



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 118 OF 2017

(Before Hon. Justice Mathews N. Nduma)

KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

NYANZA CLUB.....RESPONDENT

RULING

1) The Notice of motion Application dated 15th May 2019 seeks for an order in the following terms: -

1. That the trustees, the Chairperson and the Secretary of the respondent club be ordered to appear in person to show cause why section 13 of the Employment and Labour Relations Court Act CAP 234 B cannot be enforced against them.
2. That in the alternative the court be pleased to issue execution order and cite the trustees, the chairperson and the Secretary of respondent for contempt of court orders.
3. That the court be pleased to execute her own orders in terms of section 13 of the Employment and Labour Relations Court Act CAP 234 Laws of Kenya.

2) The Application is founded on grounds set out on the Notice of motion and the supporting affidavit of Jane Mwaka, Industrial Relations Officer of the claimant Union.

3) The nub of the grounds relied upon is that the respondent has failed to implement, the Judgment of the court delivered on 13th December 2019 in which the court directed the respondent to: -

- a. Grant a general wage increment of 8.5% for the period 1st January 2018 to December 2019 and 8.5 % increment for the period 1st January 2019 to December 2019 to all the workers and
- b. Grant the workers 15% of the basic salary as house allowance or Kshs. 5,000 whichever is greater.

4) The general wage increment and the house allowance was back dated to 1st January 2018 and so it was to be implemented forth with by the respondents.

5) The respondent filed a replying affidavit on 15th July 2019 sworn to by Tito Omoro Odera, the treasurer of the respondent in which the deponent admits that the court order was not complied with citing serious financial problems facing the respondent.

6) The deponent attached audited accounts for the year ended 31st December 2018 claiming that the respondent was unable to implement the court order.

7) The statement reflects a gross surplus of Kshs. 45,847,419 for the ended 2018 and operating surplus of 6,502,967 and a net surplus of Kshs. 3,973,709 in the statement if comprehensive income.

8) The respondent promised to implement the CBA, once the financial position of the company improves. The financial statement reflects employee benefits expense of 18,372,052. The respondent pray that the application be withdrawn awaiting implementation.

Determination

9) The dispute determined by the court vide the Judgment delivered on 13/12/2018 is an economic dispute and the terms awarded by the court became terms and conditions of service of the employees of the respondent effective 1st January 2018. The respondent did not appeal the decision and so in terms of section 59(3) of the Labour Relations Act:-

10) ‘‘ The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.’’

11) The court resolved a dispute of collective bargaining between the parties and the terms of the Judgment became the concluded CBA by parties upon adjudication by the court in terms of section 73(1) of the LRA, and E & LRC (procedure) Rule 2016.

12) Failure by an employer to implement terms of employment contract cannot be enforced by way of contempt proceedings. Remedies available to the employees and the union are remedies available in law for breach of employment contracts which include, repudiation of the contract and for damages for the breach, commencing industrial action in case of collective agreements of employment as in the present case and/or referring the dispute to contractual and statutory dispute resolution mechanism under the recognition agreement and the Labour Relations Act.

13) Alternatively, where the judgment of the Court sounds in money execution against the assets of the Judgment debtor may be commenced in case of a private employer, as in this case as opposed to public establishment.

14) Accordingly, the application to punish the Trustees, Chairperson and the Secretary of the respondent club for contempt of court is misconceived and lacks sound legal basis.

15) The application is dismissed with no order to costs.

Dated, Signed and Delivered at Nairobi this 17thDay of September 2020

Mathews N. Nduma

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 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

M/s Mwaka for Applicant – Union

Mr. Ngala Awino for Respondent.

Chrispo: Court Clerk