



## REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 763 OF 2019

*(Before Hon. Lady Justice Maureen Onyango)*

**BAKERY CONFECTIONARY FOOD MANUFACTURING**

**AND ALLIED WORKERS UNION (KENYA).....CLAIMANT**

**VERSUS**

**MONKING BAKERS LIMITED.....RESPONDENT**

### RULING

The Claimant first moved this Court when it filed a Memorandum of Claim dated 11<sup>th</sup> November, 2019 together with a notice of motion application of the same date under certificate of urgency. The application was supported by a supporting affidavit sworn by Danchael Mwangure on 11<sup>th</sup> November, 2019.

The application seeks *inter alia*, orders to restrain the Respondent from victimizing, intimidating, coercing, harassing, terminating or dismissing the Claimant's members in the employment of the Respondent for exercising their right to join the Claimant union.

The application was brought before this Court on 11<sup>th</sup> November, 2019 and upon hearing the Claimant/Applicant *ex-parte*, the following orders were granted:-

1. That the application be and is hereby certified as urgent and fixed for interparties hearing on 25<sup>th</sup> November, 2019.
2. That in the meantime, the Respondent is restrained from victimising, intimidating or coercing, harassing, terminating or dismissing the Claimant/Applicant's members or from denying the Applicant's members access to their respective work stations as prayed in prayer 2 and 4 of the application on grounds of union membership or activities.

In opposition to the application, the Respondent filed Replying Affidavits sworn by Raymond Nzioka and Betty Wausi Musumbi both sworn on 20<sup>th</sup> November, 2019 and filed on 26<sup>th</sup> November, 2019.

The application now before me is the notice of motion application dated 9<sup>th</sup> December, 2019 filed by the Claimant/Applicant under a certificate of urgency on 10<sup>th</sup> December, 2019 (the **Instant Application**).

The Application is expressed to be made under Section 5(1) of the Judicature Act Cap 8 of the Laws of Kenya, Order 52 Rule 3 of the Supreme Court of England 1965 and all other enabling provisions of the law.

The Instant application seeks the following orders:-

1. Spent
2. That the Respondents' directors **MONICA KARUNGARI, JOSEPHINE NDUKU MUSUMBI AND DANIEL KAMAU WAITHAKA** being the directors of the Respondent herein be **CITED** for being in contempt of the orders issued by Onyango J. on the 11<sup>th</sup> November, 2019 and as extended on the 25<sup>th</sup> November, 2019.
3. That an order for committal to be made against **MONICA KARUNGARI, JOSEPHINE NDUKU MUSUMBI AND DANIEL**

**KAMAU WAITHAKA** (being the Respondent's directors) to prison for such period as this Court may deem fit and just in that they have disobeyed the orders made by Onyango J. dated the 11<sup>th</sup> of November, 2019 and as extended on the 25<sup>th</sup> of November, 2019.

4. That in enforcing the committal orders above, this Court be please to issue warrants of arrest directing the Officer Commanding Station Masii Police and/or Kileleshwa Police Station to cause the arrest and presentation of the alleged contemnors **MONICA KARUNGARI, JOSEPHONE NDUKU MUSUMBI AND DANIEL KAMAU WAITHAKA** (being the respondent's directors) to be presented before this court to show cause why they should not be committed to civil jail for a period of not more than six months.

5. That an order that costs of this motion be paid directly by the said contemnors namely **MONICA KARUNGARI, JOSEPHINE NDUKU MUSUMBI AND DANIEL KAMAU WAITHAKA** and/or the Respondent as the Court may be pleased to direct.

The Application is premised on the grounds (1-19) on the face of the Application. It is supported by a statement made by JUDY KOECH OYAMO on 9<sup>th</sup> December, 2019 (the **Statement**) pursuant to Order 52 Rule 2 of the Supreme Court Rules and a supporting affidavit sworn by DANCHAEL MWANGURE, on 9<sup>th</sup> December, 2019 annexing the affidavits of DAVID MWOVE MWETHI and BERNARD ILUKU MUSAU both sworn on 11<sup>th</sup> November, 2019 (collectively, the **Supporting Affidavits**).

