



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. E013 OF 2020

KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL

INSTITUTIONS AND HOSPITAL WORKERS.....CLAIMANT

- VERSUS -

KISII UNIVERSITY COUNCIL.....RESPONDENT

RULING

1. There are two Applications before the Court. The first is by the Respondent dated 13.11.2020 brought under Article 162 of the Constitution, Rule 17(1) and 38 of the Employment and Labour Relations Court Rules 2016 and the Inherent Jurisdiction of this Court, seeking for orders:

a) Spent.

b) That this claim be transferred to the Employment and Labour Relations Court at Kisumu for hearing and determination.

c) Consequent upon (b) above this matter be placed before the Employment and Labour Relations Court at Kisumu for necessary direction.

d) Costs of this Application be provided for.

2. The Application is premised on the grounds that:

a) There are other suits being Elrc Cause number 9 of 2020 and ELRC Petition number 2 of 2020 filed at the Employment and Labour Relations Court at Kisumu raising the same issue, which matter were filed prior to institution of this Suit.

b) That the claim before this Court raised the same issue of unlawful redundancy which issue is similar to the issue raised in the Kisumu Court.

c) The Respondent is apprehensive that the Orders issued by the Court may be conflicting if this suit is allowed to proceed herein.

d) The Respondent therefore prays that the claim be transferred to Kisumu for hearing and determination to enhance the integrity of the process of Court.

3. The Application is supported by the Respondent' affidavit, deposed upon by **Seth Ayunga Onguti**, the legal officer of the Respondent, wherein he reiterates the grounds on the face of the application and adds that, since Kisumu ELRC is seize of two matter that relates to the same issue its prudent that this matter be transferred to that court for determination.

4. The Claimant/ Respondent herein did not file any response to the above application.

5. The Claimant on its part filed an Application dated 6th, May, 2021 title Contempt Application, seeking for Orders:

a) Spent.

b) That the Honourable Court be pleased to stay the proceedings in the matter herein and commence contempt of Court Proceedings against the Respondent.

c) That this Honourable court be pleased to cite The Vice Chancellor Kisii University, in the Apex management of Kisii University individually or their agents for contempt of Court and be committed to civil Jail for 6 months for disobeying Court Order issued by Court of Competent Jurisdiction

6. The Application is based on the grounds that:

a) The Respondent obtained Orders from this Court on the 28th October, 2020 to the effect that the Respondent was restrained from victimizing and terminating the employment of the grievants therein on account of redundancy till the Application is heard and determined.

b) The said Orders were subsequently served upon the Respondent on the 30th October, 2020 and a return of service filed in Court.

c) That the Respondent in total disregard to the Court Order which has not been varied or vacated, proceeded to victimize some of the employees by withholding their salaries and even terminated the services of some of them.

d) The actions of the Respondent have exposed the claimants' members to serious job losses and possibility of withdrawing their membership from the claimant.

7. The Application is also supported by the affidavit of Mr. Albert Njeru, the Claimant's Secretary General, wherein he reiterates the grounds on the face of the Application.

8. The Respondent has filed a Replying Affidavit to oppose the Claimant's Application wherein he states that the Respondent issued redundancy Notice dated 30th September, 2020 upon the claimant who received the same on the 5th October, 2020 and by the letter dated 1st October, 2020 the Respondent issue individual redundancy Notices upon all affected employees.

9. It is averred that the Court Order stopped the individual redundancy notices dated 1st October, 2020 but did not stop the redundancy Notice dated 30th September, 2020 which was issued directly to the Claimant and took effect on the 31st October, 2020.

10. It is contended that since there was no Court Orders stopping the redundancy Notice of 30th September, 2020 from taking effect, the Respondent did not do any act that it would be held in of this Court Orders.

11. The Respondent then stated that section 40 of the Employment Act provides for issuance of one Notice to the Union, when employees are unionisable, and that Notice was the one dated 30th September, 2020. That the subsequent Notice were mere courtesy call to individual employee to be informed that they are affected by the looming redundancy.

12. The Respondent therefore stated that it has done nothing that they would be held in contempt for and prayed that the Claimant Application be dismissed with costs.

13. The Court directed these Application to be disposed of by way of written submissions. The Respondent then filed submission with regard to both Application while the Claimant filed submission on its application of 6th May, 2021.

Claimant's Submissions.

14. The claimant submitted that the Respondent is in contempt of Court Orders when they failed to comply with this Court Orders Issued on the 28th October, 2020. It was argued that to allow the Respondent to continue with these state of affairs would shake the administration of justice and the edifice of the judicial system would be eroded. The Claimant then reinforced its argument by citing the case of **Christine Wangari Chege V Elizabeth Wanjiru Evans and others**(UR) which decision gave the procedure to follow when citing an individual for contempt of court.

