REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1248 OF 2016

KENYA TEA GROWERS ASSOCIATION.....CLAIMANT

- VERSUS -

KENYA PLANTATIONS AND

AGRICULTURAL WORKERS UNION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd March, 2019)

RULING

The claimant filed on 01.07.2016 a notice of motion through Kaplan & Stratton Advocates. The application was under section 63(c) of the Civil Procedure Act and Order 40 Rules 3(1) (2) (3) of the Civil Procedure Rules 2010, section 12 of the Employment and Labour Relations Court Act and all other enabling powers and provisions of law. The claimant prayed for orders:

1) That the application herein be certified urgent and the same be heard ex-parte in the first instance for purposes of prayer 2 herein.

2) That the application herein be fixed for hearing on priority basis.

3) That the Court makes an order that the respondent and its officials Thomas Kipkemboi, Dickson Sang, Jared Momanyi, and Stephen Nyamweno are in contempt of court for disobedience of the Court order issued on 27.06.2016.

4) That the Court does impose on the respondent a financial penalty of Kshs. 1, 000, 000.00 and in default the respondent's movable and immovable properties be attached and sold in execution of the order.

5) That the respondent's officials Thomas Kipkemboi, Dickson Sang, Jared Momanyi, and Stephen Nyamweno be committed to civil jail for such period as the Honourable Court shall deem necessary for being in disobedience of the orders of the Honourable Court given on 27th June 2016.

6) That the respondent does purge its contempt by directing and ensuring that its employees do return to work forthwith.

7) That such other order as may be just be made to meet the ends of justice and to safeguard and protect the dignity of the Honourable Court.

8) The costs be provided for.

The application was supported with the supporting affidavit of Apollo Kiarii, the claimant's Chief Executive Officer.

The applicant's case is that the cited union officials disobeyed the Court orders given on 27.06.2016. The orders by Nduma J subject of the application were as follows:

a) That pending the hearing and determination of the application, an injunction be and is hereby granted restraining the respondent, its officials and/or agents, and its members and/or its representatives from continuing and/or engaging in any strike and or destruction of property or inciting its members into engaging in the strike and an order prohibiting the respondent's members and or the claimant's member's employees engaging in any strike in respect of the outstanding issues pertaining to CBA 2014 – 2015.

b) That pending the hearing and determination of the application the employees who are on strike be and are hereby directed to return to work.

The applicant filed on 17.10.2016 the supplementary affidavit of Apollo Kiarii and further filed the supplementary affidavit of Apollo Kiarii on 30.04.2018 and Kinyenje-Opiyo Advocate urged the applicants' case.

The respondent filed on 24.07.2017 the replying affidavit of Thomas Kipkemboi, Deputy Secretary General of the respondent. J.A. Guserwa Advocate appeared for the respondent and later Ekwe Achiando Advocate urged the respondent's case.

The applicant's case is that the order was served upon the respondent's counsel one Mr. Muli Advocate on 27.06.2016 and the same day served upon branch officials being branch secretary Kericho one Dickson Sang; and branch secretary Bomet one Jared Momanyi. The applicant states that the order was circulated to the employees at notice boards at their stations of work posted on 27.06.2016 and further there were media reports to show that they were aware of the Court order. Further it is the case that the applicant's Chief Executive Officer (CEO) delivered to the respondent's main officials at the headquarters a letter dated 02.06.2016 requesting them to direct the employees to return to work but the officials issued no such communication or failed to call of the strike. Further it is alleged that on 28.06.2016 the employees continued on strike in disobedience of the Court order given 27.06.2016. On 28th and 29th June 2016 the employees while on strike also destroyed property at James Finlay, Kericho, and disrupted normalcy such of school going children while also threatening the management staff. As a result, it was the applicant's case that unless the respondent and its officials are punished for being in disobedience of the Honourable Court's orders of 27.06.2016 they will continue to disobey the Court order and thus continue to lower the dignity of the Honourable Court.