The Claimant/Applicant has collectively pleaded in the grounds of the Application, the Statement and the Supporting Affidavits that:-

i) Vide orders issued by this Court on 11<sup>th</sup> November, 2019, the Respondent was restrained from victimising, coercing harassing, terminating or dismissing the Claimant/Applicant or from denying the Applicant's members access to their respective work stations.

ii) When this matter came up for interparties hearing before this Court on 25<sup>th</sup> November, 2019, the same was taken out of the hearing list at the behest of the Respondent

to allow it file its response to the Application.

iii) The said orders were extended and remain in force.

iv) The interim orders as issued on 11<sup>th</sup> November, 2019 were served on the Respondent on 15<sup>th</sup> November, 2019 and the order for extension of the said orders issued on 25<sup>th</sup> November, 2019 was served upon the Respondent on 3<sup>rd</sup> December, 2019.

v) Despite issuance of the said orders, the Applicant's members who had been locked out of their respective work place by the Respondent reported to work on 16<sup>th</sup> November, 2019 under the advice of the Applicant's General Secretary on the strength of the orders issued by this court.

vi) The Applicant's members reported on that day but were denied access as stated in the Affidavits of David Mwove Mwethi and Bernard Iluku Musau.

vii) On 31<sup>st</sup> November, 2019, the Applicant's members who reported to the Respondent's office in Nairobi were coerced to execute letters where they were instructed to disown and recant their membership with the union as a precondition to being allowed back to the work place.

viii) Some of the employees conceded to the coercion so as to secure their jobs with the Respondent and upon the execution of the said letters, they were allowed back to work by the Respondent including one Benjamin Ng'eno Kipkorir, Felix Kimaili Kiilu, Phillip Mutua, Francis Ndolo and Paul Juma.

ix) The said letters are a product of coercion and intimidation and were authored after being compelled to recant their membership with the Claimant as a pre-condition to accessing their work premises. It was only upon issuance of the letters the said employees have since been allowed back to work.

x) So that only those who relinquish their membership with the Applicant after executing the said letters are allowed to access the workplace.

xi) On 25<sup>th</sup> November, 2019 when the matter came up before court, the Applicant brought the issue of denied access to the workplace by the Respondent where the Respondent's Advocate claimed that it was the Applicant's members who had not reported to work.

xii) The Applicant addressed the letter dated 25<sup>th</sup> November, 2019 to the Respondent informing the Respondent's Advocates that the Applicant's members would report to work the following day on 26<sup>th</sup> November, 2019 and called upon the Respondent's Advocates to advise the Respondent accordingly.

xiii) On 26<sup>th</sup> November 2019, when the said employees reported to the Respondent's workplace, they were required to produce their Identity Cards and to execute an unknown document as a precondition to accessing the workplace.

xiv) Despite producing their Identity Cards and executing the said unknown document, the Applicant's members were still not allowed into the workplace and instead kept waiting until 5:00 pm when they proceeded to their respective homes.

xv) In view of the foregoing, the Applicant addressed another letter to the Respondent's Advocates dated 27<sup>th</sup> November, 2019 where the Applicant communicated the events that transpired on the previous day and notified the Respondent that it would be moving the court for redress.

xvi) The Respondent escorted the Applicant's members for a meeting at Masii Police Station from 11:00 am to 4:30 pm with a view to intimidate the Applicant's members to relinquish their membership despite there being no justifiable criminal element in the matter which actions were tailored to intimidate, coerce and threaten the Applicant's members to recant their union membership.

xvii) The Respondent has failed to honour the orders of the court and the said contemptuous actions of the Respondent have exposed the authority and dignity of the court to absolute disrepute necessitating this court's intervention.

In response, the Respondent filed two Replying Affidavits. Both Replying Affidavits were sworn by RAYMOND NZIOKA on 20<sup>th</sup> January, 2020. One was filed on 21<sup>st</sup> January, 2020 and the other on 24<sup>th</sup> January, 2020 (the **Replying Affidavits**).

In its reply, the Respondent pleaded that:-

i. After the appearance in court on 25<sup>th</sup> November, 2019, the Respondent sought a meeting with the employees of the head office in Nairobi in order to resolve the dispute that ensued between the employees and its manager in Masii.

ii. The Respondent in calling for the said meeting wanted to address the issue of incitement which has been reported to its headquarters and at no time did the issue of the union arise.

iii. The employees expressed difficulties in raising the fare to the Respondent's office in Nairobi and therefore the Respondent through its manager in Masii met the employees on 20<sup>th</sup> and 27<sup>th</sup> November, 2019 where they agreed to hold a meeting on 3<sup>rd</sup> December, 2019.

