



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.429 OF 2017

KENYA UNION OF DOMESTIC, HOTEL, EDUCATIONAL

INSTITUTIONS HOSPITAL AND ALLIED WORKERS.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT

NAKURU WAR MEMORIAL HOSPITAL.....RESPONDENT

RULING

1. By application dated 7th December, 2017 the claimant union is seeking for orders that;

1) Mr Rodgers Joslyn who is the chairman and M/s P.N. Mufale who is the Matron Administrator of the defendant/respondent Board of management be jailed for a period of six (6) months and also be fined for contempt of court.

2) Upon the grant of prayer (1) above the court be pleased to order the contemnors to specifically purge the contempt by satisfying the orders of the court delivered on 13/11/2017;

3) In default of prayer (2) above, after serving six (6) months imprisonment, the court be pleased to order physical attachment and/or seizure of movable properties of the members of the Board of Management particularly the chairman Rodgers Joslyn and Ms P.N. Mufale who is the Administrator of the defendant/respondent by an auctioneer.

4) The defendant/respondent and contemnors do pay the costs of this [these] proceedings.

2. The application is supported by the Supporting Affidavit of Eddy Walter Siembo, the Assistant Secretary General of the claimant union and on the grounds that the respondent has disobeyed court orders issued on 24th October, 2017 and Mr Rodgers Joslyn being the Chairman and Ms P.N. Mufale being the Administered therein have disobeyed the court orders of 13th November, 2017. The orders sought are to commit the two officers of the respondent for contempt of court orders and be punished and be ordered to comply as ordered and in default their personal property be attached and auctioned. The acts of contempt by the respondent have undermined the authority of the court.

3. In reply, the respondents filed a Replying Affidavit sworn by Rodger Joslyn the chairman of the respondent board of management and who avers that this court issued orders on 24th October, 2017 and 13th November, 2017 and indeed the respondent has not compelled, coerced or victimised any of its employs into signing any contract or receiving gratuity. Instead the employees on their own volition opted out. On 13th November, 2017 the respondent was served with court orders of equal dates and by this time most employees had resigned from the claimant union. The respondent is not opposed to orders granted by the court as the respondent has had no intention of victimising, intimidating or in any manner acting with illegality to jeopardise relations with employees.

4. Mr Joslyn also avers that the employee on their own volition opted to leave the claimant union and this happened before the court issued orders on 13th November, 2017. Three employees remain in the claimant union.

5. There is no contempt of court order as alleged and the application is made with malice and there can be no condemnation to jail on this basis.

6. Both parties attended at the hearing of the claimant's application with Mr Osiembo representing the claimant. Mr Kamau Advocate attended for the respondent but opted to leave court without making any representations. Only the claimant's representative made oral

submission.

7. The orders upon which the claimants application is predicated upon are those issued by the court on 13th November, 2017 to the effect that;

1. *This court does issue temporary orders restraining the Respondent from compelling these employees to sign the said contracts changing their terms and conditions of service pending hearing and determination of this suit.*
2. *This court does issue orders restraining the respondent from coercing and victimising these employees into accepting and receiving the calculated Service Gratuity pending hearing of this suit.*
3. *This court does issue orders for specific performance restraining the respondent from intimidating, coercing and victimising the claimants' members into forced withdrawal of their union membership.*

8. In the affidavit of Mr Siembo he avers that upon the orders of the court as set out above, the respondent has disobeyed the same and thus in contempt. That the respondents have not replied to the claim by the claimant and the respondent officers failed to attend court upon service of the orders herein. That the respondent officers as cited, Mr Rodgers and Ms Mufale disobeyed the court orders upon service and should be punished and be made to purge the contempt.

9. Contempt of court Act No. 46 of 2016 is the law applicable to contempt proceedings in Kenya. Its date of commencement was 13th January 2017. Together with this law, regard in employment and labour relations is Section 20, the Employment and Labour Relations Court Act and which provides;

“(7) A person who –

a) Without reasonable cause fails to comply with an order duly given under subsection (4); or is required by an order made under subsection (4) to furnish information, and who makes any statement or furnishes any information which the person knows, or has reasonable cause to believe, to be false or misleading in material particular, commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both.”

(8) if an order made under subsection (4) is directed to a-

a) firm or to a body corporate, every partner of the firm and every director and officer of the body corporate shall comply with the order; or

b)

(9) Where an offence is committed by a firm, body corporate, trade union, employer's organization or federation in respect of any order made under subsection (4), every partner, director, officer or official concerned shall be guilty of the offence unless they prove that –

a) The offence was committed without their consent or connivance; and

b) They exercised all due diligence to prevent the commission of the offence.

10. Where there is wilful defiance of court orders the court must address firmly and decisively. Both parties herein are agreed on the existence of orders issued on 13th November, 2017.

