



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO. 678 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 21st May, 2020)

TAILORS AND TEXTILES WORKERS UNION.....CLAIMANT

VERSUS

GLOBAL APPARELS EPZ LIMITED.....RESPONDENT

AND

FIDELIS OMWAMBA ONSONGO.....1ST PROPOSED INTERESTED PARTY

FELIX ALUSIOLA LUYAKHA.....2ND PROPOSED INTERESTED PARTY

MOSES NYANGENA.....3RD PROPOSED INTERESTED PARTY

NZILANI MUSYOKI.....4TH PROPOSED INTERESTED PARTY

MARGRET KEMUNTO MAGARA.....5TH PROPOSED INTERESTED PARTY

DUKE MASIRE NYAKINA.....6TH PROPOSED INTERESTED PARTY

JEREMIAH RAWINJI MIIKOBIA.....7TH PROPOSED INTERESTED PARTY

RULING

1. Pending for determination before this Court is the Claimant's Notice of Motion Application dated 10th July, 2019. The same is filed under certificate of urgency and is brought under Order LIII Rules 3(1) and 3(4) of the Civil Procedure Rules and all enabling provisions of the law including the Judicature Act. Seeking orders that:-

1. This Application be certified as urgent to be heard ex-parte in the first instance.

2. This Honourable Court be pleased to find and hold that the Respondent herein Global Apparel EPZ Limited through its Court orders issued herein on the 30th day of April 2019 aforesaid and to be subsequently committed to Civil Jail for a period not exceeding 6 months pending the compliance with the Honourable Court's order.

3. This Honourable Court be pleased to deny the Respondents the audience in this matter until and unless they purge the contempt of court committed herein.

4. The Respondents be ordered to pay for the costs of this Application together with accrued interest immediately and upon determination of the Application herein.

2. The Application which is premised on the grounds THAT:

a) On the 30th day of April, 2019, this Honourable Court issued an Order in favour of the Applicant directing the Respondent to

comply with the Orders that the Respondent deduct union dues from the 1644 employee who had acknowledged their Union membership as well as victimizing all their Unionized employees and to submit the printouts of Union dues deductions from their unionized members on the said date.

b) Despite having been in Court on the 30th day of April, 2019 and having been duly served with the Order, the Respondents have elected to disobey the Court Order and have failed to acknowledge their unionized employees.

c) The Applicant's Advocates have written to the Respondents requesting them to have regard to the Court Orders but there has been no response except defiance.

d) It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is varied, discharged and/or set aside.

e) The Respondent's actions herein are an upfront attack on the integrity of our judicial process and the rule of law which actions must not be countenanced.

3. The Application further supported by the Affidavit of **REV. JOEL KANDIE CHEBII** sworn on 10th July, 2019, in which he reiterates the averments made in the Notice of Motion Application.

4. The Application is also supported by a supplementary Affidavit sworn by **REV. JOEL KANDIE CHEBII** sworn on 8th October, 2019 and a Further Affidavit by **FRANCIS MOMANYI OMECHI** sworn on 14th October, 2019, the Applicant urged this Honourable Court to allow their Contempt Application the Respondent having failed to comply with the Court Orders issued in this matter.

5. In response to the Application the Respondent filed a Replying Affidavit deposed by **TOM MBOYA**, the Respondent's Administration Manager on 16th September, 2019, in which he avers that pursuant to the Court's Ruling on 30th April, 2019, the Respondent noted errors on the list of 1644 employees as provided by the Claimant union in that 113 names were repeated, 154 were non-existent and 257 left employment and could therefore not benefit from the Court Ruling.

6. The Respondent maintained that at the time of the Court's Ruling only 1120 unionisable employees were left in employment and that they are the only employees who could benefit from the Court Ruling.

7. He averred that on 14th May, 2019 pursuant to the Court's Order the Respondent did publish a notice to its members of staff informing them of the need to effect deductions of dues from those staff listed in the Claimant's initial Application who were still in employment.

8. He further averred that as a result of the aforementioned notice he did receive letters from unionisable staff on 15th May, 2019 expressing their desire to withdraw their membership as well as protest letters to the Respondent not to effect the deductions as communicated in the notice of 14th May, 2019.

9. He contended that on realizing the import of employees, he did on the 27th May, 2019 personally visited the Claimant Union Offices in an attempt to resolve the discrepancies and met Mr. Ojuka who instead redirected him to the Claimant's Advocates on record.

10. He further contended that on 30th May, 2019 there were reports of a go slow in protest of the proposed deductions. The Respondent averred that the go-slow would have greatly affected its productivity if allowed to continue. The Respondent insists that it was at this juncture that the Claimant proceeded to serve them with the Certified Court Order emanating from the Ruling of 30th April, 2019.

11. The Respondent maintained that all measures to ensure compliance with the said Court Order have been taken but have been frustrated by factors out of its control and cannot therefore be said to be in contempt due to the fact that some of the employees have since resigned from the Claimant Union and their unwillingness to have any such deductions effected.

12. The Respondent further maintained that it has not in any way coerced, intimidated or otherwise harassed its employees into taking their decision of leaving the union. In the circumstances, the Respondent maintained that it cannot be said in contempt and therefore urged this Honourable Court to dismiss the instant Application in its entirety with costs to the Respondent.

