



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 234 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2020)

KENYA AVIATION WORKERS UNION.....PETITIONER

VERSUS

KENYA AIRWAYS PLC.....RESPONDENT

AND

CARRIER DIRECTIONS LIMITED.....1ST INTERESTED PARTY

INSIGHTS MANAGEMENT LIMITED.....2ND INTERESTED PARTY

AFRICAN CARGO

HANDLING LIMITED.....3RD INTERESTED PARTY

EX-PARTE:

1. MR. ALLAN KILAVUKA

2. EVERLYNE MUNYOKI

RULING

1. The Petitioner/Applicant, Kenya Aviation Workers Union filed a Notice of Motion application dated 7th February 2020 against the Respondent, Kenya Airways PLC and the Ex-parte Respondents, Allan Kilavuka and Everlyn Munyoki. It seeks to be heard for orders:-

1) Spent.

2) Spent.

3) THAT this Honourable Court be pleased to Order the Acting Group Managing Director/Chief Executive Officer and the Chief Human Resource Officer of the Respondent, Mr. ALLAN KILAVUKA and EVERLYN MUNYOKI respectively be committed to civil jail for contempt for disobedience of the orders issued on 6th December 2019 by Hon. Lady Justice H. Wasilwa sitting at Employment & Labour Relations Court of Kenya at Nairobi in ELRC Petition No. 234 of 2019.

4) THAT the said Acting Group Managing Director/Chief Executive Officer and the Chief Human Resource Officer of the Respondent, Mr. ALLAN KILAVUKA and EVERLYN MUNYOKI do pay costs of this Application personally.

2. The Application is based on the grounds that:-

i) On 6th December 2019, the Honourable Court issued Conservatory Orders in this matter restraining the Respondent from implementing an email dated 17th October 2019 by the Respondents Group Managing Director to all its employees to directly recruit unionisable employees outsourced from Interested Parties to the Respondent on short term contracts with lesser terms and conditions than those of the Respondents permanent and pensionable employees on similar jobs.

ii) The said Order was personally served on the Respondent and all Interested Parties herein who acknowledged receipt by stamping and endorsing on the Petitioners copy on 10th December 2019.

iii) Parties appeared in Court for hearing of the matter on 19th December 2019 wherein the same Orders were extended without any variation in the presence of parties through their respective advocates including the Respondent until inter-partes hearing on 10th February 2020.

iv) Despite having been served the Order with a penal notice thereon and having knowledge of the same, the Respondent has on diverse dates subsequent to the said Order, recruited, accepted and employed personnel on short term contracts contrary to the said Court Order and continues to do so.

v) Despite complaint and requests to desist by the Petitioner, the Respondent has threatened and intends to continue with the said disobedience.

vi) The Respondent through its Acting Group Managing Director/Chief Executive Officer and the Chief Human Resource Officer of the Respondent, Mr. ALLAN KILAVUKA and EVERLYN MUNYOKI who are agents and directing minds of the Respondents are intentionally and deliberately disobeying Court Orders with impunity.

vii) Unless this Application is heard, the rule of law and authority of Court will continue to be held in contempt leading to a disorderly society.

3. The Applicant also filed a Supporting Affidavit sworn by its Secretary General, Moss K. Ndiema who avers that he discovered that on or about 03/01/2020, Everlyne Munyoki with direct authority/approval of Allan Kilavuka, duly accepted and executed a 3 months short term contract on behalf of the Respondent directly recruiting a personnel in the capacity of Assistant Supplies Officer of the Respondent under lesser terms and conditions than current employees of the Respondent, which actions are prescribed by the Court Order of 06/12/2019. That the said employee was an employee of the 1st Interested Party who was previously outsourced and seconded to the Respondent but resigned to join the Respondent under the impugned recruitment herein. He contends that the above stated disobedience of Court orders with assistance of advocates of the Respondent who are officers of this Court is contrary to the overriding objective of this Court and must be frowned upon and punished severely so as to uphold the rule of law.

4. The Respondent filed a Replying Affidavit dated 18th February 2020 sworn by its Industrial Relations Manager, Diana Nthiwa who states that as advised by the Respondent's advocates, for there to be a finding of contempt of a court order, the order alleged to have been breached should be clear and unambiguous. That the Respondent and its advocates understood the clarification of this Honourable Court on 19/12/2019 that the Respondent was at liberty to continue with the in-sourcing programme, provided that the on-boarded employees are engaged on terms similar to those of the other Respondent's employees performing the same jobs.

