



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 193 OF 2017

KENYA PRIVATE WORKERS UNION.....CLAIMANT

VERSUS

KENYA METHODIST UNIVERSITY.....RESPONDENT

RULING

1. There are two applications before me due for determination. The first which cites Prof. Kilim Kiriamiti (former vice chancellor), Prof. Maurice Okoth (acting vice chancellor), Prof. David Gichwewa (deputy vice chancellor, finance & administration) and Ms. Rael Manjaku Mabonga (human resource manager) as the 1st to 4th contemnors, is the Claimant's contempt of court application dated 19th September 2017 and filed the same day. The notice of motion application is expressed to be 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 (Procedure) Rules 2016 and all enabling provisions of the law seeks the following orders:-

1. That the application be certified urgent and the same be heard on priority
2. That 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 24th May 2017 and 30th May 2017 thereby being in contempt of the honourable court
3. That consequent to prayer (2) hereinabove 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
4. That the Respondent be compel to purge the contempt for refusing to deduct and remit the outstanding union dues arrears for the check-off forms signed by our 82 members that were duly delivered to the Respondent, undeducted Claimant union dues of Kshs. 400,000/- forthwith (sic)
5. That we have conducted a research at the University and confirmed that the above four are the conterminous (sic) of this court orders and they should be jailed for disobeying the lawful court orders dated 24th May 2017 and 30th May 2017
6. That the costs of this application be borne by the Contemnors/Respondents jointly and/or severally
7. That such further and/or other orders be made as the court may deem fit and expedient.

The application was based on the annexed affidavit of Peter Emisembe Owiti and the grounds on the face of the motion. In the grounds, it was asserted that the court issued orders on 24th and 30th May 2017 requiring the Respondents to allow the Claimant to assess both potential members by the Respondent writing a memo, inviting and organizing a venue for union officials to meet workers thus recruiting them to join a union at employers premises and that the Respondent had permanently refused to allow them at the premises. The grounds further assert that the Claimant wrote to the Respondent on 31st May 2017 through the advocate on record to allow access by the union officials and that the Respondent with its administrators have failed and deliberately refused to comply with court orders making it difficult for the Claimant to enjoy the fruits of its labour and the employees of the Respondent from getting the services of the trade union. The Claimant states that if the Respondent is allowed to continue defying court orders the Claimant and its members will suffer irreparable loss and damage and the administration of justice will be brought to disrepute and that the integrity and dignity of the court should be protected.

The 4 alleged contemnors, Respondents to the contempt application filed grounds of opposition on 27th September 2017. In the grounds filed, the 4 assert that they were not personally served with the orders dated 24th May 2017 and 30th May 2017 which the Claimant alleges they have breached and/or disobeyed, that the alleged contemnors were not aware of the orders alleged to have been disobeyed and that there

were no employees of the Kenya Methodist University known to the alleged contemnors who are members of the Claimant.

2. The second application is the Respondent's notice of motion dated 15th November 2017 and filed on 16th November 2017, expressed to be brought under Section 3 and 16 of the Employment and Labour Relations Court Act, Rule 33(1), (2), (3) and (4) of the Employment and Labour Relations Court (Procedure) Rules 2016 and all other enabling provisions of the law. The Respondent seeks the following orders:-

1. That this application be certified urgent and the same be heard on priority basis.
2. That this honourable court be pleased to review its orders issued on 30th May 2017 directing the Respondent to deduct and remit union dues for all the members of the Claimant effective May 2017.
3. That the costs of the application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of Caroline Ndumia. The same are to the effect that there is discovery of new evidence which could not have been produced by the Respondent when the orders were issued. The Respondent asserts that it is not clear who the members of the Claimant are and that there exists sufficient reason to review the orders of the Court. The deponent to the affidavit states that the check off forms and the lists provided to court were forged and that a number of persons whose names appear did not sign the check off forms. She attached copies of email, correspondence and affidavits by some of the staff who disavowed the signatures alleged to be their signatures on the check off forms. The deponent stated further that the information could not be brought to court at the time the orders were granted by the court because there was no substantive holder of the office and also because the verification exercise had not been undertaken. She deponed that the Respondent would suffer prejudice if it continued paying the Claimant dues it was not entitled to. The Claimant was opposed to the Respondent's motion and filed grounds of opposition on 22nd February 2018. In the grounds the Claimant asserts that the Respondent's application is a belated attempt to undermine and pre-empt contempt of court application. The Claimant viewed the application as mischievous and an attempt at forum shopping and that it was meant to demean a judge of this court. The Claimant states that the Respondent had not satisfied the threshold for the grant of the orders of review.

3. The applications were urged on the 1st of March 2018. Mr. Emisembe appeared for the Claimant union while Mr. Macharia appeared for the Respondent and the 4 alleged contemnors. Mr. Emisembe submitted that the application for review was opposed and that the orders sought were not specific. The Claimant was of the view that the intent of the motion by the Respondent was to divert the attention of the court from its defiance of court orders. He pointed out that the contempt application was before the court and the Respondents had been served but instead filed a review instead of filing a response to the contempt application. He stated that there was no explanation for the delay in filing the review application and that the Respondent had not come to court with clean hands and therefore was not deserving of the orders sought. He urged that the application for contempt supersedes the review application and more so because the Respondent had avoided meeting the Claimant whenever meetings were planned.