11. The orders of the court are specific. The respondent was restrained from compelling employees to sign contracts changing their terms and condition of service; restrained the respondent from coercing and victimising employees into accepting and receiving service gratuity; and orders of specific performance and restraining the respondent from intimidating, coercing or victimising the employees and members of the respondent.

12. On these orders as set out, in the affidavit of Mr Osiembo and his submissions in court he has not submitted any material evidence to demonstrate that upon service of these orders the respondent and its officers have *compelled employees to sign contracts changing terms* or that the respondents and its officers have *coerced and victimised employees into accepting service gratuity* or that the respondents and its officers as cited herein have *intimidated, coerced or victimised employees and members of the claimant union.*

13. It is not sufficient for an application for contempt to cite that court orders have been disobeyed, or the court orders were served upon the respondent and who failed to attend court, reasons demands that where court orders have been issued they must be obeyed and failure to obey, an applicant must show what elements of disobedience exists for the court to cite and find for contempt of its orders. In this regard, the respondent has offered material that some employees resigned from the claimant union vide letters attached to the affidavit of Mr Rodgers. These letters are generic. They are from the same template and stating;

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01/11/2017

BRANCH SECRETARY

KUDHEIHA

NAKURU

RE: RESIGNATION LETTER

I have given my letter of resignation and wish to inform you that I do not wish you to take up any issues on my behalf, or act for me in any way.

...

14. These letters of resignation are then followed with letters of Retirement.

15. It is not in dispute that the parties herein enjoy Recognition and that there is a Collective Agreement (CBA). The basis of the claim herein is that the claimant union has an on-going CBA with the respondent. The relations between the parties must thus be addressed in view of the applicable CBA and the law.

16. With regard to unionisation and the rights secured under Article 41 and 36 of the Constitution, 2010 Section 48(7) and (8) of the Labour Relations Act, 2007 requires that;

(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

(8) An employer shall forward a copy of any notice of resignation he receives to the trade union.

17. Therefore, where the claimant members in the employment of the respondent opted to resign from their membership and by letters dated 1st November, 2017 notified the respondent, the respondent was legally bound to bring this to the attention of the claimant union and effectively, the resignation notice took effect from the month following the month in which the notice is given, being 1st December, 2017. See **Kenya National Union of Nurses versus County Public Service Board Homabay [2018] eKLR** and the finding therein are reiterated in the case of **Kenya Union of Export and Import Workers versus Africa Apparel EPZ Limited & Others, Cause No.1470 of 2016** that;

.....The employee who wishes to leave his or her trade union must notify the employer in writing about the resignation from such union for the same to take effect from the following month of such notice.

18. Where the respondents acknowledge receipt of the court orders herein on 14th of November, 2017 such orders became binding and subject of obedience. Any action taken directly or indirectly and contrary to the orders issued is in contempt. I find no evidence that the respondent, upon receipt of notices from its employees forwarded the same to the claimant union as required under section 48(8) of the Labour Relations Act, 2007. To proceed and move to negate the orders of the court issued on 13th November, 2017 on the basis that the employee opted out of the claimant union without following due process is a direct affront on the subject orders.

19. The actions therefore taken by the respondents in effecting the resignation notice, computation of retirement dues in the absence of the claimant union and in view of the existing CBA is null and void to the extent of application.

20. Parties are effectively taken back to the 14th November, 2017 when the respondent and its officers were served with the subject court orders.

22. With regard to the application for contempt and citation of the respondent officers and taking the above into account, regard must be given at the purpose and import of the existing CBA between the parties as of 14th November, 2017. Both parties must return to the shop floor and address the applicable CBA in view of the notices now issued by the claimant members and the computation of the retirement benefits within the terms and conditions agreed upon in the CBA. This will address the core of the dispute herein in terms of orders (28) that;

This court be pleased to order the respondent to withdraw the letters dated 9th October, 2017 and they be declared null and void.

23. The respondent cannot be allowed to circumvent justice directly or indirectly by failing to file defence and assert that they respect the rule of law and would not wish to act illegally or jeopardise the relations they enjoy with the employees. To avoid attending proceedings herein and then apply procedures at the work place in the nature set out above and which in essence frustrate orders of 13th November, 2017 and by extension the claim by the claimant is an affront on justice. Such is not and should not be permissible in a democratic and civilised society such as ours.

accordingly, the respondent officers Mr Rodgers Joslyn and Ms P.N. Mufale the chairman and administrator of the respondent respectively shall appear in person in court on 1st August, 2018 and where the court shall direct as appropriate. Effectively the orders issued on 13th November, 2017 remain in force.

Delivered in open court at Nakuru this 31st day of July, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant.....

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