15. Accordingly, the Claimant prayed for the contempt application to be allowed as prayed.

Respondent's Submissions.

16. The Respondent on the other hand maintained that it has not done any act to warrant the issuance of the contempt Orders. It argued that what this Court injunct is the redundancy Notice dated 1st October, 2020 and not the substantive and proper Notice dated 30th September, 2020.

17. The Respondent then submitted that the Claimant have not discharged the evidentiary burden placed upon them to prove that indeed the Respondent is in contempt of Court. In this they cited the Court of Appeal case of **Kimani Gachuhi & Another V Evangelical Mission in Africa & 3 others [2018] eklr** where the Court held that:-

"...It is trite law that the standard of proof in contempt proceedings is higher than proof on balance of probabilities, almost but not exactly, beyond reasonable doubt.

In the case of **Mutitika vs. Baharini Farm Limited [1985] KLR 229, 234** this Court stated:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly beyond reasonable doubt....The standard of proof beyond reasonable doubt ought to be left where it belongs to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi criminal in nature.”

18. The Respondent then submitted that the grounds in which the application of contempt was made, such as the victimization of employees, stopped salaries and termination has not been proved by the claimant to the standard of proof required in contempt of Court proceedings.

19. On the Application for transfer, the Respondent submitted that the claimant has not opposed the said application neither has it filed a response thereof, which means the Orders can be granted by the Court. The Respondent relied on the case of **Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu[2012] eKLR** where the Court held that;

“...What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.

Again in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001** the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

In the case of **Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 Makhandia, J. held:**

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.

The case of **Janet Kaphiphe Ouma & Another vs. International (Kenya) Kisumu HCCC No. 68 of 2007 -Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997**said:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

Similarly in the case of **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000 Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.**

If one is still in doubt as to the legal position reference could be made to the case of **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.

The plaintiffs have given evidence on oath supported by documentary evidence which go to prove their case. Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that the plaintiffs are entitled to succeed.”

20. Accordingly, the Respondent submitted that they have furnished this Court with evidence that there are two matter in Employment Court in Kisumu which have raised similar issue, therefore it is only prudent that this cause be transferred to Kisumu for hearing and determination.

21. I have considered the averments and submissions of the parties. In the 1st application filed by the respondent, they aver that they want this claim transferred to the ELRC Kisumu. The respondent claimant didn’t file a reply to this application. The reasons for this application are premised on the fact that there are 2 others related matters in Kisumu ELRC being ELRC Petition No. 2 of 2020 and 9 of 2020.

22. The Petition No. 25/2020 at Kisumu was filed by 4 petitioners on 7/7/2020. Another petition was filed by a different Union Kisii University staff Union, (Kisii) KUSU Branch against the respondent in Kisumu ELRC on behalf of several employees who are about 34 in number. The matter concerns unfair termination.

23. The current cause relates to redundancy as opposed to normal terminations whereas there may be need to transfer this claim to Kisumu

for good order and jurisdictional purposes, there is a pending application for contempt which must be concluded by this court. It is therefore my order that the contempt application will be concluded by this court and thereafter the claim be transferred to Kisumu ELRC as the application remained unopposed.

24. Now concerning the contempt application, it is true that on 1/10/2020 the respondents herein served redundancy notices upon some of their employees herein which redundancy was scheduled to take effect on 31/10/2020.

25. The notices were served upon 153 employees. On 23/10/2020 the claimant union filed an application before this court and by an order of J. Mbaru dated 28/10/2020 the letters giving notice to redundancy dated 1/10/2020 were stayed and ordered not to be implemented.

26. The import of the orders by J. Mbaru is that the planned redundancies were stayed or suspended. The claimants contend that despite the suspension of this redundancy notice, the respondent proceeded to terminate the services of the applicant members. The respondents argue that the injunction issued was against the notice dated 1/10/2020 and not the substantive one dated 30/9/2020.

27. The notice of 30/9/2020 was served upon the union and not the claimant's members. This is indeed the standard procedure as per Section 40 of the Employment Act.

28. That notwithstanding, the individual notice of 1/10/2020 were still in relation to the employees who are members of the claimant's union. The argument that the injunction didn't affect the notice of 30/9/2020 is therefore farfetched. In my view this is an attempt by the respondent to deny the obvious that the process of redundancy was stayed because it was affecting the employees and members of the claimant.

29. The respondents having gone ahead to affect redundancies stayed by this court are in direct and blatant contempt of the court.

30. I therefore find the application to cite the VC Kisii University merited and I allow it.

31. For avoidance of doubt only the VC Kisii University is to be cited for contempt as head of Kisii University.

32. Cost in the cause.

RULING DELIVERED VIRTUALLY THIS 16TH DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kibungu holding brief for Nyamurongi for Respondent – present

Gitonga for claimant – present

Court Assistant - Fred