5. She avers that the previously outsourced employees consisted of casuals and non-casuals and that for the 33 casuals (which includes the position of Assistant Supplies Officer), the Respondent had never directly recruited that category of employees. That there are no current terms against which the in-sourced casual employees' terms could be based on and consequently, the Respondent retained them on contract and on terms they enjoyed with their previous employer. She further avers that the Petitioner has not proved to the requisite standard of proof, willful and deliberate violation of this Honourable Court's order.

6. The Petitioner filed a Supplementary Affidavit dated 10th March 2020 sworn by Moss Ndiema who avers that the Replying Affidavit is incompetent as neither its deponent nor the Respondent's advocates on record have filed requisite authority or otherwise, given by 1st and 2nd Ex-parte Respondents for the deponent to answer to the charges against them or the said advocates to act for them. That the introduction of 3 months contract which is admitted to have never existed or provided for is discriminatory and part of the restrained acts by the Court Order. He contends that there can be no multiple interpretations of the Order in this matter as purported by the Respondent and that the Ex-parte Respondents have shown no respect or courtesy to answer to the charges against them and have left the Respondent's officers who are their supervisee to arrogantly plead and aver further acts of contempt without any remorse.

Submissions Highlighted in Court

7. The Petitioner/Applicant's advocate submitted that the Respondent is in breach of the orders dated 6/12/2019 and that there are components of breach as per their affidavits and submissions as follows:-

1. The Respondent had notice of the orders served on 10/12/2019 which it has further admitted knowledge of at paragraph 20 of the replying affidavit dated 18/12/2019 and at paragraph 11 of the replying affidavit of Diana.

2. The affidavit of Petitioner showing short term contracts is an actual breach of court orders and the Respondent admits it gave short term contracts at paragraphs 9 and 10 of the replying affidavit of Diana. Paragraphs 15 and 17 of Ndiema show 3 months contracts.

3. The Respondent by itself and through the MD and HRO have purported to allege the court order was vague and ambiguous as at paragraphs 11 and 12 of affidavit of Diana. The order in the court record is clear and in simple English and it is clear the Respondent decided to disobey court orders.

4. The disobedience is deliberate since on 19/12/2019, the Respondent sought the court's clarification and the court stated that the Respondent can continue employing as long as they employ on a similar term (para 6 of replying affidavit of Diana).

8. The Respondent's advocate submitted in court that they relied on the replying affidavit of Diana sworn on 18/02/2020 in its entirety and the submissions dated 10/07/2020. That the complaint is that the Respondent has employed and the term of contract contravenes the term of the order of 06/12/2019. That the applicant is bound to demonstrate that in short term contracts, there is someone in a short term contract with different terms as employed by KQ. That the applicants have attached short terms contracts only but details of the terms are not attached. That the Applicants have opted to refer to CBA to suggest the short term contract is against terms of the CBA but the CBA allows for both short and long term contracts as under **Clause 9(b)**. That the Applicants have failed to show the part of the CBA being flouted and that the threshold for contempt has not been met. He further submitted that the people embodied and the short term contracts exhibited were not previously in employment of the Respondent and that the Respondent has therefore not breached the Court orders.

9. The Applicant's advocate responded that they reiterate their submissions and invites the court to look at the CBA and the sample contract provided of 3 months of the person previously employed by the 1st Interested Party. They also asked the court to look at **paragraph 134(a) (b) and (c) of the Petition** where there is a Memo to show how short term contracts were conducted before. That the court should not excuse the Respondents as they are misinterpreting the orders and that the court should find the Respondents in breach of the court orders.

Petitioner/Applicant's Submissions

10. The Petitioner/Applicant submits that the Application herein is premised under the following provisions of law:-

i. Section 5(1) of the Judicature Act that states; The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate Courts.

ii. Section 63 of the Civil Procure Act that states: In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed:-

63(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;

63(e) make such other interlocutory orders as may appear to the court to be just and convenient.

iii. Rule 81.4 of the Civil Procedure (Amendment No. 2) Rules of 2012 (England).

iv. Order 40 Rule 3(1) of the Civil Procedure Rules 2010 that states: In cases of disobedience, or of breach of any such terms, the court granting an Injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.

