



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 378 OF 2019**

(Before Hon. Justice Hellen S. Wasilwa 27<sup>th</sup> January, 2020)

**KENYA EXPORT FLORICULTURE, HORTICULTURE**

**AND ALLIED WORKERS UNION .....CLAIMANT**

**VERSUS**

**VEGRO (K) LIMITED .....RESPONDENT**

**RULING**

1. The Claimant/Applicant, Export Floriculture, Horticulture and Allied Workers Union filed a Notice of Motion application dated 19<sup>th</sup> September 2019 and with leave of this Court, it then filed an Amended Application dated 9<sup>th</sup> October 2019 against Vegpro (K) Ltd. The Applicant seeks to be heard for orders that:

**1. The Honourable Court be pleased to cite Bharat Patel, Siji Das, Dharmendra Sharma, Eva Okalo and Joseph Otin for contempt of Court for disobeying orders of Court issued on 4<sup>th</sup> July 2019 and 16<sup>th</sup> September 2019 by refusing to allow workers to access the premises of Gorge Farm and Delamere Pivot to implement the orders of the Honourable Court which called off the strike.**

**2. The Honourable Court be pleased to cite Bharat Patel, Siji Das, Dharmendra Sharma, Eva Okalo and Joseph Otin to Civil Jail for 6 months or any period that the Honourable Court deems fit and until they purge the contempt and such other orders be made as may be deemed fit for disobeying the said Court Orders.**

**3. The contemnors, Bharat Patel, Siji Das, Dharmendra Sharma, Eva Okalo and Joseph Otin be compelled to purge the contempt by allowing the workers who were on strike to access their places of work and be deemed to have been on duty from 5<sup>th</sup> July 2019 when they started reporting at the gates and have been being prevented to access the farms; and they be paid for the period they have been unlawfully kept out of their work stations.**

**4. Costs of this application be borne by the contemnors.**

2. The Application is premised on the grounds that Mr. Bharat Patel who is the Chief Executive Officer of the Respondent, is responsible for ensuring that Court orders directed to the Respondent are obeyed.

3. That Mr. Siji Das, the Farm Manager of Delamere Pivots which is under the Respondent, disobeyed orders of the Court in respect of that farm. That Mr. Dharamendra Sharma is the Farm Manager in charge of Gorge Farm, which is also under the Respondent and where more than 500 employees have been prevented from accessing their places of work in disobedience of the said Court orders.

4. That Miss Eva Okalo is the overall Officer in charge of the Human Resource functions of the Respondent including the abovementioned two farms while Mr. Joseph Otin is the Respondent's Regional Human Resource Manager for Naivasha region and in charge of HR functions in Delamere Pivot and Gorge Farm.

5. That the contemnors are severally and individually aware of the said Court orders which were served to the Respondent through their advocate on record and on email.

6. That on several occasions, the workers also availed copies of the said orders to the farms' management through the security personnel at

the gates of the two farms involved.

7. That on 04/07/2019, this Honourable Court directed parties to engage in conciliation and the strike which had been called for by the Claimant was called off and workers were advised by the Claimant to report back to work not later than 05/07/2019 in the morning.
8. That the said order was pronounced inter-parties pursuant to the consenting sentiments of the parties but on 05/07/2019 between 5.50am and 7.00 am and similarly on 17/09/2019, workers were prevented from boarding company transport buses to work and they instead walked daily to the gates of the two farms where they were denied access to the said premises. The Respondent even deployed police at the gates to prevent the employees from accessing their places of work.
9. Further, that there is nothing on record to suggest that the status of the employees had changed prior to issuance of the orders and the Applicant contends that a court order calling off a strike cannot be solely implemented by the workers without the employer's participation.
10. That the workers who are out are suffering immense economic prejudice since their only source of income has been stopped. That orders of this Court must be obeyed by enforcement and punishing the abovementioned contemnors in order to protect the independence and integrity of the Court and to promote the rule of law. The Applicant prays that this Court allows the application with orders as prayed.
11. The Applicant also filed a Supporting Affidavit sworn by its Secretary General David Omulama who avers that the Applicant wrote to the Respondent seeking for a meeting to engage in conciliation but the Respondent did not respond to the said letter and was not willing to negotiate in good faith.
12. He contends that the contemnors by their acts of preventing employees to gain access to their places of work after the strike was called off by the Court are in contempt of Court. He annexes documents marked **DBO-1 to DBO-7** in support of the Applicant union's application.
13. The Respondent filed a Replying Affidavit dated 23<sup>rd</sup> October 2019 sworn by the Respondent's Regional Human Resource Manager, Joseph Otin who avers that the application herein is *mala fide*, misconceived, incompetent, vexatious, frivolous, scandalous and an abuse of the Court process, brought in bad faith and bad in law.
14. That there is no basis in law for an amendment or the introduction of new parties through an amendment as sought in the application herein.
15. He contends that as advised by their advocates on record, there is also no law presently governing contempt of Court both substantively and procedurally as they were declared unconstitutional.
16. That the inherent power of the Court in relation to contempt of Court has not been invoked by the Applicant and therefore the Court cannot act *suo moto* in determining this application in the absence of both substantive and procedural law.
17. That the provisions of **Section 63(c) of the Civil Procedure Act** and **Order 40, Rule 3** have not been breached as the impugned Order does not relate to an injunction.
18. He avers that the Claimant has instituted a suit within a suit since the parties named in the Application have never been parties to this Cause, thus contravening **Section 6 of the Civil Procedure Act** and the order laid down by the Supreme Court in *Aviation & Airport Services Workers Union (Kenya) v Registrar of Trade Unions & 5 others, Civil Application No. 3 of 2017*.
19. That the Applicant on its own volition and without influence proceeded to call off the strike which the Court endorsed and further directed parties to try reconciliation and report the outcome within 14 days.
20. That pursuant to directions of the Court, Benedict Omulama and Issa Wafula for the Applicant and Advocate Okweh Achiando, Advocate Delbert Ochola and Eva Okallo for the Respondent met at the Respondent's advocate's office on 15/07/2019 with the agenda items being **the status of the persons on strike** and **status of the negotiations and conclusion of the CBA**. That the parties however disagreed and did not reach a settlement and that the Court was duly informed during Mention of the case on 17/07/2019.
21. Mr. Joseph continues to aver that the Applicant's allegation that there is nothing to suggest that the status of the employees had not changed prior to issuance of the Court orders is false since the said employees had been dismissed by the time the matter came up for directions before Court on 03/07/2019.
22. That following the strike, the Respondent's management commenced disciplinary proceedings against the employees who had participated in the strike by issuing show cause letters and that those who responded to were allowed to resume their duties.
23. That the employees who failed to respond were dismissed and that the Applicant was at all times aware as has been captured at paragraph 6 of its Statement of Claim dated 13/6/2019.
24. He further contends that no contempt of Court proceedings could be commenced against the Respondent without personal service of the Order and Penal Notice on the employers and directors and that they were therefore not aware of the said order.
25. He denies that they intentionally and wilfully disobeyed the order adding that the terms of the order were however complied with the meeting held on 15/07/2019.

26. Further, that that there is also no evidence of the name of the process server who served the Order upon their advocates on record to prove they were served with the said order. That the Applicant cannot purport to enforce a Court order calling off a strike without a return to work formula and that this is a threat to the rule of law and orderliness of the judicial functions of the Court.

27. That the alleged contemnors have not been cited as acting as agents/assigns of the Respondent and cannot therefore be cited for contempt of Court and that the application should thus be dismissed with punitive costs to the Respondent.

28. In response to the Respondent's Replying Affidavit, the Claimant/Applicant filed a Further Affidavit dated 29<sup>th</sup> October 2019 sworn by its Secretary General, David Omulama, he admits there was a meeting at the Respondent's office save for the correct agenda items being **the status of the employees in view of the Court order of 04/07/2019** and **negotiations and conclusion of the CBA** but denies there being any discussions since the Respondent refused to discuss the agenda of the meeting.

29. That the Applicant reiterates the position that no employee had been dismissed prior to 04/07/2019 and that the Respondent has also not applied to set aside the Order on that alleged ground, hence the same cannot be an excuse for disobedience of the Order.

30. The Applicant continues to aver that contempt of Court is more of an offence against the Court and an attack against the rule of law and that an application addressing the same should not be defended on account of technicalities. That the contemnors have frustrated full implementation of the Court Order by not allowing the workers resume duty and failing to communicate to them why they cannot be allowed back to work.

31. He contends that knowledge of an order supersedes personal service and states that there is no difference between the Respondent and the proposed contemnors under the definition of "**employer**" under **Section 2 of the Labour Relations Act**.

32. That the Respondent has failed to respond to the substantive issue of disobedience of Court orders and is instead hiding under legal technicalities to avoid responsibility for their actions. Further, the proposed contemnors have admitted through Joseph Otin that they are aware of the Court Order and even held a meeting with the Applicant to address the same.

#### **Applicant's Submissions**

33. The Applicant submits that the descriptions of the contemnors in its Application have not been rebutted by the Respondent and that pursuant to the definition of "employer" in the Labour Relations Act, they are properly enjoined in their capacity as managers and/or factors of the Respondent disobeying the said order.

34. Further, that the matter is not another suit but an application within a suit for contempt of Court in disobedience of orders. He also submits that the inherent power of this Court has been properly invoked as among the provisions of law cited in the Application are **Sections 11, 12 and 20 of the Employment and Labour Relations Court Act** and that it has also cited in general terms 'and other enabling provisions of the law' since there is no single substantive law under which contempt proceedings can be filed. That it has also demonstrated through its affidavit and list of documents that the Respondent was aware of the existence of the said Court Order.

35. That a Court order calling off a strike supersedes a return to work formula and cannot be varied through a return to work formula which is a mutual engagement that can only take place outside the Court jurisdiction before the Court pronounces itself on the matter.

36. It denies the Respondent's allegation that the order is an '**obiter dicta**' and urges the Court to adopt the findings of Odunga J in **Republic v The Kenya School of Law and others (MCL Application No. 58 of 2004)** where he held that once a Court order is made in a suit, the same is valid unless set aside on review or on appeal. It also relies on the case of **Wildlife Lodges Ltd -v- County Council of Narok and another (2005) 2 EA 344 (HCK)** where the Court stated that:-

**"...Consistent obedience to Court orders is required, and parties should not take it upon themselves to decide on their own which Court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties;..."**

37. Further, that the Applicant relies on **Council of Governors -v- Seth Panyako and others, Cause No. 69 of 2019** where Abuodha J held as follows:-

**"An allegation of contempt of Court is a serious one since if proved, would greatly undermine the authority of the Court. The issue is therefore more of serious concern to the Court than the party to the benefit of whom the order was made. It therefore does not matter the novelty or otherwise of submissions by Counsel. The issue is plain and simple. That is to say was there an order lawfully issued by the Court? If so was the order reasonably brought to the attention of the person to whom it was directed? And finally has the person complied with the order? If not has the person sought at the next available opportunity to have the order reviewed or set aside or appealed to superior Court against the order?"**

**A party against whom a Court order has issued does not have the discretion to elect whether to obey the order or not. Wilful disobedience to a Court order is an affront to the rule of law and administration of justice, which is a recipe for chaos and anarchy. The Court when confronted with an allegation of wilful disobedience to its authority must seize the moment and stamp its authority by swiftly and appropriately punishing for such disobedience."**

#### **Respondent's Submissions**

38. The Respondent submits that it should not be held in contempt since the order it is alleged to have disobeyed is neither a positive nor a negative order and it cites the case of Catherine Njeri Maranga –v- Serah Chege & another [2017] eKLR where the Court while dismissing the application on the ground that there was nothing to stay in the matter cited the case of Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR where the Court expounded on stay of execution stating:-

**“16. In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:**

**“...By the order, the superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only..”**

**17. The same reasoning was applied in the case of Raymond M. Omboga v. Austine Pyan Maranga (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-**

**“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to Court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”**

39. It also relies on the case of Antoinette Bonita Kamau & another –v- Energy Regulatory Commission [2019] eKLR where the Court stated:-

**“The Court in North Tetu Farmers Co. Limited vs. Joseph Nderitu Wanjohi [2016] eKLR cited the case of Gatharia K. Mutikika vs Baharini Farm Ltd where it was held as follows:-**

**“The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of Court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a 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 offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of Court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject...”**

**In view of the foregoing, it is very difficult for this Court to establish if indeed the impugned actions were committed and with the intent of disobeying Court orders and under the instructions of the cited parties. Additionally, from the 1st Applicant’s petition, it is clear that the actions complained of were undertaken before the issuance of the impugned orders.”**

40. It is submitted by the Respondent that **Section 5 of the Judicature Act** that is relied upon by the Applicant was repealed by **Act No. 46 of 2016** and which Act was declared unconstitutional by Court and that **Section 36 of the High Court Reorganization** was also repealed by the same Act.

41. That the applicable law is **Section 63 of the Civil Procedure Act** and **Order 40 of the Civil Procedure Rules** applying only to injunctions but which cannot apply in this case because the Applicant has not invoked the same as is the nature of our adversarial system that parties are bound by their pleadings.

42. The Respondent further submits that they indeed complied with the order when they met with the Applicant to try conciliation but the negotiations collapsed and that it does not deserve to be punished for contempt. That it has therefore not disobeyed the terms of the said order and contends that even though negotiations collapsed, the dignity of the Court has not been brought into public odium and ridicule.

43. That it is in the interest of justice that the application herein is dismissed pursuant to **Section 107 and 109 of the Evidence Act** and further because the Applicant has failed to provide sufficient material facts with cogent evidence to cite it with contempt of Court charges.

44. I have examined all the averments and submissions of both Parties. The Applicants filed this application under Rule No. 16 of the Employment and Labour Relations Court Rules 2010, Section 11, 12 and 20 of the Employment and Labour Relations Court Act 2011, Section 5 of the Judicature Act, Section 5 of the Civil Procedure Rules and all enabling provisions of the law.

45. The Respondents have submitted that this application is premised on a non-existent law, the Contempt of Court Act having been declared unconstitutional by the Court and that there is no law presently governing contempt of Court both substantively and procedurally.

46. I do not agree with this contention since the contempt of Court Act was declared unconstitutional, the provisions in the said Act that had repealed the Judicature Act fall by the way side and this Court therefore reverts to the Judicature Act in pushing for contempt. Society does

not abhor a vacuum and neither can there be a vacuum in the law. This application therefore having been filed under the provisions of the Judicature Act is properly before Court.

47. The Applicant has sought to have certain officials of the Respondent cited for contempt by not allowing their employees who are members of the Applicant to resume duty after an order lifting a strike that was ongoing.

48. The Respondents aver that though the strike was called off the employees had already been dismissed for participating in an illegal strike.

49. On 3.7.2019, the Parties herein appeared before this Court. The Applicant expressed their willingness to call off the strike if the Respondents were willing to negotiate. The Respondent insisted they could not negotiate and prosecute but were willing to negotiate.

50. On this understanding, the Court ordered the strike called off and ordered a mention in 14 days' time.

51. There was a mention later on 17/7/2019 and by then the Respondent had filed a Preliminary Objection, which was handled by Hon. J. Onyango. The parties appeared before me on 1/10/2019 seeking interpretation of my orders and I reiterated the fact that the strike had been called off.

52. My understanding was and is still the position today that once a strike was called off, the workers needed to go back to work. The Applicant contends that the Respondent declined to allow the employees back to work insisting that they had been dismissed for participating in an illegal strike.

53. The application for contempt has been filed by the Applicant insisting that failure to allow workers back on duty was in contempt of this Court's orders of 3.7.2019, which called off the strike.

54. The Respondent have contended that the orders of this Court did not compel any action and so the Respondents cannot be cited for contempt. Indeed the order just indicated that the strike had been called off. This meant that the workers were to go back to work.

55. There was however, no express order compelling parties to do anything or refrain from doing anything. The order however, by implication envisaged that workers would resume their duties and the employer would allow them continue with their duty interrupted. The lock out of the workers was therefore against the order of this Court, which envisaged the employees to resume work.

56. The Respondents aver that the employees were already dismissed when the order to call out the strike was issued. This cannot be the position because the Respondent though present in Court, did not intimate to Court this position. The dismissal letters served upon the employees were also not exhibited before this Court.

57. This Court therefore finds the action of locking out the employees from work after the order calling off the strike was in contempt of this Court's orders.

58. As to whether the Respondents who have been cited with contempt were responsible for the contempt is another matter altogether.

59. The Applicants aver that the alleged contemnors are the responsible officers of the Respondent and so acted to prevent compliance with the orders of the Court.

60. It is not however clear whether the alleged contemnors save for the Respondent were responsible for the contempt. There is no indication that the alleged contemnors were served with the orders of the Court in question.

61. There is also no indication that they acted personally in one way or another to prevent execution of this Court's orders. Save for the Respondent, who have Counsel on record, there is no indication that the other named alleged contemnors were guilty of any action of contempt.

62. I therefore find the application to cite all the alleged contemnors with contempt must fail. The Respondent who is the guilty party has however not been cited for contempt and therefore the entire application for contempt fails.

**Dated and delivered in open Court this 27<sup>th</sup> day of January, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Omulama for Applicant

Ochola holding brief Okweh Achiando for Respondent