



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. 86 OF 2017**

**KENYA PRIVATE UNIVERSITIES**

**WORKERS UNION.....CLAIMANT/APPLICANT**

**VERSUS**

**PRESBYTERIAN UNIVERSITY**

**OF EAST AFRICA.....RESPONDENT**

**RULING**

**Introduction**

1. There are two Applications before me for determination and both of them were filed by the claimant on 24.8.2017 and 18.5.2018. The former seeks to have some officers of the respondent punished for contempt of court while the latter seeks reinstatement of Mr. Aaron Sailepu to his employment which he lost while this suit was pending. The applications were opposed by the respondent through replying affidavits sworn by the respondent's HR Manager Mr. Dominic Mugao on 8.6.2018. When the applications came up for hearing on 25.9.2018, the parties agreed to dispose of the same by written submissions.

**Notice of Motion Dated 24.8.2017**

2. The Application dated 24th August, 2017 was brought under Section 5(b) of the Contempt of Court Act, 2016, Section 13 and 56 of the Labour Relations Act, 2007, Rule 17 of the Employment and Labour Relations Court (Practice Rules of 2015) and all enabling provisions of the Law. It seeks the following Orders THAT:-

- a) The Honourable Court be pleased to cite the Respondents for contempt of Court for breaching, disregarding, disobeying and/or ignoring the terms of the Order of this Honourable Court issued on 6th February 2017 and thereby being in contempt of this Honourable Court.
- b) Consequent to prayer (2) herein above being granted, the Respondents herein be committed to jail for a duration not exceeding Six (6) months and/or such other duration as the Honourable Court may deem fit and Expedient.
- c) The Respondent be compelled to purge the contempt by remitting the outstanding union dues arrears duly deducted but not remitted to the Claimant union of Kshs. 250,000/= forthwith.
- d) The Respondent be compelled to purge the contempt by reinstating our following members: Shadrack Muchemi and Jane Wamboi back to work and pay their outstanding salaries arrears forthwith.
- e) We have conducted a research at the university and confirmed that the above here are the contemnors of this Court Orders and they should be jailed for disobeying the lawful Court Orders dated 6th February, 2017.
- f) The Costs of the Application be borne by the Contemnors/Respondents jointly and severally.
- g) Such further and/or other Leave be made as the Court may deem fit and expedient.

3. This Application is premised on the grounds which are set out in the body of the motion and reiterated in the Supporting Affidavit sworn

by Mr. Peter Emisembe Owiti on even date, that:

- a) This Court issued Orders on the 6th February, 2017 requiring the Respondents to allow the Claimant access both potential members by the respondent writing a memo, inviting and organising a venue for union officials to meet workers thus recruiting them into joining a union at employers premises. The Respondent allowed them at the initial stage but currently has been denying union officials' access to members and discriminating on payment of salaries to those in union not being paid at all.
- b) The Respondent and its administrators as above are fully aware of the contents and terms of the Orders.
- c) The Respondent with its administrators have failed and deliberately refused to comply with Court Orders making it only difficult for the Claimant to enjoy fruits of its labour and the employees of the Respondent from getting the services of the trade union.
- d) If the Respondent is allowed to continue defying the Court directive not only will the Claimant/Applicant together with the members will suffer irreparable loss and damage but also the administration of justice is and will be brought to disrepute.
- e) The actions and/or omissions of the Respondents, amounts to and/or constitutes disregard and/or disobedience of Court Orders.
- f) The Orders of this Honourable Court on the 6th February, 2017 were duly extracted and endorsed with Penal Notice.
- g) The Respondents herein were duly and personally served with the Court Order issued on the 7th February, 2017.
- h) The Respondent duly understood and appreciated the gist of the Court Order and he has been communicating through messages.
- i) Notwithstanding the foregoing, the Respondents have since disobeyed and/or disregarded the said lawful Court Orders
- j) The leave to take out contempt proceedings be granted by this Honourable Court,
- k) All requisite requirements before taking Contempt Proceedings have been complied with and in particular the Orders of 6th February, 2017, were duly extracted and the same was duly and personally served on the Respondents herein.
- l) Besides, the actions and/or omissions of the Respondents is bound to create anarchy.
- m) The Respondents are in contempt of the Court Order given on the 6th February, 2017.
- n) The Ex-parte Applicants have been prejudiced by the Conduct of the Respondents.
- o) There exist salient, pertinent and/or plausible reasons, to enable the orders sought herein to be granted.
- p) It is in the interest of justice that the Application herein be allowed.
- q) The Application herein ought to be dealt with expeditiously to enable the integrity and dignity of the Honourable Court is protected.
- r) Order Costs be provided for by the Contemnors/Respondents.