iv. On 3<sup>rd</sup> December, 2019, the Respondent's Legal Officer, Mr Chege, the Manager, Betty Musembi (now deceased) and the deponent being the Human Resources Manager, held a **meeting with eight of the employees**.

v. The meeting was held at Masii police station because the employees preferred to have the meeting held at the police station as opposed to the Respondent's offices since the employees had already reported the matter at the police station and felt that the police station would be more neutral.

vi. The meeting was not attended by any police officer and it is thus not true that the employees were escorted to the **police station as alleged by the Applicant**.

vii. The Supporting Affidavits sworn by Danchael Mwangure, David Mwove Mwethi and Bernard Iluku containing allegation of intimidation are not only misleading but are intended to paint the Respondent and its Directors as people who have no regard to the rule of law which was not true.

viii. From the list of those who attended the meeting, it is clear that the deponents of the Replying Affidavits did not attend the meeting held on 3<sup>rd</sup> December, 2019.

ix. During the meeting, the employees refused and/or rejected the offer and/or formula to return to work and stated they would not report to work until they discussed the matter with their union representative and in particular, one David Mwove Mwethi.

x. It is also not true that the Respondent refused the employees to go back to work and that the correct position is that they have refused to report back to work.

xi. Only one Alfred Muriithi agreed to return to work and was still working for the Respondent.

xii. The resolution of the meeting was the employees would revert to the Respondent on the matters discussed once they consulted their union representative which they did not and instead served the Respondent with the Claimant's instant application.

xiii. The Applicant is misleading the Court by stating that the employees have not been paid their salaries. The employees were paid their wages for all the days worked.

xiv. The Respondent has never coerced any of its employees to relinquish their membership to the Claimant and/or any union.

xv. The Applicant has not proved any victimization, harassment, termination or dismissal of the Applicant's members from employment.

The parties appeared before me on 6<sup>th</sup> February, 2020 where Mr. Amalemba holding brief for Mrs. Koech appeared for the Claimant and Ms. Mailu holding brief for Mr. Ndirangu appeared for the Respondent. Counsels made oral submissions with respect to the instant application.

Mr. Amalemba relied on the grounds on the face of the Application as well as the Supporting Affidavits therein and a list of authorities dated 6<sup>th</sup> February, 2020 and filed on the same day. His submissions were that:-

- i. In the Replying Affidavit to the first application sworn by Raymond Mutuku on 20<sup>th</sup> November, 2019, it was alleged that its employees reported late to work on 24<sup>th</sup> October, 2019 and were asked to report to the head office for further instructions. It was further deposed therein that only 4 of 21 employees were asked to report to the head office, however, the check-off form does not have an exact number of employees.
- ii. The said employees were never issued with show cause letters or any form of notice that disciplinary action would be taken against them.
- iii. However, in the Replying Affidavits to the instant application both sworn by Raymond Nzioka, at paragraph 5, there is a different reason deposed to in the Affidavit for the calling of the meeting, being incitement.
- iv. Further, at Paragraph 8 of Raymond Nzioka's Replying Affidavit to the first application, he deposed that it was during the meeting that the Respondent discovered that the employees had joined union membership.
- v. Paragraph 9 of Raymond Nzioka's Replying Affidavit to the first application confirms allegations of victimisation by the Human Resources Officers wherein he deposed that the employees were instructed to write letters stating that they did not understand why they signed the check-off forms.
- vi. In the letters referred to, there is no reference to the employees reporting to work late.
- vii. In the said letters, the employees were confirming that they were requested to leave the union.
- viii. Those who were allowed to go back to work are those who signed the resignation letters.
- ix. The employees have not received their salaries since 31<sup>st</sup> October, 2019. The Respondent's response to this at paragraph 14 of the Replying Affidavit is that the workers have never reported back to work from the date they reported unruly on 24<sup>th</sup> October, 2019 and have been paid for the days worked in October, 2019.
- x. The Claimant is seeking only to stop the Respondent from victimising the employees from exercising their rights to join the union and to restrain the Respondent from denying the Claimant's members access to the workplace.
- xi. The service of the Orders of this court dated 11<sup>th</sup> November, 2019 and the Order of extension issued on 25<sup>th</sup> November, 2019 has not been contested.
- xii. When the employees reported to work on 16<sup>th</sup> November, 2019 after the orders were served, the employees were denied access.
- xiii. Following the letters of 25<sup>th</sup> and 27<sup>th</sup> November, 2019 informing counsel for the Respondent that there was no compliance with court's order and requesting for compliance for which there has been no compliance.
- xiv. At paragraph 1 of the Replying Affidavits to the instant application, the deponent confirms that the head office is based in Nairobi and where the employees were to report to work is in Masii, Machakos County. Having been in Nairobi, the deponent has not challenged the facts tendered by the employees in their affidavits.
- xv. The Respondent in its Replying Affidavits to both the first and the instant application contend that the employees never reported back to work. It would have been expected if such was the case that the Respondent would have at least commenced disciplinary action for desertion.
- xvi. There is no evidence of summary dismissal for desertion.
- xvii. There is a deposition at paragraph 7 of the Replying Affidavits to the instant application that a meeting was held with some of the employees to resolve the issues. The list produced as annexure **RN2** is a list of employees who reported to work on 26<sup>th</sup> November, 2019. The employees wrote their names, ID numbers and dates of signing.
- xviii. The employees reported following the Claimant's letter addressed to the Respondent's Advocates informing them that the said employees would report to work on 26<sup>th</sup> November, 2019.
- xix. However, there was no compliance with the Court's Orders that they be allowed access to the workplace.