The respondent denied disobeying the Court order. In particular the respondent denied the allegations against it by the applicant and stated that it had not and did not call the employees of Williamson Tea and James Finlay to strike and further the applicant by its conduct and statements provoked and incited the employees to strike by virtue of their letter dated 23.06.2016 issued immediately after the judgment of 20.07.2017(read as 2016 as a typo in the affidavit) that they would not implement the judgment but would appeal against it to the dismay of workers who had waited for over two and a half years for an outcome. Further, the respondent stated that the strike was instantaneous and was not called for by the respondent as alleged by the applicant. In any event the workers had an unfettered right to strike in enforcement of the judgment of the Court delivered on 20.06.2016 which the applicant had refused to implement. The respondent further stated that if the workers engaged in destruction of property or any other activity that amounted to an offence as alleged for the applicant, then the same ought to have been handled in accordance with the criminal justice system and not by way of the present contempt application. Finally, the parties entered a return to work formula dated 04.07.2016 and the application was thereby overtaken by events.

The **1st issue** for determination is whether the order subject of the application for contempt must have been personally served upon the cited contemnors for the application to be successfully prosecuted. It was submitted for the applicant that it was sufficient that the cited contemnors were aware or had knowledge of the court order in issue. As submitted for the applicant, personal service was not mandatory and that it was sufficient that the respondents were aware of or had knowledge of the court orders. Thus in **Justus Wanjala Kisiangani and 2 Others-Versus- City Council of Nairobi and 3 Others[2008]eKLR** it was held that it is trite law that any party who is aware of a court order is required to obey the same. Further, in **Kenya Tourist Development Corporation –Versus- Kenya National Capital Corporation & Another, High Court Civil Appeal No. 6776 of 1992,** Akiwumi J. held that notice of a restraining order may be given by telephone, telegram or otherwise and that suffices for purposes of enforcing the order. Akiwumi J (as he then was) followed **Halsbury's Laws of England, 4th Edition Vol.9** thus, **"Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly endorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has notice of the terms of the order either by being present when the order was made or by being notified of the terms of the order whether by telephone, telegram, or otherwise."**

In the instant case Muli Advocate for the respondent was served at his office within the respondent's Nakuru office. At the time of the service the process server states that Muli Advocate consulted Thomas Kipkemboi on office extension telephone line about the service of the order and the application. The details of the consultations as relates to the terms of the order are not disclosed by the process server suggesting that the consultations were about the fact of service and not the terms of the order. There was no evidence that the said Muli Advocate then proceeded to inform the persons mentioned in the order the terms of the order thereof. The contempt proceedings carry drastic consequences against the cited persons and it is the Court's opinion that a presumption that the advocate informed the persons mentioned in the order about service or even terms of the order cannot be relied on to find culpability against the cited persons. It was submitted that the order was served on 27.06.2016 upon branch officials being branch secretary, Kericho, one Dickson Sang; and branch secretary, Bomet, one Jared Momanyi. However, there was no affidavit of service filed in that regard and the Court returns that the details of that service were not established to the required standard in civil cases and then in the more serious contempt proceedings. As for the other cited persons, it cannot be said that they had knowledge of the order as the basis of such knowledge has not been shown. While making that finding, the Court considers that the press reports about the court order as exhibited on the supporting affidavit were published in the print media on 29.06.2016 and 30.06.2019 but there was no evidence that the cited persons read the media stories and further, the matters constituting contempt on the face of the application were said to have happened on 28th and 29th of June 2016 (at the time of or after the media publications). The Court returns that to that extent and in view of the unlikely accuracy of the media stories about the terms of the orders, it cannot be said that for the contempt alleged to have taken place on 28th and 29th of June 2016, the cited persons were aware of the terms of the court orders on 28th and 29th of June 2016. The Court finds as much and by that reason alone, the application as against the cited persons will fail. However, the Court further returns that the service upon Muli Advocate at the respondent's office was adequate service upon the respondent as a corporate body.