4. The Respondent's case was articulated by Mr. Macharia who stated that the Respondent opposed the application for contempt of court which was not merited as the orders were not personally served on the alleged contemnors and as held in the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**, the court should satisfy itself that the party had full knowledge of the existence of the orders being punished for. He stated that it was quite a high threshold as it related to the loss of personal liberty. He asserted that the 4 alleged contemnors were accused of disobeying a court order and the order had been served on the advocate for the Respondent. He surmised that did not meet the threshold as the alleged contemnors only retained counsel after the contempt of court proceedings were initiated. He argued that the standard of proof in contempt of court is above that of a balance of probability though lower than beyond reasonable doubt. He relied on the case of **Hakika Transport Services Limited v Kenya Long Distance Truck Drivers & Allied Workers Union [2015] eKLR** and stated that there was nothing before court to prove breach of the orders given. The orders were in the main to restrain the victimization of members and the deduction and remittance of union dues. He submitted that there were no known members of the Claimant and that is why the review application was filed. He said that the check off forms were found to have serious issues of validity such as forgery, conduct that is to be frowned upon. He stated that the review application was brought upon discovery of the new evidence and that the delay of 6 months was explained. He relied on the dicta of Rika J. who issued a reprimand for forgery of signatures.

5. Mr. Emisembe for the Claimant submitted that the Respondent was of the view that the orders were not served directly. He stated that the court order was served upon the vice chancellor in Meru and the advocate on record. He said that the change in management is neither here nor there as the university is a corporate body. He submitted that there was no proof of the alleged forgeries and stated that under Section 48 of the Labour Relations Act an employer has a duty to deduct. He submitted that it was coercion and intimidation to summon workers. He thus urged the court to dismiss the motion by the Respondent with costs.

6. In matters of union recognition and the attendant consequences, it is about numbers. In the case before me it is asserted on one hand that the court orders issued in respect of union dues and remittance were disobeyed by the Respondent and the alleged contemnors. On the other hand, it is asserted that the Claimant does not have members in the Respondent and therefore is not entitled to the orders it obtained and the orders of May 2017 should therefore be reviewed on that score and also because the check off forms were forged.

7. The two applications raise grave matters. Disobedience of a court order is to be frowned upon and punished where it occurs. Court orders are not suggestions. They are edicts that must be obeyed and where parties have issues with the order given, the affected party should move with haste to the court and seek a stay, review or reversal. The Claimant obtained orders on 23rd and 30th May 2017. In the order issued by Ongaya J., the Claimant was entitled to receive union dues deducted from its members, employees of the Respondent. It follows therefore that the Respondent having elected to engage counsel in the matter, it cannot hide behind the obscene submission that there was no personal service. In order to effectively disobey a court order a party need only state that they were not personally served. That we cannot sanction. Contempt of court is governed by the Contempt of Court Act, 2016. The objectives of the Act are set out in Section 3:-

- (a) uphold the dignity and authority of the court;
- (b) ensure compliance with the directions of court;
- (c) ensure the observance and respect of due process of law;
- (d) preserve an effective and impartial system of justice; and
- (e) maintain public confidence in the administration of justice as administered by court.

8. What is contempt of Court? Section 4 of the Act defines contempt of court as follows:-

4.(1) 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 an undertaking given to a court;

(b) criminal contempt which means the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which —

(i) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice.

(2) In any case not relating to civil or criminal proceedings as contemplated under subsection (1), an act that is willfully committed to interfere, obstruct or interrupt the due process of the administration of justice in relation to any court, or to lower the authority of a court, or to scandalize a judge, judicial officer in relation to any proceedings before the court, on any other manner constitutes contempt of court.

9. The essence of the power to punish for contempt is to ensure that the dignity and authority of courts is maintained with an eye at the larger picture which is the maintenance of law and order. To rephrase the English philosopher Thomas Hobbes memorable description that *life outside society would be 'solitary, poor, nasty, brutish, and short'*, I would say that without the law, life as we know it, would be poor, nasty, brutish and extremely short. Law and order are key components of civilized life.

10. The Respondent would have thus been amenable to punishment for contempt of court. The alleged contemnors may have however to their saving grace not been properly roped in. The Respondent also would escape censure by way of fine because the Claimant forgot to cite the Respondent. The alleged contemnors cannot carry the Respondent's cross as the Claimant did not clarify their roles in the disobedience. Suffice to say, the Respondent is put on notice that court orders are not decorative pieces of paper with court seals and signatures. They must be obeyed unless lawfully set aside.

11. The Respondent asserts that the Claimant does not have the numbers in the sense that it has no members. In view of the inability of the court to discern what signatures appear on the check off forms, the Court is unable to make a definitive finding regarding the alleged forgeries. The Court would not countenance the illegality that would ensue from the use of forged signatures. I however comprehend the dilemma the matter places in the hands of the Respondent. The Respondent should have approached the Director of Criminal Investigations to commence investigations regarding the check off forms and not make the court initiate investigations. The material that has been placed before me is insufficient as the email address does not bear a signature to compare whether the ICT official is the one who joined the union or an imposter. The Respondent is bound to make deductions of union dues unless proper basis is laid for the variation of the court order. In the final result, the Claimant is unsuccessful in its attempt to have the Respondent's officials cited for contempt. On the other hand, the Respondent has been unable to obtain a review of the orders of the court. Both motions are dismissed but I make no order as to costs. Parties are at liberty to apply.

It is so ordered.

Dated and delivered at Nyeri this 14th day of March 2018

Nzioki wa Makau

JUDGE