



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2204 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 23rd October, 2018)

KENYA AVIATION WORKERS UNION.....CLAIMANT/APPLICANT

VERSUS

KENYA AIRPORTS AUTHORITY.....RESPONDENT

RULING

1. The Claimant filed a Notice of Motion Application dated 17th July, 2017, brought under Order 51 (1) of the Civil Procedure Rules and Section 5 of the Judicature Act Cap 8 Laws of Kenya, Section 1A, 3A and 63 of the Civil Procedure Act Cap 21 Laws of Kenya, Section 4,5,23,7 of the Contempt of Court Act and all other enabling provisions of the law seeking for Orders:-

1. THAT the Applicant be granted leave to pursue Contempt Proceedings against JONNY ANDERSON, Managing Director/CEO and Dr. ELIZABETH NEKESA KALEI General Manager and Human Resource Development for defying orders of Hon. Lady Justice HELLEN WASILWA issued on 14th March 2017 and be punished accordingly.

2. THAT the Honourable Court be pleased to find that JONNY ANDERSON and Dr. ELIZABETH NEKESA KALEI are in contempt of court orders issued on 14th March 2017.

3. THAT the Honourable Court be pleased to grant leave for order for the arrest and detention of JONNY ANDERSON and Dr. ELIZABETH NEKESA KALEI cited above in prison for a term not exceeding six months for contempt of Court.

4. THAT in the alternative the Honourable Court be pleased to order JONNY ANDERSON and Dr. ELIZABETH NEKESA KALEI to purge all the actions of contempt by Paying the Applicant members all their increments/arrears and Union dues accrued from CBA registered on 12/2/2015 under RCA NO. 36 of 2015 amounting to about Kshs.288, 078,173/= together with accrued interest of 7% from the time of its commencement.

5. THAT general damages of upto the tune of kshs.10, 000,000/= be paid by the Respondent.

6. THAT costs of this application be provided for.

2. The Application is premised on the grounds that:-

i. The Honourable Court on the 14th March 2017 issued an order restraining /prohibiting the Respondent from denying the said members of staff Grade 5, the benefits and increments provided for within the CBA registered on 12/2/2015.

ii. That the said orders of 14th /03/2017 were extracted from a Ruling delivered in open court on 6th September 2016, upon hearing both counsel for the Applicant/Respondent and Counsel for the Applicant extracted them on 14th March 2017 and who subsequently served the orders onto all the parties to this suit including the Respondent who have adamantly refused to obey the court orders.

iii. The Respondent has NOT complied with the Court orders and to date have not offered the Applicant any plausible reason for disobedience of court orders.

iv. These Orders were formally extracted on the 14th March 2017 by the Applicant's lawyer and subsequently served on the Respondents.

v. The Respondent has failed, refused and or neglected to obey the court order and caused the Applicants inconvenience and prejudice.

vi. That the Respondents has ignored the court orders by continuing to deny members of staff Grade 5, the benefits and increments provided for within the C.B.A registered on 12/2/2015.

vii. That the Respondent has ignored the court orders by refusing to enforce the orders as mandated by law, hence denying the claimant members of all benefits and increments as provided for within the C.B.A registered on 12/ 2/2015.

viii. It is essential for the maintenance of the Rule of Law and court order that the dignity and authority of the Court be upheld.

ix. The Respondents have failed, refused and or neglected to obey the Court Order and thereafter have deliberately disobeyed the same to date and as a result the Applicant has been occasioned irreparable loss and damage.

x. The Power and authority of this court is being undermined by the Respondent's outright.

3. The Application is also supported by the Affidavit of Moss Ndiema, the Claimant's Secretary General, wherein he states that he seeks orders of a declaration that the Respondent had failed to honour the Collective Bargaining Agreement, which was duly entered into by the parties and registered in Court. He avers that the Court delivered its ruling on 6th September 2016 in open Court upon hearing all parties to the suit and the Orders were extracted on 14th March 2017 and served upon the Respondents.