The **2nd issue** for determination is whether the cited persons were in disobedience of the Court order by reason of the events of 28th and 29th June 2016 as set out in the application. As per **Borrie and Lowe, The Law of Contempt, 4th Edition, 139,** the general rule is that the liability for breaking a court order is strict in the sense that all that requires to be proved is service of the order and subsequent doing by the party bound of that which is prohibited. Again, in **Kenya Tea Growers Association –Versus- Francis Atwoli & 5 Others [2012]eKLR** and on the basis of **Clarke & Others –Versus-Chad Burn & Others (1985) ALL ER 211,** the court stated thus, **" I need not cite authority for the proposition that it is of high importance that orders of the court should be obeyed. Willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal."**

On the other hand, the standard of proof in contempt applications was established in **Mutika-Versus- Baharini Farm Limited (1985)KLR**

229 thus, **"In our view, the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt….The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."**

The Court has taken into account the applicable principles in determining culpability for contempt applications including alleged disobedience of an injunction like in the instant case. The applicant's case is that on 28th and 29th June 2016 and despite the Court order of 27.06.2016, the workers went on with the strike. The Court has examined the material on record and nothing is shown that the cited persons or the respondent as a corporate did on 28th and 29th of June 2016 in disobedience of the orders of 27.06.2016. The Court returns that whereas the parties are in agreement that the strike proceeded on the two days, there is nothing established to show that the cited persons incited the workers to strike. There is nothing before the Court to discount the respondent's position that the workers' activities and strike on 28th and 29th June 2016 was instantaneous. Further as urged for the respondent, the Court returns that if the workers engaged in destruction of property, then the correct legal action was to institute relevant criminal proceedings against the individual workers involved and not the present contempt proceedings. The Court returns that as submitted for the respondent, the fact that unionisable employees decided to go on strike without directions from the respondent by way of a strike notice clearly meant that the union officials were not in control of their members at the material time and they should not therefore be held liable for actions not within their control.

The respondent has urged in supplementary affidavits matters allegedly attributable to the respondent or cited persons after 28th and 29th June 2016 including the meeting of 20.07.2016. The Court considers that the applicant was bound by the scope of the pleadings on the face of the application and the offending activities and strike is stated to have been on 28th and 29th June 2016 and the Court returns that the applicant is bound by the pleadings accordingly. Further, the application was fixed for hearing on 07.07.2016 when the interim orders said to have been disobeyed were lapsing. The Court finds that there was no order exhibited or submissions made for the applicant that the orders were ever extended beyond 07.07.2016 and the meeting of 20.07.2016, in the opinion of the Court, was outside the scope of the contempt application. In any event it is not in dispute that the parties signed an agreement following the consultative meeting on 04.07.2016 and it was agreed, inter alia, that normalcy is restored and parties had agreed that all employees to resume duty immediately and in any case not later than 7.00am on Tuesday 05.07.2016; that there will be no pay for work not done; no victimization by either party subject to applicable law; and parties to have a follow up meeting on 11.07.2016 to discuss implementation of the issues in dispute and if no settlement is reached the court process will be allowed to take its course. In consideration of the cited circumstances, the Court returns that the events and meeting of 20.07.2016 were clearly outside the scope of the contempt application.

It was submitted for the applicant that the respondent's officials were required to call the strike off. The respondent submitted that there was no evidence that they had called for such a strike so that they were obligated to call it off. The Court finds that the material on record showed that there was no strike notice issued or called by the respondent and there was no order for the respondent to call a strike off – so that the respondent's submissions are upheld in that regard. The Court further returns that the terms of the Court order were clearly restraining or prohibitory in nature and required the respondent's officials to refrain from the prohibited conduct. The Court further returns that the order for employees who were on strike to return to work was directed at the individual employees. For avoidance of doubt, the Court returns that the applicant has not established a thing the respondent may have done as a body corporate, particularly on 28th and 29th June 2016 that may have amounted to disobedience of the order given on 27.06.2016. Thus, though the respondent was served, contempt within the scope of the application has not been established. The evidence shows that instead, the respondent acted towards resolving the dispute and the impugned strike as per the consultative meeting of 04.07.2016.

