



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 340 OF 2014

(Before Hon. Justice Mathews N. Nduma)

KENYA CONCRETE STRUCTURAL CERAMIC

TILES WOOD PLY & INTERIOR

DESIGNS WORKERS UNION.....CLAIMANT

VERSUS

LAXMANBHAI CONSTRUCTION LTD.....RESPONDENT

KENYA BUILDING, CONSTRUCTION,

TIMBER, FURNITURE AND ALLIED

INDUSTRIES EMPLOYERS UNION.....INTERESTED PARTY

R U L I N G

1. By a Notice of Motion application, the applicant seeks for orders, inter alia –

- THAT this honourable Court be pleased to order the arrest and committal of the Respondent's Directors herein namely **B. K. RAGHWANI, MANJI KANJI, VALJI LAXMANBHAI, KARSAN KANJI, VIRJI KANJI, RAMJI KANJI AND DHAJI RAGHWANI** to jail or to a fine for contempt of the court orders issued on 4th April 2017 and 21st October 2016 requiring the Respondent to deduct and remit union dues for all the Claimant's members as per the check off forms remitted to the respondent by the Claimant and not to deduct twice union dues from the said employees and remitting the same to any third party including the Interested party.

2. The application is supported on grounds set out on the Notice of Motion as follows –

- (a) The Court issued orders on 4th April 2017 and 21st October 2016 requiring the Respondent to deduct and remit union dues for all the Claimant's members as per the check off forms remitted to the Respondent by the Claimant and not to deduct twice union dues from the said employees and remitting the same to any third party including the Interested party.

- (b) The orders were served upon the Respondent.
- (c) The Respondent has however failed and or deliberately refused to comply with the court orders by making only partial payments of the sums deducted and also making double deductions.
- (d) The sum outstanding to date is Kshs.5,054,364.
- (e) The Respondent's compliance report does not tally with the court orders herein.
- (f) If the Respondent is allowed to continue defying the Court's directive, not only will the Claimant/Applicant together with their members suffer irreparable loss and damage but also the administration of justice is and will be brought to disrepute.
- (g) The Respondent have willfully disobeyed the orders of this Honourable Court.
- (h) It is in the interest of justice that the application herein be allowed.

Response

3. The application is opposed through a Replying affidavit sworn by Charles Mochoga on 21st August, 2017 and further affidavit dated 14th August, 2017 together with documents annexed therein.
4. The gravamen of the response is that the Respondent has fully complied with the orders of the court in that –
 - (i) Respondent remitted the deductions from 725 employees to the Claimant for the month of April, 2016 vide cheque of Kshs.353,050 dated 6th May, 2016.
 - (ii) Respondent remitted deductions from employees who were still members of the interested party as is required by law and this caused a double deduction to occur because some employees were members of both unions, thus giving rise to the Claimant's application dated 12th April, 2016 seeking to stop double deductions.
5. The application was allowed by the court and the Respondent complied with the orders dated 4th April, 2016 and 21st October, 2016 by deducting Union dues in respect of all employees in respect of whom it had been served with check-off forms by the Claimant.
6. That the Claimant has failed to identify which individual employees the Respondent has failed to deduct and remit Union dues to the Claimant.
7. That the Respondent filed a compliance report on 23rd February, 2017, which clearly demonstrates that the Respondent has deducted and remitted union dues for the period April 2016 to February 2017.
8. The interested party, was accused by the Claimant of connivance with the Respondent to deny the Claimant its rightful share of union dues. The interested party filed a replying affidavit of Francis K. Murange on 15th May, 2017.
9. The Interested Party is the recognized Union by the Respondent and has majority members in the employment of the Respondent. The Interested Party is entitled to payment of union dues in respect of its members, regardless of whether they have joined the Claimant Union. The Interested Party is also entitled to payment of Agency fees by all unions as the employees of the Respondent who have not joined either of the Unions because it has a valid Collective Bargaining Agreement with the Respondent for the benefit of all unionisable employees regardless of whether they've joined a union or not.

Determination

10. Section 4 of the contempt of Court Act, 2016 defines contempt of court as follows –

“(I) Contempt of court includes:-

(a) Civil contempt which means willful disobedience of any judgment, decree, direction, order or other process of a court or willful breach of any undertaking given to a court.”

11. In **Mutitika v Baharini Farm Limited** Hancox, Nyarangi JJA & Gachuhi Ag JA set the standard of proof to be applied in contempt cases of civil dispute nature as follow:-

“In Re Breamblevale Ltd [1969]3. All ER 1062, Lord Denning MR (as he then was) at page 103, had this to say:

*‘A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, **it must be proved beyond reasonable doubt**’.*

With the greatest possible respect to that eminent English Judge, that proof is much too high for an offence ‘of a criminal character’... in our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities in courts determining the suggested standard of proof. 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 offences which can be said to be quasi-criminal in nature...”

12. The evidence before court shows that the Respondent complied with each and every court order that was served on it. That in few instances where there was double deduction, under deduction or non deduction, it was not willful and the mistake was corrected at the earliest possible opportunity.

13. This is not a party who had willful intent at all to defy orders of the court or bring the court into odium or disrepute. Far from it. To the contrary, the compliance report bore testimony of almost full compliance with the orders of the court.

14. The applicant has failed to discharge the onus of proof placed on it in an application for contempt of court, that is to say, higher than on the balance of probabilities, almost but not exactly, beyond reasonable doubt.

15. The application is dismissed with costs.

Dated and Signed in Kisumu this 19th day of December, 2017

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 19th day of January, 2018

Maureen Onyango

Judge

Appearances

Enonda for Claimant

M/s Omondi for Respondent

M/s chege for Interested Party

Anne Njung'e – Court Clerk