On the other hand, Ms Mailu relied on the Replying Affidavits sworn by Raymond Nzioka on 20<sup>th</sup> January, 2020 and the list of authorities dated 6<sup>th</sup> February, 2020 and filed on the same date. Ms Mailu's submissions were that:-

i. The Claimant has come for relief for its members with unclean hands as the problems arising have been caused by the Claimant's Members.

ii. On 24<sup>th</sup> October, 2019 the employees arrived late, a fact which has not been disputed by the Claimant in its affidavits.

iii. A meeting was called and it was during this meeting that the issue of coercion to join the Claimant Union arose. The same was addressed and a letter to Phillip Mutua was sent on 7<sup>th</sup> November for incitement of his colleagues.

iv. There were proceedings in this court on 25<sup>th</sup> November, 2019 and after the proceedings, the Respondent requested for a meeting with the employees.

v. On that day, some of the employees stated that they were not able to meet transport costs to Nairobi and they were told that the meeting would be held in Masii.

vi. That is the list appended at RN2 where the employees who attended the meeting appended their signatures. During the meeting, it was agreed upon request of the employees who attended the meeting and appended their signatures.

vii. The minutes in annexure RN3 of the Affidavit of Raymond Nzioka show the names of the members who were present in the meeting as expressed in the minutes, some of the members who have sworn affidavits were

not present.

viii. Among those who were present, only one agreed to return to work. The others declined.

ix. The Claimant's application outlines that the Respondent is guilty of coercion and victimisation of its members which claims have not been proved.

x. The Claimant's submission about the meeting of 24<sup>th</sup> October, 2019 casting doubts that while the meeting was intended to address the lateness of the employees turned out to be a meeting about incitement which is not the case.

xi. The meeting of 24<sup>th</sup> October, 2019 was about issues in the workplace thus it was unusual that issues related to incitement would come up.

xii. The Claimant's submissions are that the letters its members were allegedly asked to write were recanting union membership which the Respondent denied. The said letters however do not confirm resignation from the union as submitted by the Claimant.

xiii. On the basis of the meeting and minutes of the meetings held by the Respondent with the Claimant's members on 26<sup>th</sup> and 27<sup>th</sup> November, 2019 and on 3<sup>rd</sup> December, 2019, it is unfair for the Claimant to blame the Respondent for the behaviour of its members as they were the ones who failed to show up to work and to the meetings convened by the Respondent.

xiv. The deponent of the 2 Replying Affidavits is based in Nairobi while the workplace is in Masii is undisputed. The deponent has clearly shown in the said Replying Affidavits that the said meeting between the members of the Claimant and the Manager at Masii Branch. The same is proved by minutes of the meetings where the deponent has been shown to have affixed his identity card and number and appended his signature.

xv. As such, the Claimant's claims of coercion, victimisation and dismissal of its members stands unproved, therefore no contempt was committed or has been proved as the Respondent has not breached the Court Orders.