4. He further avers that despite demand from their Advocate, the Respondent has failed, refused and/or neglected to obey the Court Order and has continued to deny members of staff Grade 5, the benefits and increments provided for within the Collective Bargaining Agreement registered on 12th February, 2015.

5. He states that the Respondent has refused to deduct the union dues from the Claimant/Applicant members in job Grade 5 who have signed the check off forms and that the amount due ever since they disobeyed the Court orders is Kshs.288,078,173.00.

6. He also states that all his efforts to seek audience with the Respondent's Officials have failed and the said Officials continue to ignore the Court orders an example being issuing staff internal communication contrary to the registered Collective Bargaining Agreement.

7. He avers that the continued breach of the said Orders by the Respondent through its agents has occasioned untold suffering and prejudice to the Claimant members and unless the Respondent purges its acts of contempt, the Court Orders will be in vain. He states that the actions of the Respondent smacks of malice, illegality and an abuse of the Court process.

8. He further states that it is in the interest of justice that the application is heard and that the orders sought are granted. Further, that leave is granted to bring contempt proceedings against the Respondent, which is essential in upholding the dignity and the authority of the Court.

Respondent's Response

9. The Application is opposed by the Affidavit of Dr. Elizabeth Nekesa Kalei, the General Manager-Human Resource Development in the Respondent's Authority. She states in her Replying Affidavit that the Applicants have deliberately distorted and or failed to disclose material facts in the Application with the intention of portraying the Respondent's officials as contemptuous.

10. She avers that the Respondent is a statutory body whose establishment and management strive towards the achievement of its core statutory functions and adherence to the rule of law, fair labour practices and protections of its employees' rights and freedoms as enshrined in Article 41 of the Constitution and the relevant employment laws. For that reason, the Respondent and its management recognize, accept and respect the authority of this Court, its orders and directions at all material times.

11. She admits that this Court made an Order on 6th September 2016 which was extracted on 14th March 2017 and that although the Respondent lodged an Appeal against the Order on 13th September, 2016, the Respondent immediately commenced steps towards complying with the Court Order.

12. She avers that the Respondent's compliance with the Court Order was however delayed and or inhibited for a period of over 1 year by various litigation disputes between the Claimant and rival unions, who also claimed membership and dues from the Respondent from the same pool.

13. She further states that the said disputes led to deregistration of the Claimant by the Court in Nairobi, ELRC. Judicial Review Case No. 1/2014 on 2nd November 2016 and that the Claimant only obtained stay of execution of the said order from the Court of Appeal in Nairobi, Civil Application No. 274/2016 on 3rd February 2017.

14. She further avers that the said rivalry dispute was only settled on 7th April 2017 by a Consent Order of the Supreme Court in Petition No. 5/2017, Aviation & Airport Services Workers Union (Kenya) vs Registrar of Trade Unions & Kenya Aviation Workers Union which now permitted the Claimant to operate as a Trade Union and receive dues from its members. Most importantly, the Order also permitted

employers, including the Respondent to release any withheld dues to the Claimant.

15. It is her averment that the Respondent requested the Claimant to provide it with duly signed check off forms for the employees in Job Group S5 who are Claimant's members for purposes of compliance with the Court Order hereof. Thereafter on 31st July 2017, the Claimant submitted to the Respondent check off forms bearing names of 367 employees of the Respondent in Job Grade 5.

16. She further avers that upon conducting an audit of the said Check off forms provided by the Claimant, the Respondent advised the Claimant that the audit found the total number of employees in Job Group S5 listed in the said check off forms submitted by the Claimant was 358 and not 367 as indicated; and that out of the said 358 members, 29 names were invalid and therefore only 329 employees in the listed Check off forms were considered as being in the Job Grade S5 members whose union deductions and subscriptions would be effected in the month of August 2017.