4. In opposing the motion vide the Replying Affidavit dated 8.6.2018 Mr. Dominic Mugao, the Human Resource Manager of the Respondent deposed that the contempt of Court Application lacks merit and ought to be dismissed. He further avers that the Respondent was willing to remit union dues payable but only delayed due to financial constraints caused by the suspension of the Interim Letter of Authority, and which has seen it fail to pay salaries for three (3) months. He therefore urged the Court to grant the respondent a period of two (2) months period to effect the payments.

#### **The Notice of Motion dated 18.5.2018**

5. The 2nd Application was brought under Section 3 & 12 of the Employment and Labour Relations Court Act, Rule 17 of Employment and Labour Relations Rules, Section 41, 43, 44, 45, 46, 48, 50 & 51 of the Employment Act, 2007, Section 4 & 7 of the Fair Administrative Action Act, 2015, Articles 19, 20, 21, 22, 23, 27, 28, 29 (d) (f), 41, 43, 47, 50, 159, 258 & 259 of the Constitution of Kenya, 2010 and all other enabling provisions of the law. It seeks the following Orders:-

- a) **THAT** pending the hearing and determination of the Application dated 18th January 2017 & Contempt proceedings Application dated 24th August 2017, an Order for Stay and setting aside of the Respondent's letter/notice dated 17th May 2018 and its execution, be issued forthwith
- b) **THAT** pending the hearing and determination of this Application, an Order directing the Respondent to continue paying the Grievant his full salaries and all other allowances and benefits emanating from his employment contract, be issued forthwith.
- c) **THAT** an early date be fixed for hearing of this Application *Inter-Parties* for the following further Order:-

i) Declaration the termination of employment notice dated 17th May 2018 against the Grievant, MR. AARON SAILEPU is irregular and an act of victimization, meant to violate the fundamental and constitutional rights of the Grievant under article 36 and 41 of the Constitution of Kenya 2010.

ii) The setting aside and permanently dismiss the Respondent's letter dated 17th May 2018 and its implementation/execution.

iii) Permanent Order of Injunction, directing the Respondent to reinstate the Grievant back to his employment without of any loss of benefits.

iv) Leave to Claimant Union to amend its Memorandum of Claim dated 18th January, 2017.

v) Costs the Application.

6. The Application is premised on the following grounds as set out in the body of the motion and reiterated in the supporting affidavit sworn by Mr. Aaron Sailepu on even date, that:

a. The Claimant/Applicant Union moved this Court vide an Application dated 18th January, 2017, seeking orders that the Respondent be prohibited and barred from victimizing, harassing intimidating, threatening and terminating her employees simply because of their association with the Union; access, and deduction and remittance of union dues from members among other orders.

b. The Orders sought were granted, dated 6th February 2017, which orders were properly served upon the Respondent on 7th February, 2017. The Respondent neglected, failed and blatantly refused to obey the orders dated 6th February 2017.

c. After the Claimant/Applicant's Union's several attempts to try and reach out and access the Respondent's premises failed, the Claimant/Applicant's Union initiated and filed an Application dated 24th August 2017, to cite the Respondents' Agents and Representatives for Contempt of Court Orders.

d. The Orders issued and dated 6th February 2017 against the Respondent are still in force as the same have not been stayed, varied or set aside.

e. On the **16th day of May, 2018** the Application dated 24th August, 2017 was coming up for hearing before Justice Onesmus Makau, the Counsel for the Respondent requested for more time to file the Respondent's pleadings, as she was granted time, the Honourable Court directed her to go and advise her Client to comply with orders of the Court dated 6th February 2017. The Application dated 24th August, 2017 has been scheduled for mention on 11th June 2018.

f. On **17th May 2018**, Mr. AARON SAILEPU was irregularly, unlawfully and purportedly issued with a termination letter intending to terminate his contract of employment upon clearance with the Management. The Grievant, Mr. Aaron Sailepu is a member of the Applicant/Claimant Union.

g. The purported termination of the employment contract is incomplete as repudiation process is not complete; the Grievant has not cleared with the Respondent.

