



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 23 OF 2020**

**KENYA UNION OF SUGAR PLANTATION & ALLIED WORKERS.... CLAIMANT**

**V**

**KIBOS SUGAR & ALLIED INDUSTRIES LIMITED.....RESPONDENT**

**RULING**

1. On 27 February 2020, the Court, upon the application of the Kenya Union of Sugar Plantation & Allied Workers (the Union) granted the following orders

1. **THAT** the application is certified urgent and be heard *ex-parte* in the first instance.

2. **THAT** pending the hearing and determination of the present application *inter-partes*, this Honourable Court be pleased and hereby grants a temporary order of stay/conservatory order lifting and cancelling the action of the Respondent of suspending the 5 (five) branch officials and 1 (one) member namely

? Benard Ochieng Abuto.

? Michael Abiero Agallo.

? Benard Otieno Owuor.

? Charles Guya Orondo.

? Aloice Otieno Owere.

? Elly Onyango Odera

from service, employment and duty on the 21/02/2020 and from taking any further disciplinary measures detrimental and prejudicial to their bona fide status as employees of the Respondent and that the said aggrieved officials and member be reinstated to their respective positions forthwith.

3. **THAT** the application be served and be responded to within 14 days.

4. **THAT** *inter-partes* hearing on 18/3/2020.

2. Due to the declaration of COVID19 public health pandemic, the *inter-partes* hearing did not proceed on the scheduled date.

3. On 14 April 2020, the Union filed a Motion seeking orders

(a). ...

(b). **THAT** the Respondents herein be held to have disobeyed and/or breached the court order given by this Court on 27<sup>th</sup> February 2020 and served to the 1<sup>st</sup> Respondent on 28<sup>th</sup> February 2020.

(c) **THAT** the 2<sup>nd</sup> Respondent be detained and/or imprisoned for a period up to six months for disobeying/contempt of court order.

(d) **THAT** the costs of this application be provided for by the 2<sup>nd</sup> Respondent.

4. On 1 October 2020, the Union filed another Motion seeking the unconditional reinstatement of the named 6 Grievants.

5. When the file was placed before the Court on 2 November 2020, it directed that the contempt application would be taken first.

6. Consequently, Kibos Sugar & Allied Industries Ltd (the Respondent) filed Grounds of Opposition to the Motion on 3 November 2020.

7. The following were also filed

i. Respondent's Human Resource Manager replying affidavit on 13 November 2020.

ii. Union's Assistant Branch Manager's further affidavit and submissions on 17 November 2020.

iii. Respondent's submissions on 19 November 2020.

iv. Respondent's Human Resource Manager supplementary affidavit on 19 November 2020.

8. The Respondent's Human Resource Manager's supplementary affidavit was filed without leave and the Court expunges it from the record.

9. The Court also expunges from the record the name of 2<sup>nd</sup> Respondent purportedly introduced through the Notice of Motion dated 14 April 2020 as no leave was sought nor granted for such joinder.

#### **Grounds for the contempt application**

10. In support of the application for contempt, the Union asserted that though the Respondent had suspended the Grievants on 20 February 2020, it secured Court orders on 27 February 2020 lifting the suspensions and reinstating the Grievants to work; that the Court orders were served upon the Respondent's Legal Officer on 28 February 2020; that the Respondent did not comply and on 1 March 2020, it raised the non-compliance with the Respondent in writing; that the Respondent then purported to revoke the suspensions through backdated letters dated 25 February 2020 and 29 February 2020; that contrary to the Court orders the Respondent issued *show-cause* notices to the Grievants on 10 March 2020 for allegedly failing to report back to work after the lifting of their suspensions and that despite the Grievants meeting the Respondent's Managing Director on 23 March 2020, they had not been reinstated to the substantive positions.

11. In its submissions, the Union contended that the Respondent had been acting in bad faith as it did not formally notify or serve the Grievants with letters lifting their suspensions and that it is the Union which got wind of the decision and informed the Grievants and that the Respondent had stopped remitting statutory dues deducted from the Grievants wages.

12. The Union also submitted that the Respondent had disobeyed Court orders in Cause No. 34 of 2020 in respect to the deduction of union dues.

#### **Respondent's opposition**

13. For the Respondent, it was contended that the application was misconceived and incompetent for being brought under the wrong provisions of the law.