17. She further states that subsequently, the Respondent notified the said 329 employees of Job Grade S5 whose names were listed in the Check off forms provided by the Claimant through a general circular that it would be deducting union dues from their August 2017 salaries and pay the same to the Claimant as per the Collective Bargaining Agreement dated 28th January 2013. That before the deductions could be effected, 212 out of the 329 employees together with 83 more employees under Job Grade S5 severally wrote to the Respondent denying being members of any trade union and or signing the check off forms submitted by the Claimant and instructed the Respondent not to deduct or submit any dues to the Claimant from their salaries or any union whatsoever.

18. She avers that following the numerous objections, the number of employees in Job Group S5 without any objections to the check off forms reduced to 9 employees as at 22nd September 2017, when the Respondent had already prepared a check off to the Claimant in compliance with the Court Order.

19. That the Respondent having not received any further objections for a period of over 7 days from the last registered objection on or about 5th October 2017, it prepared the final check off payments to the Claimant of union dues and paid the Claimant a sum of KShs. 603,193.00 being union dues for the months of August 2017 and September 2017.

20. She also avers that arrangements were being made to pay the union arrears from the date of the Order to July 2017 as follows:-

a. Grade S1-4 (560 Members) - KShs. 571,960.84

b. Grade S5 (9 Members) -KShs. 31,235.02

21. Further, that the Respondent made arrangements to pay the outstanding arrears above in lump sum from its own funds and recover as a debt from the affected employees. The Respondent is a statutory body financed with public funds from the consolidated fund whose use must be budgeted and sanctioned by law and as such, it was not possible to offset the outstanding union arrears debt arising from a Court Order by ex-gratia payment for the 28 employees since the funds assigned for the Respondent from the consolidated fund for use in the year 2017 were already budgeted for other use. On the other hand, the affected members were paid their salaries in full without the union deductions for the period between the date of the Court Order and September 2017 hence the staggered payments.

Applicant's Submissions

22. The Applicant/Claimant submits that it served the Court orders upon the Respondents and adduces the Affidavit of Service vide the sworn affidavit of Moss Ndiema and that the Respondent admits receiving the said Orders through the Replying Affidavit of Dr. Elizabeth Nekesa. They cite the following decision of Lenaola, J in the case of BASIL CRITICOS -VS- AG & 8 OTHERS [2012] eKLR where it was stated that:-

“The law has changed and as it stands today knowledge supersedes personal services....where a party dearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”

23. On the issue of whether the Respondent deliberately refused to comply with the Court orders, the Claimant submits that neither they nor their unionisable members have ever achieved the benefits of their judgment. That the Respondent has a duty to obey the Court orders whether they feel it is irregular or void and that occurrence of many events after the judgment being delivered do not bar the Respondents from complying with the Court Orders. They cite the case of AFRICA MANAGEMENT COMMUNICATION INTERNATIONAL LTD -VS- JOSEPH MATHENGE MUGO & ANOR [2013] eKLR the case of HADKINSON -VS- HADKINSON [1952] P. 285 at 288 was cited at page 7 with approval where it was held that:-

“It is plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.” [Emphasis added].

24..... Further, that Order 42, rule 6 of the Civil Procedure Rules provides that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay.” (Emphasis ours).

25..... It is also submitted that the Respondent has demonstrated in its Replying Affidavit how it has always acted to avert compliance of the Court Orders. That the standard of proof in contempt of Court matters has been met in this case and it is beyond doubt that the Respondent was aware upon service of the Court Orders but deliberately refused to comply with the Orders of this Court dated 14th March, 2017. They rely in the case of AFRICA MANGEMENT COMMUNICATION INTERNATIONAL LTD VS JOSEPH MATHENGE MUGO & ANOR [2013] eKLR where it was held that the 1st Defendant was guilty of contempt of the Court order and committed to jail for 30 days.

26..... The Applicant/Claimant pray for a declaration that:-

- a. This Court finds JONNY ANDERSON (Managing Director) and DR. ELIZABETH NEKESA KALE1 (General Manager and Human Resource Development) guilty and in contempt of Court orders.
- b. An order compelling the Respondent to pay the unionable members their salary arrears of Kshs.288, 078,173/= and the union dues of Kshs. 40,646,286/= be granted by this Honourable Court.
- c. Prayers 3,4,5,6,7 of the Notice of Motion application dated 17/7/2017 be granted by this Honourable Court as prayed.
- d. The cost of the suit to be granted to the Applicants/ Claimant.