While deciding the present application the Court has considered the proper place of contempt proceedings in cases of alleged unprotected strikes. It is the opinion of the Court that the employers invoke the statutory provisions as appropriate so that the contempt proceedings are in addition and secondary to the disciplinary action prescribed in the statute. In particular Section 80 of the Labour Relations Act provides as follows:

> **"80. (1) An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and?**
>
> (a) **is liable to disciplinary action; and**
>
> (b) **is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike.**
>
> **(2) A person who refuses to take part or to continue to take part in any strike or lock-out that is not in compliance with this Act may not be?**
>
> **(a) expelled from any trade union, employers organisation or other body or deprived of any right or benefit as a result of that refusal; or**
>
> **(b) placed under any disability or disadvantaged, compared to other members or the trade union, employers' organisation or other body as a result of that refusal.**
>
> **(3) Any issue concerning whether any strike or lock-out or threatened strike or lock-out complies with the provisions of this Act may be referred to the Industrial Court."**

The Court holds that that provision provides for the appropriate action that the applicant was primarily entitled to take in this case where an unprotected strike on 28th and 29th of June 2016 was alleged to have taken place. In implementing that statutory disciplinary action and the manner of carrying out that disciplinary action the Court upholds its opinion in **Kenya Plantation and Agricultural Workers Union – Versus- Roseto Flowers [2013]eKLR**, thus:

"First, it is the view of the court that a punishment including the dismissal on account of an employee's involvement in a strike that does not comply with provisions of the Labour Relations Act, 2007 can only be imposed by the employer through a fair process that affords the employee an opportunity to know the allegations leveled and a chance for the hearing. The Labour Relations Act, 2007 does not prescribe the procedure for the disciplinary action and the court holds that such procedure is provided for in the principles of due process of justice set out in the Constitution such as Articles 47 and 50(1), the provisions of the Employment Act, 2007 and the lawful provisions of the agreement between the parties.

Secondly, the court finds that under section 80 of the Act, the primary punishment to be imposed by the employer is to deny payment to the concerned employee for the period of the strike because the section declares, such an employee "….is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike...". While making this holding, the court further holds that the imposition of that primary punishment can only take place after the employee has been accorded due process to establish that the employee was indeed involved in the strike that did not comply with the statutory provisions. The primary punishment cannot be imposed sweepingly like by invoking the ultimatum principle which is devoid of the statutory and constitutional fair process as already elaborated and as innocent employees could easily be unfairly punished.

For avoidance of doubt, the drastic punishment of dismissal may be imposed in appropriate cases under due process but the view of the court is that the primary punishment is preferable so as to foster collective bargaining recognising that employees usually do not go on lawful or unprotected strikes with the evil design to injure the employer and end the relationship; it is bargaining chip invoked as a last option to strike amicable balance - the storm before the tranquillity. The purpose of the strike is seldom to trigger a separation and termination or dismissal should, in the opinion of the court, be invoked in extremely rare and obviously justified cases.

Thirdly, the court finds that under section 80 of the Act, the employee does not surrender the right and freedom not to participate, so to say, to refuse to participate, in a strike that does not comply with the statutory provisions. This principle against expulsion, disability or disadvantage for refusal to take part in a strike because it contravenes the statutory provisions imports individual responsibility of the employee in a strike situation and the collateral obligation upon the employer is to deal with staff individually in strike cases. That effect of the section effectively makes the ultimatum principle unavailable in our strike legislative framework.

Fourthly, the jurisdiction to determine the legality of a strike is vested in this court as per provisions of section 80 of the Act."

Further the Court has considered the applicant's case that on 28th and 29th June 2016 the workers in employment of the members of the applicant allegedly destroyed the employers' property as was alleged in the supporting affidavits and the grounds in the application. The Court returns that again the applicant and its members as the employers were entitled to initiate a primary remedy as prescribed in the relevant statute, the Employment Act, 2007. In particular, the Court returns that subsection 19(1) (b) of the Act provides that notwithstanding the employer's obligation to pay salary or wage as per subsection 17(1) of the Act, an employer may deduct from the wages of his employee a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee.

