



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 20 OF 2019

THE COUNTY GOVERNMENT OF LAIKIPIA.....CLAIMANT

VERSUS

KENYA MEDICAL PHARMACISTS & DENTISTS

PRACTITIONERS UNION.....1<sup>ST</sup> RESPONDENT

DR. OUMA OLUGA.....2<sup>ND</sup> RESPONDENT

RULING

1. The Claimant/Applicant through the notice of motion application dated 24<sup>th</sup> June 2019 under a certificate of urgency seeks *inter alia* for an order of committal to prison for such period as this Honourable Court may deem fit and just be made against Dr. Ouma Oluga the 2<sup>nd</sup> Respondent herein and Dr. Davji Bhimji Atella the 1<sup>st</sup> Respondent's Branch Secretary. The Claimant/Applicant sought that Dr. Ouma Oluga and Dr. Davji Bhimji Atella be fined accordingly for disobedience of a Court Order made on the 4<sup>th</sup> June 2019 that the ongoing strike by the Respondents' and members of the 1<sup>st</sup> Respondent had been suspended pending the hearing and determination of this application. The notice of motion is on the grounds on the face of the application and the supporting affidavit of Karanja Njora who is the Acting County Secretary.

2. In opposition to the motion, the 2<sup>nd</sup> Respondent Dr. Ouma Oluga filed a replying affidavit sworn on his own behalf and with the authority of Dr. Davji Bhimji on 17<sup>th</sup> July 2019 and filed in court on 22<sup>nd</sup> July 2019. The notice of Motion was canvassed by way of written submissions.

3. The Claimant/Applicant's written submissions were to the effect as to whether the application has been properly made under the correct provisions of the law and whether Dr. Ouma Oluga and Dr. Davji Bhimji Atella are in contempt of the orders of this Court. The applicant submitted that vide a decision delivered on 9<sup>th</sup> November 2018 in case of **Kenya Human Rights Commission v Attorney General & Another [2018] eKLR**, the contempt of Court Act was declared unconstitutional in its entirety and that in the absence of any other new law, the Claimant/Applicant reverts to the initial position in law in respect of contempt proceedings before the said Act was enacted. The Claimant/Applicant submitted that there can never be a vacuum in the application of the rule of law. It submitted that Section 5(1) Judicature Act and Section 63(c) are applicable provisions of law in respect of contempt proceedings and therefore the Claimant/Applicant's application is properly before this Honourable Court. The Claimant/Applicant relied on the case of **Africa Management Communication International Limited v Joseph Mathenge Mugo & Another [2013] eKLR** where Mabeya J held that "*in my view, there exists two legal regimes in this country regarding contempt of court. This is to be found in section 5 of the Judicature Act and S. 63 of the Civil Procedure Act.*" It was submitted that it therefore follows that the law applicable to contempt proceedings in the Country is the law as set out currently in England which the Claimant/Applicant relied on and that the application is correctly before this Court. The Claimant/Applicant submitted that the Respondents having been served and confirmed to be aware of this Honourable court's orders were under an obligation to fully obey the same to the satisfaction of this Honourable Court. The Claimant/Applicant submitted that however, this was not done as no evidence has been adduced to that effect. The Claimant/Applicant submitted that the averments made by the 2<sup>nd</sup> Respondent in his affidavit that the orders were not a directive on him and Dr. Davji for any further action are misplaced and amount to a mere excuse. The Claimant/Applicant submitted that the 2<sup>nd</sup> Respondent having authored and issued the strike notice was under an obligation upon receiving the orders, to direct the members of the 1<sup>st</sup> Respondent to immediately resume duty in compliance with the orders. The Claimant/Applicant submitted that under the 1<sup>st</sup> Respondent's constitution the 2<sup>nd</sup> Respondent is the official spokesperson of the 1<sup>st</sup> Respondent and is bestowed with the mandate to issue all relevant notices. The Claimant/Applicant placed reliance on the case of **Kenya National Union of Teachers & 2 Others v Teachers Service Commission [2018] eKLR** where the learned Judge held "*from the foregoing provisions of the 1st respondent's constitution, it is obvious that the teachers did not just go on strike. They were called out by their Union through its organ and officials. The same organ and officials were duly bound to call the teachers back to work upon the existence of the orders of this Court issued on 1st July, 2013. The fact that the order to go back was addressed to the teachers does not take away the responsibility of the respondent to ensure compliance*" the Claimant/Applicant submitted that the tests required to be met in order to establish that a party is in contempt of court orders as in this cited case have been met and the Respondents are therefore in contempt. It was submitted that members of the 1<sup>st</sup> Respondent who resumed work as expected were never served with show cause letters and the applicant invites this Honourable Court to take Judicial Notice of Judicial Review Application Number 9 of 2019 filed before this court where the applicant has illustrated the same fact beyond reasonable doubt. The Claimant/Applicant submitted that it never negotiated with the Respondent's any return to work formula as such talks collapsed on the account of the contempt. The Claimant/Applicant submitted that there is no way such talks would have commenced before the Respondents complying with the orders of the court. The Claimant/Applicant submitted that the Respondents did not annex any minutes to prove any such talks but have relied on a return to work formula document that is totally unfamiliar to the Claimant/Applicant. The Claimant/Applicant submitted that the letter purported to have been issued by Dr. Davji dated 17<sup>th</sup> June 2019 cannot be relied upon by this court for reasons that it does not exhibit that the same was received by the members, it was issued two weeks after the court had issued its orders and it was premised on alleged talks that resulted into a return to work formula which document remains