Respondent's Submissions

27. The Respondent submits that it opposes the Application in toto as devoid of legal and evidential merit, vexatious and otherwise an abuse of Court process and for that reason, the Respondent relies on their Replying Affidavit dated 3rd November 2017, the law and judicial precedents.

28. Further, the Respondent submits that as set out in the said Replying Affidavit, it denies disobedience of the Court Order as alleged or at all. That neither it nor any of its officers whereof the Respondent seeks leave of this Court to cite has disobeyed or breached any of the terms of the Court Order.

29. It is submitted that the Respondent has been deducting and continues to pay union dues to the Applicant/Claimant in respect of the Claimant's members in Job Group S3 who have signed check off forms as well as other Job Groups, which are not subject to this suit. That payment of the said union dues for the members who had signed check off forms was done on 5th October, 2017.

30. That the Respondent has since the date of the Court Order been deducting and remitting the union dues as and when they accrue and been recovering arrears of the Union dues from the Claimant's members in Job Group S5 and remitting to the Claimant in accordance with the Court Order and Section 19 of the Employment Act. Further, that the same is not denied by the Applicant/Claimant in their Replying Affidavit dated and filed on 14th and 15th November, 2018 in this Court.

31. The Respondent admits that they did not immediately comply with the Court Order until 3rd October, 2017 for reasons explained in the Replying Affidavit and which inhibited immediate compliance. The reasons include:-

- i. The Claimant only submitted check off forms to the Respondent on 31st July 2017,
- ii. The Claimant was deregistered between 2nd November 2016 to 3rd February 2017 by this Court,
- iii. The Respondent was prevented from making any payments to the Claimant by the Supreme Court until April 2017,
- iv. Audit and ascertainment of the members who have signed the Claimants submitted check off forms in order to comply with the Court Order and section 19 of the Employment Act.

32. The Respondent submits that the Court Order restricted deduction to only those members who have signed the check off forms hence notification and ascertainment was necessary.

33. That the Respondent has ably and aptly explained the Claimant membership has only 9 members in Job Group S-5. Upon notice of the intended deduction in compliance with Court Orders, out of the 367 names presented in the Claimant's check off forms in Job Group S-5, 29 names were invalid/non-existent hence leaving valid names or individuals to be 358 persons. Further to that, 349 members out of the 358 persons stated/formally informed the Respondent that they have never at any time signed up the Claimants check off forms or signed up for membership to the Claimant.

34. It is also submitted by the Respondent that there is no affidavit nor attachment of payslip by any of the alleged staff in Job Group S5 supporting the allegations that they have been denied the alleged salary reviews or allowances or arrears as purported by the Claimant. That the Claimant has failed to prove the alleged breach of the Court Orders by the Respondent as provided for in Section 107-110 of the Evidence Act which requires that whoever alleges must prove.

35. The Respondent submits that the Application is vexatious and is contrary to Article 47 and 50(2)(b) of the Constitution in so far as it fails to state with particularity what the Respondent has breached in respect of clause 2 of the Court Order. That consequently the Respondent and its officers' fundamental rights and freedoms under Articles 27, 50(2)(b) and (k) of the Constitution are threatened.

36. They also submit that the Application fails the legal threshold for grant of leave to institute contempt proceedings and they rely on the decision of the Court in GACHONI ENTERPRISES LIMITED V D.N. NYAGA T/A NJERU, NYAGA & CO. ADVOCATES & ANOTHER [2012] eKLR where the Court outlined the conditions for committal for contempt as follows:-

“I now wish to consider the issue whether the conditions necessary for committal for contempt have been proved. It is trite law that where committal is sought for breach of an injunction, it must be made clear what the defendant is alleged to have done and that it is breached. The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is the criminal standard, not being attained especially on affidavit evidence.”