11. It is submitted by the Applicant that the said clarification sought by the Respondent's advocates never varied or gave the Respondents latitude to vary the above Order and that the same erroneous argument was invoked by the Respondent's advocates vide their letter dated 13th January 2020. That its advocates rebutted the same in their response letter dated 31st January 2020 addressed to the Respondent's advocates. That paragraph 2 of the said Order is crystal clear and states below:-

“THAT pending Inter-partes hearing and determination of this Application, an order of stay be and is hereby granted restraining the Respondents, by themselves, their officers, agents, servants or any person, agency claiming under them from restraining the Respondent and or anyone claiming under them including but not limited to the Interested Parties from the implementation of an email dated 17th October 2019 by the Group Managing Director of the respondent to all employees of the Respondent or KQ Group Members advertising for recruitment of all unionisable employees contracted by the interested parties and seconded to the Respondent to be employed by the Respondent under short term fixed term contracts contrary to or with lesser terms and conditions than those enjoyed by permanent and pensionable employees of the respondent or terms set out at Clause 9A of the Collective Bargaining Agreement (the CBA) between the Petitioner and Respondent dated 19th December 2014 or in anyway discriminating the said employees in recruitment, training, promotion, terms and conditions of employment or other terms arising out of employment and all other consequential process arising therefrom”.

12. The Applicant cites the case of **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR** where the High Court quoted **Halsbury's Laws of England** wherein it is stated:-

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment.....an application to court by him not being entertained until he had purged his contempt”.

13. That the learned Judge in the above decision further stated the elements to be met in a contempt application and observed thus:-

“Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand[22] have authoritatively stated as follows:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

(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 terms of the order; and

(d) the defendant's conduct was deliberate.”

14. The Applicant submits that the Respondents had knowledge of or proper notice of the terms of the said Order which they have not denied and it relies on the High Court case of **Africa Management Communication International Limited v Joseph Mathenge Mugo & another [2013] eKLR** where it was held thus:-

“Given that the 2nd Defendant is a company, the question that arises is how service of an order is to be effected upon a company if the directors of such a company are to be committed for disobedience of such an order. To my mind, in order to hold a corporation with liability for contempt, it is necessary to show that the corporation has been properly served or that service has been dispensed with on the basis that an appropriate officer of the company had knowledge of the order. In the same way, in order to hold the directors of such a corporation personally liable for breach of an order, such directors should be served with the order or it must be shown that they had personal knowledge of the same.”

15. It further submits that is clear from **Clauses 7, 17, 18, 19, 26, 34,39, 40 and 42 of the CBA** between parties and or **Clause 6 of the Conciliation Agreement** hereof, there is no provision showing parties ever agreed on 3 months non-renewable contracts at any time. That the Petitioner/ Applicant has thus far proved contempt by the Respondent and ex-parte Respondents beyond reasonable doubt notwithstanding that it should only be higher than a balance of probabilities but lower than beyond reasonable doubt. That the Court in the **Africa Management Communication International Limited case above** pronounced itself on the standard of proof to be met in case of contempt:-

“The standard of proof in matters of contempt of Court is well settled. It must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt. See the case of Mutitika Vs Baharini Farm Limited [1985] KLR 229. This is because the charge of contempt of Court is akin to a criminal offence. A party may lose his liberty. In this case I have found that the Defendants have not denied that they have continued to market and organize the “2nd Human Resources Symposium” using brochures and branded items that bear a close similarity to those of the Plaintiff. This is in utter breach of the Order of 13th June, 2013. Their main contention is that the Order was irregular, given the issues raised as to ownership of the intellectual property of the event and the Plaintiffs locus standi. That argument may probably be credible. But the application to establish the legal rights of the parties on a prima facie basis is still pending. The same is yet to be determined. What is at hand is an allegation that an order issued by this Court was not complied with. The explanation given by the Defendants for non-compliance thereof is that they think that the same was irregular as the Plaintiff was undeserving of the same. In my view, this is a strange argument.”

16. The Applicant submits that the Ex-parte Respondents should thus be committed to civil jail for contempt for disobedience of the orders. It refers the Court to the **Africa Management Communication International limited case above** where the Court reiterated the sentiments of Romer U in **Hadkinson -v- Hadkinson 1952) P 285 at 288** that the obligation of a person to obey Court orders affecting them is uncompromising and extends even to cases where the person affected believes the order to be irregular or void.

Respondent's Submissions

17. The Respondent submits that the said order is clear the Respondent was at liberty to on-board the employees on either of the following ways:-

a. *On terms and conditions enjoyed by permanent and pensionable employees of the Respondent; or*

b. *On terms set out at clause 9A of Collective Bargaining Agreement; or*

c. *On other terms as it employs provided it did not in any way discriminate these employees on the terms and conditions of employment.*

18. It submits that the Petitioner has not proved its allegations on a standard higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt as held by the Court in **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR**.

19. The Respondent further submits that it is evident from the correspondence and present application, that parties disagreed on the meaning of the Order which shows that the Order was not clear and unambiguous but was subject to multiple interpretations. That **Black's Law Dictionary 9th Edition** defines clear as 'without doubt or unambiguous' and which means that persons reading the Order ought to arrive at the same conclusion of its meaning which is not the case with the present Order. That consequently, this Honourable Court cannot find the Respondent and its officers in contempt as prayed by the Petitioner and that as such, there was no willful and deliberate disobedience of the Order as alleged by the Petitioner.