a stranger to the Claimant/Applicant and that the letter was advisory rather than being directive, meaning it gave members an option of ignoring it. The Claimant/Applicant further submitted that it is trite law that court orders must be obeyed and relied on the case of **Republic v Kenya School of Law & 2 Others Ex Parte Juliet Wanjiru Njoroge & 5 Others [2015] eKLR** where Odunga J. stated that “*In my considered view, Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders, the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a court order is made in a suit the same is valid unless set aside on review or on appeal.*” The Claimant/Applicant invited this honourable court to consider the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication Kenya and Another [2005] 1 KLR 828** where Ibrahim J stated that “*the court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors.*” The Claimant/Applicant submitted that relying on the authorities cited above the honourable court should stamp its authority and punish the 2<sup>nd</sup> Respondent together with Dr. Davji for wilful disobedience of the orders of this honourable court.

4. The Respondent submitted that it was correctly set out in the case of **Francis Oyatsi v Nzoia Sugar Company Limited [2016] eKLR** that the accuser must prove all the four elements of contempt. The Respondents submitted that only two elements were proved and that the last two elements being that the contemnor had the ability to comply with the order and finally that the contemnor failed to comply with the order were not proved. The Respondents submit that in the replying affidavit it had been demonstrated that the power to call for or call off an industrial action was vested on the National Advisory Council of the 1<sup>st</sup> Respondent and communicated by the secretary general being the 2<sup>nd</sup> Respondent. It was submitted that neither the 2<sup>nd</sup> Respondent nor Dr. Davji had the ability by themselves to comply with this court’s orders but rather they required ratification from the 1<sup>st</sup> Respondent’s National Advisory Council. The Respondents submitted that the ability to call off the industrial action is even bleaker in relation to Dr. Davji, the 1<sup>st</sup> Respondent’s Branch Secretary. They submitted that he has been included in the present contempt application solely for the reason that he had sworn an affidavit responding to another application by the Claimant/Applicant herein, and his inclusion is thus malicious and meant to cause him mental anguish. The Respondents submitted that the affidavit of Dr. Davji filed on the 20<sup>th</sup> June 2019 was limited to replying to issues raised in the application dated 3<sup>rd</sup> June 2019 and he could not make averments on compliance of the court order of 4<sup>th</sup> June 2019. The Respondents submitted that the affidavit was sworn by Dr. Davji for the reason that the 2<sup>nd</sup> Respondent was not in the country and not because he is a spokesperson of the 2<sup>nd</sup> Respondent under the 1<sup>st</sup> Respondent’s constitution. The respondents submitted that whereas there was no ability by the 2<sup>nd</sup> Respondent and Dr. Davji to comply with the orders of this Court they nevertheless acted to their full mandate in that upon immediately becoming aware of the orders escalating the Court’s Orders to the National Executive Committee for ratification by National Advisory Council and issuing a written advisory to the 1<sup>st</sup> Respondent’s members on 17<sup>th</sup> June 2019 to comply with the court’s orders even as the 1<sup>st</sup> Respondent’s National Advisory Council would deliberate on the prevailing labour issues on the 19<sup>th</sup> July 2019. The