37. The Respondent also cites the case of MUTITIKA V BAHARINI FARM LTD [1985] eKLR, where the Court of Appeal settled the standard of proof in contempt proceedings and Held that:-

“The standard of proof in contempt proceedings must be higher than proof on balance of probabilities, almost but not exactly, beyond reasonable doubt.”

38. **It is also submitted that** that the mandatory statutory pre-requisites of Section 30 of the Contempt of Court Act have not been satisfied. That there was no service of the statutory notice of the intended contempt proceedings against the cited Accounting Officers of the Respondent, which is a state corporation by reason of being a creature of the Kenya Airports Authority Act No. 3 of 1991. That the Claimant has not demonstrated that it served the cited Accounting Officers with the Court Order and that makes the Application fatally defective.

39. The Respondent submits that in the decisions relied upon by the Claimant in AFRICA MANAGEMENT INTERNATIONAL LTD VS JOSEPH MATHENGE MUGO & ANOR [2013] eKLR or BASIL CRITOCOS VS AG & 8 OTHERS [2012] eKLR are distinguishable and inapplicable in this case for reasons that:-

- i. The party accused of contempt was not a state corporation or government agency;
- ii. Contempt of Court Act came into force on 13th January 2017 which is over 5 years after the said decision and hence provisions of the Act take precedence over the said Court decision made in 2013;
- iii. Personal service of the Order on the Accounting Officer is mandatory prior to commencing or prosecuting contempt proceedings against the cited Accounting Officer; and
- iv. Contempt proceedings or orders thereon cannot issue on accounting officer without participation of the Attorney General where a State Corporation is the accused party.

40. It is submitted by the Respondent that prayer 5 and 6 of the Application is misconceived, incompetent and an abuse of the Court process in so far as the Applicant purports to camouflage execution proceedings or claim special damages through contempt proceedings and that the prayers sought are contrary to Section 28 of the **Contempt of Court Act**.

41. The Respondent finally submits that the Claimant's Notice of Motion must fail because it fails to prove the allegations or satisfy the threshold for contempt proceedings and it prays that the Claimant's Application be dismissed with costs to the Respondent.

42. I have considered the averments of both Parties. In determining whether or not the orders sought can be granted or not, I note that the Applicants must prove non-compliance with this Court's orders dated 14/3/2017 as particularized in this judgement.

43. The Respondents have submitted that they have fully complied with this Court's judgement and on this, they aver that the members who were said to have joined the Union denied it and so they could not remit union dues of the said employees.

44. They submitted a list of letters from several employees who were contending that they had not joined the Claimant union and that their names had been captured on the check off forms irregularly. The list is seen from page 33 to 369 of the Respondent's bundle.

45. The Respondents also pointed out that the position of the Applicant only became clear after the Supreme Court pronounced itself on the matter in Supreme Court No. 3 of 2017 on 7/4/2017. The Respondents therefore contend that they did not do anything in contempt of the Court's order.

46. It is true that indeed several members of the Claimant's union dispute membership to the union as evidenced in the forms attached to the Respondent's bundle. It is also true that there were problems between the Claimant and a rival union until the Supreme Court settled the position on 7/4/2017. In the circumstances, it would have been difficult for the Respondent to effect deductions of union dues as was sought by the Applicants.

47. It is therefore my finding that in the **confusion ensuing, implementation of the Court order** would not have been workable. It is therefore my finding that the Respondents did not deliberately disobey this Court's order and the quest by the Applicants to have them committed for contempt cannot lie.

48. In order to resolve this issue then, it would be prudent for the Applicant to proceed and do fresh recruitments of members who wish to join the union and submit fresh check off forms for deduction of union dues bearing in mind those members who have not ceded their

membership to the union. The Application must therefore fail in the circumstances.

49. Costs will be in the cause.

Dated and delivered in open Court this 23rd day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Chobika for Claimant – