



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1330 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 15th January, 2020)

KENYA TERTIARY AND

SCHOOLS WORKERS' UNION.....CLAIMANT

VERSUS

ROCKY DRIVING SCHOOL.....RESPONDENT

RULING

1. Before this Court is the Claimant's Application dated 25/06/2019 wherein the following orders have been sought:-

1. Spent.

2. THAT the Applicant/Claimant herein be granted leave of Court on the Preceding the Filing of this Notice (sic), Lodge and to commence "Contempt Proceedings" against the cited hereinabove Contemnors/Respondent forthwith.

3. THAT the 1st to 4th Contemnors be committed to imprisonment (sic) forthwith for a term of six (6) months for blatantly disobeying the orders of this Court Orders (sic) dated and issued on 28th August 2018, 7th September 2018 and 28th January 2019, respectively.

4. THAT the substantive claim be forthwith dispensed with.

5. THAT any and better relief this Honourable Court may deem fit to grant be granted.

6. THAT the cost of this Application be provided for by the 1st, 2nd, 3rd and 4th Contemnors.

2. The Application is based on the grounds set out in the motion and the Supporting Affidavit of Japheth Anyira Agura. They are that the 1st to 4th Contemnors have disobeyed the orders of this Court issued on 28/08/2018, 7/09/2018 and 28/01/2019 despite them being duly served with the same.

3. The Applicant avers that the Contemnors have declared some of its members redundant and transferred Raymond Kadhengi Ziro, Stephen Kinyanjui and Ernest Mugami Agufa, for actively participating in the activities of the union. Further, the Contemnors have engaged new employees on condition that they completely disown and abstain from union membership of the Applicant.

4. It is the Applicant's case that the Contemnors have refused to remit trade union dues from all the employees who have already signed check off forms.

5. The Respondent opposed the Application vide the Replying Affidavit of Hellen Anyiso sworn on 12/09/2019. She avers that the orders referred to in paragraphs 6, 7 and 8 of Japheth Anyira's Supporting Affidavit have never been served upon the Respondent.

6. The Affiant contends that the Applicant has not substantiated the allegations set out in ground 3, 4 and 5 of the motion and that there were no orders issued touching on the said grounds.

7. It is the Respondent's case that the Application has no nexus with the substantive suit hence should be disregarded for being misleading. The Affiant contends that the Respondent has deducted union dues of all its employees who have signed check-off forms.
8. The Application was disposed of by way of written submissions where the Applicant filed its submissions on 1/10/2019 and the Respondent filed theirs on 23/10/2019.
9. The Applicant submits that there is no contestation of membership and that it duly recruited more than 110 of the Respondent's employees. As such, the Respondent ought to have deducted the trade union fees as required under Section 48 (3) of the Labour Relations Act. They rely on the case of **Kudheha Workers Union vs. Aga Khan University Hospital [2015] eKLR** and the Court of Appeal Case of **Banking Insurance Finance Union (K) vs. Kenya Revenue Authority: Civil Appeal 255 of 2010**.
10. The Applicant submits that it has proved its case for granting of the orders sought, as such, the contemnors should be committed to civil jail for contempt of Court.
11. The Respondent submits that the orders alleged to have been disobeyed do not relate to the orders sought in the Application, as the Applicant did not plead redundancy or irregular transfers of union members. Additionally, the Respondent submits that the orders issued on 28/8/2018 were limited to transfer of Raymond Kadhengi Ziro to Kisumu.
12. It is the Respondent's submissions that the Application seeks to hold its directors liable without lifting of the corporate veil, which is contrary to the holding in **Salomon & Company Limited vs. Salomon [1897] AC, 22, HL**.
13. Further, that the Applicant has not met the threshold for granting of contempt orders as it has failed to prove that the Directors were served with the orders, as such, the contemnors' alleged disobedience has not been proved. The Respondent relies on the cases of **Katsuri Limited vs. Kapurchand Depar Shah [2016] eKLR**, **Peter O Ngoge T/A O.P Ngoge & Associates Advocates vs. Amu Investment Company Limited [2019] eKLR**.
14. The Respondent submits that the Applicant has not adduced evidence to prove that the Respondent was in breach of the Court orders. That no affidavits were provided to corroborate the Applicant's allegations and that the Applicant has not denied receiving union dues from the Respondent.
15. I have examined the averments and submissions of both Parties herein.
16. The Applicant has submitted that the Respondent has breached this Court's orders dated 28/8/2018, 7/09/2018 and 28/1/2019 respectively.
17. The orders of this Court dated 28/8/2018 issued by Justice Ongaya restrained the Respondents, its Directors, Managers and Agents from harassing and intimidating the Claimant's Union Members and infringing on their rights to fair labour practice and their opportunity to freely form and participate in the activities and programmes of a trade union of their choice.
18. The orders also stayed the transfer of Mr. Raymond Kadhengi Ziro to Kisumu and of any other member thereof of the Claimant union for their active involvement in trade union activities and programmes.
19. Orders dated 7th September 2018 extended the orders dated 28/8/2018.
20. On the other hand, the orders dated 28/1/2019 confirmed the above orders pending hearing and determination of the claim.
21. The Court also ordered the Respondents to initiate deduction of union dues as per the signed check off forms. The Claimants contend that the Respondents have breached these orders.
22. The Respondents on the other hand aver that the 1st to 4th Contemnors have never been served with the above orders and hence there is no breach. They also aver that the 1st to 4th Contemnors are directors of the Respondent hence cannot be held in contempt without the lifting of the corporate veil.
23. The Respondent has also deponed through one Anyiso that they have in fact deducted and remitted union dues as per the check off forms hence there is no breach. They even attached a cheque to the Claimants to show the remittance.
24. I have not seen any affidavit showing service of the orders above upon the 1st and 4th Contemnors. The 1st to 4th alleged contemnors are directors of the Respondent.
25. They are not party to this claim. It is not clear why they are being cited for contempt without express orders of this Court to lift the corporate veil. There is also no proof that they have been served with the orders indicated.
26. The application against the 1st to 4th Respondents must therefore fail. As to the case against the Respondents herein the Applicants have also not explained the act or omission complained of to warrant commission for contempt.
27. I find the application has no merit and I therefore dismiss it accordingly.

28. Costs in the cause.

Dated and delivered in open Court this 15th day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Japheth Agura for Claimant

Ratemo holding brief Morara for Respondent