Respondents submit that there was no positive order directed to them and requiring them to call off the strike. The order was self-executory as the court called off and/or suspended the strike pending inter-parties hearing and that failure by members to comply meant that they would individually face the consequences as the court had further ordered that the strike was unprotected pending inter-parties hearing on 20<sup>th</sup> June 2019. The respondents submitted that it is clear double speak for the applicant to submit that members of the 1<sup>st</sup> Respondent resumed work and at the same time purport that the Respondents and Dr. Davji were still in disobedience of this Honourable Court’s orders. The Respondent submitted that the Claimant/Applicant by its own submissions admit that there was a general compliance of the Court’s orders. The Respondents submitted that they have demonstrated sufficiently above balance of probabilities that they were not wilfully disobedient of the Court’s orders. The Respondents submitted that in contrast to the case of **Kenya National Union of Teachers & 2 Others (supra)** setting out the test for contempt and cited by the Claimant/Applicant, the Respondents have sufficiently demonstrated that they were not wilfully disobedient of the Court’s orders. The respondents submitted that the orders were not extended on the 22<sup>nd</sup> July during the inter-parties hearing and thus remain vacated. There are no orders that the 2<sup>nd</sup> Respondent and Dr. Davji can be said to be in contempt of hence the entire application must fail as there are no substantive orders grounding it. The 2<sup>nd</sup> Respondent and Dr. Davji submitted that they crave leave to be heard in mitigation prior to sentencing should this honourable court be guided to hold that they were in contempt of orders of this court. In support of their right to mitigate they rely on the case of **Woburn Estate v Margaret Bashforth [2016] eKLR** and **Joseph Wanambisi & 3 others v Trans Nzoia Investments Company Ltd [2012] eKLR** both cited in the **Kenya National Union of Teachers & 2 others** case. The Respondents submitted that the applicant failed to discharge the burden of proof in contempt cases and made admissions of compliance with the Court orders of 4<sup>th</sup> June 2019 in this case by way of its posting order of 28<sup>th</sup> June 2019 and in Nyeri Judicial Review No. 9 of 2019. They further submitted that the entire application should be dismissed with costs for reasons that despite the orders issued by this court being clear and directed to the members of the 1<sup>st</sup> Respondent and this honourable court actually called off and suspended the industrial action thereby pre-empting any positive action towards compliance by the Respondents and Dr. Davji, the Respondents sufficiently demonstrated that they were not wilfully disobedient of the Court’s orders.

5. For contempt of court there must be a disobedience of court orders. From the material before me it is clear the Respondents cited were aware of the court orders and instead of compliance engaged in boardroom games by pretending that the decision to obey the court order must be sanctioned by an organ within the Trade union. Such cannot wash. As held by Ibrahim J. (as he then was) the court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. As there is proof of wilful disobedience of court orders the contemnors Dr. Ouma Oluga and Dr. Davji Bhimji Atella are hereby found to have been in contempt of court and accordingly will be called to mitigate before sentence.

It is so ordered.

**Dated and delivered at Nyeri this 12<sup>th</sup> day of November 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**