h. On 17th May 2018, the Applicant/Claimant's member, Mr. Aaron Sailepu, without reason, grounds, or/and any justification whatsoever was issued with a purported termination of employment letter dated 17th May 2018, the Grievant was also required clear with Respondent by **18th May 2018**. The fundamental right to employment of the Grievant is under attack, under threat and likely to be violated by the unlawful action of the Respondent.

i. At the time the Respondent issued a termination notice intending to terminate the employment contract of the Grievant, he was/is serving in the Respondent's University as the Marketing Officer position, Job Group F (6), earning a consolidated salary of **KSHS. 62,000.00**.

j. Due to the grievant's hardworking, dedication, determination and passion, and love for the work he was doing, the Respondent's University promoted him to another level, Marketing Officer, Job Group F (6) vide a letter / or notice dated 31st October 2017, with consolidated salary of **KSHS. 62, 000.00**.

k. The Grievant, Aaron is a member of Claimant/Applicant Union, and currently he is the Union Chapter Representative/Chairman, representing other members of the Union working in the Respondent's University. That despite joining the Union, he continued discharging his duties diligently and with utmost good faith, as he has never been in any dispute with Respondent's University since he was considered for employment.

l. In the letter dated 17th May 2018, which intends to terminate the Grievant contract of employment, the Respondent's Vice Chancellor, who authored and signed the termination notice/letter, has not shown any grounds or reasons for the intended termination of the Grievant's employment contract. The Respondent did not tell and explain to the Grievant the reasons for terminating the contract.

m. It is not in doubt that the Grievant's intended termination is emanating from his active role in trade union activities as he is the Union Chapter Representative. The purported cause of action vide letter dated 17th May 2018 is irregular, unlawful, unfair, and unprocedural and an act of victimization due to the grievant active role in Union activities, and his role as the Union Chapter Representative.

n. The action as initiated by the Respondent vide the notice dated 17th May 2018 is in breach of the orders dated **6th February 2017**, and this Court must find so.

o. The said purported cause of action vide the letter dated 17th May 2018 is not complete as the repudiation process is only complete with issuance of certificate of service. This Honourable Court is clothed with all the necessary powers to stay and stop this irregular processes, to protect the integrity of this Court and to assure the Applicant/Claimant Union that Court Orders are not issued in vain, to protect the grievant's rights from manipulation by the Respondent. The Grievant has neither been given opportunity to be heard nor reasons for intended termination.

p. The purported action against Mr. Aaron Sailepu by the Respondent as contained in her letter/notice dated 17th May 2018, blatantly breaches Court Orders dated **6th February 2017**, Sections 41, 43, 44, 45 & 46 of the Employment Act, Revised Edition 2012 (2007).

q. The intended adverse action of the Respondent against the Mr. Aaron Sailepu violates the provisions of Section 4 of The Fair Administrative Action Act, 2015. The same action by the Respondent vide her letter dated 17th May 2018, infringes the fundamental rights of Mr. Aaron Sailepu in terms of Articles 36, 41, 47 and 50 of the constitution of Kenya 2010.

r. The grant of orders sought will promote the rule of law and protect integrity of this Court, protect Mr. Aaron Sailepu from the excesses of the Respondent.

s. The grant of orders will not prejudice the Respondent in anyway, since she has not complied with the Orders of this Court dated **6th February 2017**, and she has not in any way involved the Applicant/Claimant Union in the

processes resulted to the letter dated 17th May 2018. Either way, the Respondent did not give any reasons or grounds whatsoever for the intended cause of action contained in the letter dated 17th May 2018.

t. The Honourable Court has a fundamental obligation, and to invoke its inherent authority and judicial powers in terms of Articles 159(2) (a, b, d & e), 259(1) (a-d) to evaluate and consider the Applicant/Claimant's Application, and to grant the Orders sought.

u. If the Honourable Court declines to grant the Orders sought, or/and allow the Applicant/Claimant's

Application, the Court's integrity will be in doubt as orders will be complied selectively, the grievant's dignity will be severely eroded, his public life will be subjected to ridicule, misery, mental/psychological torture.

v. The Application is filed under Section 10(7) of the Employment Act, Section 1A, 1B, 3A and 63 of the Civil Procedure Act CAP 21 Laws of Kenya and all the enabling provisions of the Law.

