the Respondent had failed to reinstate the 5 or file an affidavit of compliance.

9. The Union also asserted that the Grievants had reported to the Respondent for reinstatement on 16 December 2020, but they were denied an opportunity to meet either the Director or Human Resources Manager.

10. According to the Union, the Respondent had been playing games with the Court since it had severally disobeyed Court orders in other cases involving the parties.

Respondent's defences

11. The Respondent resisted the contempt application by contending that it had served the Grievants with letters lifting their suspensions on 29 February 2020, but save for 1, they declined to resume work, and due to the nature of the business it is involved in, they were replaced by October 2020, and therefore it was not practicable to reinstate them.

12. On the failure to file an affidavit of compliance within 5 days, the Respondent deposed that the emergence of new facts meant it could not file the affidavit without leave of the Court.

Evaluation

13. In order to prove contempt of court, an applicant should prove 4 ingredients, and these are the *existence of a court order, the Respondent had knowledge or was served with the order, the Respondent has breached the order and that the breach was deliberate or wilful.*

14. The standard of proof for contempt of court is on a standard higher than proof on a balance of probabilities.

15. Looking at the outlined parameters, it is not in dispute that there was in existence a Court order issued on 11 December 2020, directing the Respondent to reinstate the 5 Grievants and file an affidavit of compliance within 5 days.

16. The Respondent has not denied that it had knowledge of the order.

17. Apart from the Court order having been served, the Respondent's advocate on record was present during the delivery of the Ruling.

18. The next 2 ingredients are intertwined, breach of a valid court order and whether the breach was wilful or deliberate.

19. The Respondent admits there was a breach but contended that it was not wilful or deliberate because by the time the Court was granting the reinstatement orders in December 2020, the Grievants had already been replaced, but it inadvertently failed to bring the fact to the notice of the Court.

20. In explaining the failure, the Respondent's Human Resources Manager David Moli Odongo deposed that:

4. THAT I know of my own knowledge that on 29th February 2020, I personally signed letter revoking the suspension of each of the above grievants and that the letters were delivered to each of them and to the Claimant herein.

5. That I know of my own knowledge that upon receipt of the said letters, it was upon each of the grievants to decide on whether to return to and resume work or not.

6. THAT I know of my own knowledge that only Benard Otieno Owuor returned to, resumed work and is still working with the Respondent.

7. THAT I know of my own knowledge that the Respondent waited for the other grievants to return and resume work, but they never turned up.

8. THAT I know of my own knowledge that owing to the nature of work involved in the sugar industry and activities undertaken by the Respondent, it was not possible to wait indefinitely for the other grievants to return to work.

9. THAT as a result of failure by the other grievants to return to work, the Respondent sourced for and employed new persons in replacement of the grievants who had not returned and/or resumed work as set out in the report dated 16th December 2020 filed herewith with the supporting document marked DMO 1.

10. THAT having replaced the other grievants with new employees, there is no vacancy to which the other grievants can be returned and/or employed.

21. The Respondent also filed records to show that the Grievants were replaced in May, July and October 2020.
22. The Union did not make any responses to rebut the assertions that the Grievants had been replaced by the time the Court was rendering its Ruling on 11 December 2020.
23. Although the Respondent did not provide evidence during the hearing of the application culminating in the Ruling of 11 December 2020, the Court is satisfied that the facts on the ground had changed such that the orders of reinstatement at the interlocutory stage ought not to have been granted.
24. The Court, therefore, finds that there was no wilful disobedience of its orders warranting a determination of contempt.
25. Before concluding, the Court notes that there appears to be immense animus in the relationship between the Union and the Respondent. Industrial relations requires utmost good faith, and the Court would urge the parties to have their own handshake for the good of the employees, the employer and the Union.
26. The orders sought in the Motion dated 22 December 2020 are declined. No order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF OCTOBER 2021.

RADIDO STEPHEN

JUDGE

APPEARANCES

FOR UNION MR. GOMBE, BRANCH SECRETARY/NATIONAL VICE-CHAIRMAN

FOR RESPONDENT MR. ONSONGO INSTRUCTED BY ONSONGO & CO. ADVOCATES

COURT ASSISTANT CHRISPO AURA