In his rejoinder, Mr. Amalemba submitted that:-

i. While on the one hand the Respondent says that the employees have never gone back to work, they on the hand say that they had meetings with the employees on 25<sup>th</sup> November and 3<sup>rd</sup> December, 2019.

ii. While the meeting of 25<sup>th</sup> November, 2019 was at the Respondent's workplace, it is the Claimant who advised the members to report to the workplace.

iii. There is a list shown with respect to the meeting but the Court is not being told what happened after the meeting.

iv. His submission was that they were not allowed to go back to work hence on the letter of 27<sup>th</sup> November, 2019 to the Respondent's Advocates at page 28 of the instant application. The Respondent has not made mention of any correspondence between counsels for the parties.

v. If at all the Respondent has requested for meetings with employees, it has not been shown how the employees were called to these meetings.

vi. A look at the meeting minutes shows that the people who signed the minutes are all from the Respondent. Minute 3 mentions that Alfred Mureithi was ready to return while others declined.

vii. While counsel for the Respondent alluded to the meeting of 24<sup>th</sup> October, 2019, there is no evidence of action taken against the employees to warrant that they stay out of the workplace.

viii. While counsel for the Respondent stated that the letters attached do not mention resignation of employees from the union, one letter contained in annexure RN1 in the Replying Affidavits to the instant application is by Phillip Mutua. The last paragraph of which states that he never joined any union and he is not a member.

ix. The most critical point of the letters is that the employees were called to explain why they reported to work late yet the letters do not mention lateness.

## Determination

I have considered the Instant Application, the Supporting Affidavits in support thereof and the Replying Affidavits filed by the Respondents in opposition to the same. I have also considered the submissions made by counsels on behalf of both parties.

The elements that must be proved to make a case for civil contempt were outlined in the case of **North Tetu Farmers Company Limited v Joseph Nderitu Wanjohi [2016] eKLR** as:

- a. *The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;*
- b. *The Defendant had knowledge of or proper notice of the terms of the order;*
- c. *The Defendant has acted in breach of the term of the order; and*
- d. *The Defendant's conduct was deliberate."*

The clarity and unambiguity of this court's orders issued on 12<sup>th</sup> November, 2019 are not contested by either of the parties. The Respondent has also not contested knowledge or proper notice of the terms of the said orders. It was thus the obligation of the Respondent to obey the orders unless they were vacated or set aside.

It is the Claimant's contention and submissions however, that

the Respondent has acted in breach of the orders of this court by continued harassment and intimidation of the Claimant's members and the refusal to allow the Claimant's members access to the work place.

The Claimant relies on the depositions made in the Supporting Affidavits to the instant application that the Claimant's members reported to work but were not allowed access to the place of work and that the Claimant's members were escorted to the police station for the meeting held on 3<sup>rd</sup> December, 2019 between the Claimant's members and the Respondent as which served to intimidate and harass the Claimant's members in contravention of this Court's Orders.

The Respondent on the other hand relies on the Replying Affidavits to the instant application which depose that the Claimant's members never reported back to work after the meeting of 24<sup>th</sup> October, 2019 and that the meeting of 12<sup>th</sup> December, 2019 between the Claimant's members and the Respondents was held at the police station at the behest of the Claimant's members who stated that it would serve as a neutral ground having reported the matter to the police station. Further, it was also deposed that there was no police officer at the said meeting both depositions of which have not been contested by the Respondent.

An applicant in contempt proceedings must prove beyond peradventure that the Respondent is guilty of contempt. This was the finding of the Court in **North Tetu Farmers Co. Limited v Joseph Nderitu Wanjohi [SUPRA]** while citing the case of **Peter K. Yego & Others v Pauline Nekesa Kode**.

The Claimant has not presented to this Court any cogent evidence that the Respondent is in breach of the orders of this Court so as to be found guilty of contempt. The opposing depositions and submissions by the parties rely heavily on divergent accounts on matters of fact that can only be tested at the hearing of the suit.

A finding of contempt cannot be made on a balance of probabilities due to its quasi-criminal nature that has a direct bearing on the liberty of a party. This is what was stated by the court in the case of **Gatharia K. Mutikika v Baharini Farm Limited (1985) KLR 227** where the court stated: -

*"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... It 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.....Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt...."*

It is a rule of evidence that he who avers must bear the burden of persuading the court to believe him. In the instant suit, the court is unable to tell whether it is the applicant or the respondent that is telling the truth. The applicant has thus failed to discharged its burden of proof. I find that the Claimant has not proved its case for contempt to the required standards. The Application is therefore dismissed with no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF MAY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

**MAUREEN ONYANGO**

**JUDGE**