7. The Respondents opposed the Application by the Replying Affidavit sworn 8.6.2018 by **DOMINIC MUGAO**, the Human Resource Manager of the Respondent. He prayed for that the application to be dismissed for lack of merit, being misplaced and is bad in law for the following reasons:

a) No amendment of the Memorandum of Claim has been made to include this new claim.

b) There are pending different proceedings.

c) The termination was based on his employment contract not as a union representative.

d) The said AARON SAILEPU is not recognised by the Respondent as Union leader.

8. Mr. Mugao further deposed that the termination of AARON SAILEPU was lawfully done not through summary dismissal but lawfully in exercise of the employer's right to terminate the contract by a notice under the termination clause in the contract of employment.

9. He contended that the Grievant has not proved that his constitutional, labour or personal rights have been breached. He however admitted that the Grievant had been served with internal memos for his improper performance and negative utterances.

10. He further stated that the Respondent is suffering from financial constraints and suspension of its Interim Letter of Authority and promised to pay the salary arrears after 3 months as part of its restructuring.

#### **Claimant/Applicant's submissions**

11. The claimant submitted that the Court Orders against the Respondent dated 6th February, 2017 was meant to protect the Respondent's employees who are members or potential members of the Claimant union from any adverse infringement of their rights. That despite service of the Court Order dated 6th February, 2017 the contemnors have failed and/or ignored to comply with the Court Order.

12. She further submitted that the purported termination of the grievant, Aaron Sailepu, was made in bad faith and in complete disobedience to the Court Order of 6th February, 2017 that restrained the Respondent and their agents from victimizing the Applicant union members, the grievant being one of the union members, whose services were unfairly terminated. That the

termination of the grievant's employment was due to his active role in trade union activities as he was a member of the Claimant union as well as the union chapter representative.

13. She further submitted that the grievant was not given an opportunity to be heard contrary to the provisions of Article 50 of the Constitution of Kenya, 2010. Further, that the grievant's termination was not done fairly in line with Article 47 of the Constitution of Kenya, 2010.

14. She argued that the Honourable Court has a fundamental obligation drawn from Article 162 (2) of the Constitution to invoke inherent authority and judicial powers to enforce its orders and punish contemnors.

15. The Claimant/Applicant further submitted that the Respondent ought not be given audience by this Honourable Court until the Contempt of Court Application is heard and determined because she has come to court with unclean hands. In conclusion, she submitted that her applications have been made in good faith and urged the Court to allow the application as prayed because she has proved a prima facie case.

#### **Respondent's submissions**

16. The Respondent submitted that the grievant had a separate contract of employment which provided for termination clause together with grounds that would lead to termination. She is further submitted that the termination of the grievant was procedural and was not as a result of the grievant's membership to the Claimant union. She also submitted that the Application dated 18th May, 2018 ought to be dismissed since Mr. Aaron Sailepu was not a party to this suit when it was filed and as such he lacked the *locus standi* in this matter.

17. She submitted that the refusal of access or coercion and victimization of the claimants has not been proved by the Claimant. She contended that there is no proof of service provided by the Claimant herein. She further submitted that she has since remitted the union dues in compliance with Section 48 of the Labour Relations Act, 2007 and promised to continue remitting the same.

18. She relied on *Communication Workers Union Vs Safaricom Limited (2014) eKLR*, *Magdalene M. Ngea vs National Cereals and Produce Board [2017]eKLR* and *John Ngoko Isoe vs Nyasiongo Tea Factory co. Ltd [2017] eKLR*. In conclusion the Respondent urged the Court to dismiss the Claimant's applications with Costs.

#### **Analysis and determination**

19. The applications before me are fairly simple but presented in layman's manner making them difficult to decipher the real dispute and the facts therein. The written submissions did not help matters either. I think time has come for trade unions to either undertake some basic training on trial advocacy or just hire lawyers to at least draft pleadings, applications and submissions. Having said that, after careful consideration of the pleadings, motions, affidavits and submissions, the following issues arise for determination:

- a) Whether the Application dated 24th August, 2017 is merited and should be allowed.
- b) Whether the Application dated 18th May, 2018 is incompetent.
- c) Whether the Application dated 18th May, 2018 is merited.

#### **Notice of motion dated 24.8.2017**

20. According to Black's Law Dictionary, 9th Edition at page 360:

***“Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”***

21. Halsbury's Laws of England, 4th Edition Volume 9 at paragraph 52 stated as follows concerning civil contempt of court:

***“It is a civil contempt of court to refuse or neglect to do an act required by a Judgment or order of the court within the time specified in the judgment or order...A judgment or order against a corporate body may be enforced by an order of committal against the directors or other officers of the corporation.”***

22. The Claimant herein contends that the Respondent has violated the Court Order of 6th February, 2017, by purporting to termination of the grievant, Aaron Sailepu. The Claimant further submitted that the grievant's termination was made in bad faith and in complete disobedience to the said Court Order that restrained the Respondent and their agents from victimizing the Applicant union members, the grievant being one of the union members, whose services were unfairly terminated.