13. In further opposition to the Application filed herein the Respondent filed Further Affidavits sworn by **TOM MBOYA**, **FRANCISCA KOKI DAUDI** and **TITUS M. MBWIKA** on 15th November, 2019, in which affidavits that Respondent reiterated the averments made in its Replying Affidavit sworn by **TOM MBOYA** on behalf of the Respondent on 16th September, 2019 and urged the Court to dismiss the Contempt Application with costs to the Respondent.

14. Parties thereafter agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

15. In its Submissions the Claimant/Applicant contends that the terms of the Orders issued by Court on 30th April, 2019 were clear and unambiguous and that the same are still in force since they have not been varied and/or set aside and are therefore binding on the Respondent

who have failed and/or ignored to comply with the Orders warranting the filing of the instant Application.

16. The Applicant further contends that there is no dispute of service of the said Court Orders as the same was effected through the Respondent's Production Manager One Mr. Ryi John. It is on this basis that the Claimant/Applicant submitted that the Respondent had full knowledge of the existence of the Court Order having been properly served with the same.

17. The Claimant/Applicant further submitted that the allegations raised by the Respondent of repeated entries of employees, non-existent employees and employees that have since left employment has not been proved as no evidence has been availed to this Honourable Court to support this assertion.

18. It is further the Claimant's contention that the letters attached in the Replying Affidavit are not genuine and are forged as they appear to be written in similar hand writing and have similar wordings.

19. The Claimant/Applicant further maintained that the Respondent's actions are indeed in contempt of the Court Orders and therefore urged this Honourable Court to allow its Application in terms of the Reliefs sought therein. To buttress this argument the Claimant/Applicant cited the cases of **Dorothy Mwanzia Ng'ang'a & 4 Others Vs Machakos County Government & 4 Others (2018) eKLR**, **Teachers Service Commission Vs Kenya National Union of Teachers & 2 Others (2013) eKLR** and **Kenya National Private Security Workers Union Vs Lavington Security Limited (2019) eKLR** where the Courts found the Respondents in contempt having failed to comply with Court Orders issued.

Respondent's Submissions

20. The Respondent on the other hand maintains that it is not in contempt and has in fact complied with the Court Orders by continuing to remit union dues in respect of its employees who are still members of the Claimant Union.

21. The Respondent contends that subsequent to the Court's decision it has been served with copies of letters of mass resignation by a large number of its employees thus rendering it incapable of effecting the Court Orders with respect to the said employees. To fortify this argument the Respondent cited and relied on the case of **Kenya Aviation Workers Union Vs Kenya Airports Authority (2018) eKLR** where the Court was of the view that where members have denied membership to the union such parties are not in contempt as the failure to comply with the Court Orders was not deliberate.

22. Similarly, the Respondent place emphasis on the case of **Noreen Shariff & Others, as Administrators of the Estate of Jim Choge Vs Chief Land Registrar & 2 Others; Amusement Garden Limited (Interested Party) (2019) eKLR** where the Court was of the view that what constitutes contempt as a deliberate, wilful ad mala fides. The Court in that matter went on to find that an unreasonable non-compliance so long as the same is bonafide does not constitute contempt.

23. The Respondent urged this Honourable Court to be guided by the above decisions and maintained that it did not deliberately or wilfully set out to disobey the Court Orders but was frustrated in its attempts at implementation by the mass resignation of its employees from the Union.

24. The Respondent further submitted that it made all possible efforts to comply fully with the Court Order but full compliance was rendered impossible as deductions of union dues could not be effected its employees having resigned from the union. To buttress this argument the Respondent cited the provisions of Section 48 (6) of the Labour Relations Act and insists that proceeding with the deductions would be tantamount to a breach of the employees' rights as guaranteed under Article 41 of the Constitution of Kenya, 2010.

25. The Respondent further submitted that the Applicant has not met the standard of proof required for contempt proceedings as highlighted in the Court of Appeal decision in the case of **Mutitika Vs Baharini Farm Limited (1985) eKLR** where the Court was of the view that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.

26. The Respondent further maintained that the allegation of victimization is not credible and urged the Court to disregard the same.

27. In conclusion, the Respondent urged this Honourable Court to dismiss the instant Application with costs as the Contempt Orders sought therein do not lie and can therefore not be granted by this Court.

28. I have considered the averments of both Parties herein. The Applicants seek to have the Respondents condemned for being in contempt of this Court's orders issued on 30th April 2019 ordering deduction of union dues for 1644 employees of the Respondent.

29. The Respondent on their part cite various reasons for none compliance amongst their problems in the list, withdrawal of some members from the union etc.

30. The Respondents aver that out of the list of 1644 members, only 1120 were remaining after checking the list.

31. The Respondents however do not explain why they did not proceed to effect the deductions for the 1120 members they allege were still available even now almost a year down the line.

32. Under Section 48(3) of the Labour Relations Act:-

(3) “An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee’s wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction”.

33. Section 48 (6) of the Labour Relations Act however opines as follows:-

(6) “An employer may not make any deduction from an employee who has notified the employer in writing that the employee has

34. If indeed then the Respondent failed to remit dues in respect of members who notified them of resignation from the Union that should have been notified to the Claimants’ herein.

35. The Respondent only annexed one such notification to their further affidavit indicating that one Francis Momanyi has resigned from the union, that then does not qualify the Respondent from not deducting union dues from the rest of the members.

36. The failure by the Respondent to deduct and remit union dues from the Claimant’s members save for those for who have resigned is therefore in contempt of this Court’s orders. I therefore find the Respondent guilty as cited for contempt.

Dated and delivered in open Court this 21st day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Weru holding brief Bonyo for Respondent – Present

Guserwa for Claimant – Absent