14. The Respondent also assailed the application on the ground that it was *sub judice* as there existed another Cause (Kisumu Cause No. 68 of 2020, Kenya Union of Sugar Plantation & Allied Workers v Kibos Sugar & Allied Industries Ltd) where similar issues had been raised.

15. It was further asserted that the application was an abuse of the court process and that the orders sought were not capable of being granted, the suspensions having been lifted before the Court orders were issued on 27 February 2020.

16. Urging that no contempt had been committed, the Respondent asserted that the suspension of the Grievants had been lifted on 25 February 2020 before the Court issued orders on 27 February 2020.

#### **Sub judice**

17. The Respondent raised the defence of *sub judice* on the ground that the issues raised in the instant Cause were similar to those advanced in Kisumu Cause No. 68 of 2020, Kenya Union of Sugar Plantation & Allied Workers v Kibos Sugar & Allied Industries Ltd.

18. The Court has looked at the records in Kisumu Cause No. 68 of 2020, *Kenya Union of Sugar Plantation & Allied Workers v Kibos Sugar & Allied Industries Ltd* and come to the finding that *sub judice* does not arise because the cause of action therein is predicated on a failure to agree on the terms of a *collective bargaining agreement* whilst the cause of action herein is the wrongful and illegal suspension of trade union officials and a member from employment.

### **Incompetent application**

19. Challenging the competence of the Motion, the Respondent contended that the Union had invoked the wrong provisions of the law.
20. The Union cited in support of the contempt application what it stated to be Order 17 and Order 38 of the Employment and Labour Relations Court Rules and all enabling powers of the Court.
21. The Rules of this Court are organised in Rules and not Orders, unlike the Civil Procedure Rules.
22. However, considering that the Union was represented by a Union official without a solid legal training, the paramount issue for the Court is whether the Respondent understood the nature of the case advanced by the Union through the Motion.
23. The application facing the Respondent, from the body of the application is *disobedience* of Court orders issued on 27 February 2020. The Respondent addressed the issue in its replying affidavit meaning it understood the case to meet. It was not prejudiced.
24. The Court is therefore of the view that the application should not fail on account of invoking the wrong provisions of the law.

### **Merits of the application**

25. The orders sought in the Motion, and the ground(s) in support thereof, as well as the supporting affidavit, make it clear that the gravamen of the Union's complaint was the failure by the Respondent to lift the suspension of the 6 named Grievants after the Court had lifted the suspensions with the subsequent reinstatement to work.
26. The Respondent, in the replying affidavit, deposed that it lifted the suspensions before the Court orders were issued and that actually one of the Grievants resumed work and the question of contempt did not arise in the circumstances.
27. The Union asserted that the letters lifting the suspensions were backdated and were not delivered to the Grievants directly.
28. The records filed by the Union nevertheless indicate that the Respondent wrote letters to the Grievants informing them of the lifting of their suspensions and requesting them to resume work (there is an apparent dispute as to how the letters were delivered, for the Respondent later issued *show-cause* notices to the Grievants for not reporting back to work).
29. Before a contempt determination is made, there should be evidence that there was wilful disobedience of a Court order.
30. In this case, there is doubt as to when the suspension letters were revoked (before or after Court orders were given). The doubt is one which the Court could not resolve on the papers.
31. And even if it is true that the letters revoking the suspensions were backdated, there was no cogent reason given why the Grievants did not resume work after the Respondent had delivered the revocation letters to the Union's head office.
32. The Court also notes that the Union's General Secretary who is mentioned in the letters of 25 February 2020 as having had discussions with the Respondent's Human Resource Manager did not swear an affidavit to deny that the lifting of the suspensions was as a result of the discussions.
33. In light of the state of the record, the order that commends itself to the Court, in lieu of finding the Respondent in contempt is to order the Respondent to unconditionally allow the Grievants to resume work without loss of any benefits or privileges.
34. In this regard, the Respondent through its responsible officer should file an affidavit in Court within the next 5 days confirming compliance.
35. Costs to the Union.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 11<sup>th</sup> day of December 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Mr. Gombe, Branch Secretary

For Respondent Mr. Onsongo instructed by Onsongo & Co. Advocates

Court Assistant Chrispo Aura