



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 19 OF 2020**

**KENYA LONG DISTANCE TRUCK DRIVERS AND ALLIED WORKERS UNION.....CLAIMANT**  
**VERSUS**  
**MASTERS FABRICATORS LIMITED.....RESPONDENT**

**RULING NO. 2**

1. In a Ruling delivered on 8 May 2020, the Court issued the following orders

(i) The Respondent to comply with the mandatory provisions of sections 48 and 50 of the Labour Relations Act effective May 2020 in respect of the employees in its payroll who have signed the Form S.

(ii) In default, the Respondent will pay from its own funds' such deductions not made and remitted backdated to November 2019.

2. Apparently, the Respondent did not comply for on 11 June 2020, the Kenya Long Distance Truck Drivers & Allied Workers Union (the Union) filed a motion under a certificate of urgency seeking orders

1. ...

2. ...

3. ....

4. **THAT** in the alternative to prayer 3 above, the Honourable Court issue a warrant of arrest against the Respondent company directors to show cause why they should not be committed to civil jail for failure to comply with the court order.

5. **THAT** pending the hearing and determination of this application and the main suit, the Honourable Court be pleased to issue an order prohibiting the Respondent Company from replacing the employment of the Claimant union members except through due process of the law.

6. **THAT** pending the hearing and determination of this application and the main suit, the Honourable Court be pleased to issue an order compelling the Respondent to recall all employees of the Claimant/Applicant sent on leave of absence without pay.

7. **THAT** pending the hearing and determination of this application and the main suit, the Honourable Court be pleased to issue an order compelling the Respondent Company to engage the Claimant Union in all issues involving its employees who are the Claimant Union members.

8. **THAT** costs of this application and the suit be met by the Respondent.

3. When the application was placed before the Court on 11 June 2020, it directed that it be served upon the Respondent for the giving of directions.

4. Pursuant to directions issued by the Court on 16 June 2020, the Respondent filed a replying affidavit sworn by its Human Resources Manager while the Union filed a further affidavit sworn on 26 June 2020.

5. The Union filed its submissions on 2 July 2020 and the Respondent filed its submissions on 16 July 2020.

6. The Court has given due consideration to the facts placed before it and the law.

### **Compliance with orders of 8 May 2020**

7. In seeking an arrest warrant against the directors of the Respondent for purportedly breaching the orders of 8 May 2020, the Union asserted that the order requiring the Respondent to deduct and remit monthly union subscriptions was served upon the Respondent on 13 May 2020 but instead, it continued to send employees on compulsory unpaid leave.

8. The Respondent, denying that it had breached any limb of the orders issued on 8 May 2020 deposed in the affidavit of its Human Resources Manager that deduction of union dues for employees who were still on the payroll for May 2020 was effected and two cheques issued in favour of the Union and COTU and the same were deposited into the respective bank accounts on 5 June 2020. Copies of the cheques and bank deposit slips were filed in Court.

9. On the strength of the copies of cheques and banking slips, the Court finds that the Respondent did not breach the terms of the orders of 8 May 2020 to warrant the issuing of warrants of arrest or asking the directors to show cause.

10. This limb of the prayers, the Court holds was without merit.

### **Recalling employees on compulsory leave**

11. The Respondent sent some 18 employees on leave of absence without pay through letters dated 5 May 2020 and 16 May 2020.

12. The decision, the Union contended, was made without prior consultations with it (the Union) and/or the employees.

13. In the view of the Union, the decision was to navigate out of the Ruling of 8 May 2020 and defeat the ends of justice, victimise the employees on account of their union membership, was discriminatory and was dishonest as the employees had been replaced by casual employees.

14. The Respondent did not accept that its decision was an attempt to defeat the course of justice, was dishonest or meant to victimise the employees who had joined the Union.

15. The decision to send employees on compulsory unpaid leave, the Respondent maintained, was preceded with consultations (Memo dated 25 March 2020 and minutes of meetings with the staff held on the same day as well as a Memo dated 8 April 2020, Notice dated 4 May 2020 and a letter dated 4 May 2020 to the County Labour Office were produced).

16. On the considerations which led to the decision, the Respondent drew the attention of the Court to Government directives on social distancing and public gatherings as a direct result of the COVID19 public health pandemic.

17. The declaration of COVID19 public health pandemic by the Cabinet Secretary for Health is within public knowledge. Some of the guidelines and protocols included a ban on public gatherings and social distance.

18. Section 10(5) of the Employment Act, 2007 requires consultations before the change of certain employment particulars. Such include the payment of remuneration during the tenure of the contract.

19. On the question as to whether there was consultation, the Respondent has demonstrated that there was some form of consultations with the employees.

20. As to the extent, nature and agreement reached during the consultations and the lawfulness of the action taken by the Respondent and whether such was in breach of contract or statute (such as unpaid leave if not supported by contract), the Court must await until a hearing on the merits.

21. The Court cannot, therefore, fault the Respondent in sending some employees away from the workplace in order to comply with the guidelines and/or protocols by the Ministry of Health, at this interlocutory stage.

### **Defeating the course of justice**

22. The Union also asserted that the employees who were sent on compulsory leave were replaced by *casual labourers*. No evidence was laid before the Court to prove the assertion. If any evidence had been laid, it would have lend credence to the allegations of victimisation, dishonesty, an attempt to defeat the course of justice and discrimination on the part of the Respondent.

23. Further, the Union did not place any evidentiary material that any of the employees was called by the Management and threatened with untoward action if they refused to resign from the Union.

24. Before concluding, the Court wishes to make an observation on the need for dialogue not only between employers and employees but with Unions where workers have organised.

25. These observations have been necessitated by the prayer by the Union for an order compelling the Respondent to engage with it in all

matters involving employees.

26. The Constitution, as well as the Labour Relations Act and other statutes, recognise the pivotal role played by Unions in ensuring and maintaining industrial peace and harmony. Such engagements entail good faith.

27. Consequently, employers should not see Unions as rabble-rousers or incendiary elements in the workplace.

28. Where employers engage Unions in good faith, the outcome for the employer and the worker advances both the interests of the employer and the business, as there can be no production and profits without the workers, the workers themselves, and the cause of social justice.

### **Conclusion and Orders**

29. In light of the aforesaid, the Court finds no merit in the motion dated 22 May 2020 and orders that it be dismissed.

30. Costs in the Cause.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 6<sup>th</sup> day of August 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Mr. Onyony instructed by Onyony & Co. Advocates

For Respondent Mr. Wati instructed by D.B. Wati & Co. Advocates

Court Assistant Judy Maina