20. The Respondent urges the Court to dismiss the Petitioner's application with costs.

21. I have examined the averments of both Parties. On the 6/12/2019, this court granted orders as follows:-

1. ***“THAT the application be and is certified urgent.***

2. ***THAT pending inter-partes hearing and determination of this Application, an order of stay be and is hereby granted restraining the Respondents, by themselves, their officers, agents, servants or any person, agency claiming under them from restraining the Respondent and or anyone claiming under them including but not limited to the Interested Parties from implementation of an email dated 17th October 2019 by the Group Managing Director of the Respondent to all employees of the Respondent and or KQ Group Members advertising for recruitment of all unionisable employees contracted by the Interested Parties and seconded to the Respondent to be employed by the Respondent under short term fixed term contracts contrary to with or of lesser terms and conditions than those enjoyed by permanent and pensionable employees of the Respondent or terms set out at clause 9A of Collective Bargaining Agreement (the CBA) between the Petitioner and Respondent dated 19th December 2014 or in any way discriminating the said employees in recruitment, training, promotion, terms and conditions of employment or other matters arising out of employment and all other consequential processes arising therefrom.***

3. ***THAT the application be served upon respondent and be heard inter partes on 19th December, 2019”.***

22. The Petitioner/Applicants contend that the Respondent’s Contemnors acted in contempt of this Court’s orders. In order to prove existence of contempt, the Petitioner must establish the following:-

1. ***“The Respondents had knowledge of the existence of the Court orders above.***

2. ***The Respondents acted or omitted to act in such a manner that was in contempt of the Court orders.***

3. ***The act or omission was in breach of the Court Orders and thus punishable”.***

1. Knowledge of the Court orders

23. The fact that the Respondents were aware of the Court orders dated 6/12/2019 is infact an admitted issue because on 11/12/2019, the Respondent’s Chief Executive Officer wrote an email to all staff informing them of the existence of the orders in question.

24. On 19/12/2019, the Parties in this case also appeared in Court and Respondents put on record as asking Court to reconsider the Interim orders. This in effect means that they were aware of the existence of the Court orders in question. This is also acknowledged in Respondents’ pleadings.

2. Actions or omissions of the Respondent

25. The Applicant has averred that the Respondents acted in breach of this Court’s Orders. The Respondents on their part deny breach. They submitted that the orders was clear that they were at liberty to on-board employees on terms and conditions enjoyed by permanent and pensionable employees of the Respondent or on terms set out at Clause 9A of the CBA or on other terms as its employees providing it did not discriminate those employees on the terms and conditions of employment.

26. The Applicants have submitted that the Respondents breached the Court’s Orders by recruiting, accepting and employing employees on short term contracts contrary to the said Court order and continues to do this.

27. The Applicants aver that on 3/1/2020, the Contemnors executed a 3 months short term contract on behalf of the Respondent directly recruiting a personnel in the capacity of Assistant Supplies Officer of the Respondent under less terms and conditions than current employees of the Respondent.

28. In order for this Court to be convinced that the Respondents breached the Court order in question by employees at lesser favourable terms, this Court must have the import of the employment contract issued to the employee in question and compare with terms for staff currently in employment.

29. The contract of employment in question was produced as Annexure MKN-3.

30. The Applicants have however not annexed a comparative contract for staff of same level as the employee in question whose terms appear superior to those offered to the inbound employee.

31. The Applicants referred Court to Clause 9A of the CBA with the Respondent. Clause 9A relates however to staff on permanent and pensionable terms and most of staff mentioned herein as flight attendants, cabin crew ad allowances payable to them. Other allowances payable herein include house allowance mileage allowance and shift allowance.

32. I note that the contract of employment of employee x – stated at Clause 18 as follows:-

“Exclusion of benefits

Employee benefits available to permanent employees of the company are expressly excluded from this contract”

33. This Clause actually negates what is payable of the new inbound employee for which the Respondents have departed from and which is indeed in contravention of the orders of this Court.

34. It is therefore my finding that the Respondents have breached the orders of this Court by employing the Assistant Supplies Officer at terms less favourable than those granted to employees on permanent and pensionable terms.

35. I find the alleged Contemnors guilty in the circumstances and are liable to punishment accordingly.

Dated and delivered in Chambers via zoom this 16th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Litoro for Petitioner/Applicant and hold brief Omondi for 1st Interested Party – Present

Mwangi for Respondent – Present