Further, the Court has considered that under section 21 of the Labour Relations Act, 2007, a trade union is registered as a body corporate with perpetual succession and a common seal; with capacity in its own name to sue and to be sued and to enter into contracts; and hold, purchase or otherwise acquire movable and immovable property. Thus, it is the opinion of the Court that an order directed against the trade union like in the instant terms should as far as possible be implemented and enforced against the union as a body corporate so that a contempt application will properly be directed at the trade union and not the trade union's officials or members as was purportedly done in the present application.

In the present application, the order was directed against the respondent acting by itself, its officials or its members. It is the opinion of the Court that even if the members or the officials breached the order within their official capacities, then the proper action was to hold the trade union, the respondent, liable in contempt. Thus, unless the terms of the Court order expressly imposes on the members or officials a specific duty or obligation, they would have acted within official capacities and the trade union should be held liable. In the present case, it was ordered that pending the hearing and determination of the application the employees who were on strike were thereby directed to return to work. It was the employees, by the order, who were directed to return to work – without intervention of the respondent's officials. In the present application there were no orders sought against such employees who may have breached the terms of the order.

As against the respondent, the applicant prayed that consequential to a finding that the respondent was in contempt, the Court does impose on the respondent a financial penalty of Kshs. 1, 000, 000.00 and in default the respondent's movable and immovable properties be attached and sold in execution of the order. The Court has found that whereas the respondent was served, nothing has been established that the respondent did in its corporate capacity to disobey the terms of the order. In any event, it is the opinion of the Court that it was open for the applicant to even seek such extreme and ultimate order of sequestration against the respondent rather than moving against the officials who were outside the terms of the order except within their official capacities and in that case, their actions binding the respondent as the corporate person that was bound by the order. While sequestration against the respondent would be available as a final measure to deal with the offending and continuing strike that was continuing rather than moving against the officials, the Court also considers that sequestration would be very rarely invoked as the Court held in the ruling delivered on 11.03.2016 in **Dr. Fredrick Njeru Kamunde –Versus- Tharaka Nithi County Government and 2 Others [2016]eKLR,** thus,**"Black's Law Dictionary, 9th Edition defines "sequestration" to include a writ which is sometimes issued against a civil defendant who has defaulted or has acted in contempt of court. Thus the court returns that a sequestration order is available in contempt proceedings just like a sentence to imprisonment or a fine. Further, the court holds that sequestration is a remedy of the last resort in contempt cases in line with the submissions made for the 1st respondent that the order may not be made where other remedies are available; that was further confirmed in the submissions for the petitioner by citing O'Regan, Contempt of Court and the Enforcement of Labour Injunctions, Modern Law Review, Vol54, 1991 at 401 thus, "Sequestration is a remedy of the last resort in contempt cases. It is a process whereby a person in contempt of court is deprived of his or her property and that property is given to sequestrators to hold and detain in order to obtain compliance with the court order.**

There were four well publicized disputes which led to the sequestration of trade union assets in the 1980's." Thus, the Court holds that unless the terms of the order alleged to be disobeyed in relation to a strike in its own terms imposes a duty or obligation on the trade union officials or members in relation to the strike, the alleged disobedience of the order shall as far as possible be enforced against the trade union as a body corporate without necessity of moving against the trade union officials or members in their formal capacity.

The parties were in agreement that the matters in dispute had since been resolved and in the furtherance of harmony and continued good industrial relationship between the parties, the Court returns that each party shall bear own costs of the application.

In conclusion the application dated 30.06.2016 and filed for the claimant on 01.07.2016 is hereby dismissed with orders for each party to bear own costs of the application.

Signed, dated and delivered in court at Nairobi this Friday 22nd March, 2019.

BYRAM ONGAYA

JUDGE