23. In *Teachers Service Commission Versus Kenya National Union of Teachers & 2 Others, Petition No. 23 of 2013* Lady Justice L. Ndolo stated as follows:

***“The reason why courts will punish contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the Court or even personal ego of the presiding judge. Neither is it about placating the applicant who moves the Court by taking out contempt of court proceedings. It is about***

***preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the Order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the Court, the avenues for challenging it are set out in the law. Defiance is not an option.***

24. It is however important to state that before a court embarks on punishing any alleged contemnors, there must be a clear prove that the order in question was indeed served or the person had become aware of the existence of the said order and disobeyed it. In this case the respondent submitted that the claimant has not proved that the order was served on the respondent. To prove service of the order, the claimant annexed to the supporting affidavit, a copy of the Order bearing a stamp from the respondent's Vice Chancellor. However, there is no Affidavit of Service to prove the said service filed before the Notice of motion dated 24.8.2017.

25. Upon perusal of the court record, the only affidavit filed to prove service of the order was filed on 25.4.2018 and it was sworn on 12.2.2018 by the Process Server Mr. Jackson Njogu stating that he served the order on 19.1.2017 together with a Mention Notice. Had service been done earlier, an affidavit of service could have been filed with the application for contempt on 24.8.2017. It is trite that the burden of proving contempt of court committed out of the court's precinct, lies with the Applicant and the standard of proof is beyond reasonable doubt.

26. Considering the facts of the case vis-a-vis the time of filing the application on 24.8.2017, I find that doubt has been cast regarding service of the material Court Order. Consequently, I give the benefit of doubt to the Respondent and decline the Notice of Motion dated 24.8.2017. I however wish to note that, although coming at the submission stage, the Respondent indicated that she has since complied with the court orders despite going through some financial constraints. The alleged compliance is however subject to confirmation by the Claimant.

27. The foregoing notwithstanding, I wish to state that in any legal proceedings where the court gives an injunction order to restrain employers from victimizing employees, like in this case, the said interlocutory orders do not and cannot insulate an employee from disciplinary action for a justifiable cause. Employees are bound by their respective contract of employment to conduct themselves in the manner prescribed by their contract of service at all times during the subsistence of the contract.

28. In view of the foregoing opinion, even if service of the Court Order issued on 6th February, 2016 had been proved, I still would not find that there was contempt simply because Mr. Aaron Sailepu or any other union member was dismissed. I will only find in favour of the applicant if she proves that the employee was dismissed in breach of a court order barring the employer from dismissing the employee on the basis of same matter pending before the court for determination.

#### **Notice of motion dated 18.5.2018**

29. The first issue in this motion is whether it is competently before the court. The Respondent contended that the motion is brought by a stranger to the suit and it introduces a new cause of action. The Claimant did not oppose that contention but quickly applied and obtained leave to amend the Statement of claim. That act was however forward looking and it could not cure the defect in the motion. I therefore agree with the Respondent that the motion dated 18.5.2018 was filed by a non-party to the suit and it is therefore incompetent.

30. The foregoing notwithstanding I wish to say that even if the application was competently before the court, the order sought would still be declined. First, stay of termination letter is a strange relief to be sought from a court of law and my assessment, giving the same would amount to reinstating the employee to his employment or ordering specific performance of the contract of service against the employer's wish and before hearing the case on merits.

Consequently, I direct that the claims in respect of Aaron Sailepu shall await determination on merits after hearing evidence at the trial or such other or further orders and directions of the court.

#### **Conclusion**

31. I have found that the application dated 24.8.2017 lacks merits due to lack of service of the court order before filing the application for contempt. I have further found that the application dated 18.5.2018 is incompetent for being brought by a stranger to the suit. Finally, I have found that the reliefs sought by the latter application are better remaining the subject of the trial in the main suit. Consequently, the two applications are dismissed with costs to the Respondent.

**Dated, Signed and Delivered in Open Court at Nairobi this 22nd day of March, 2019**

**ONESMUS N. MAKAU**

**JUDGE**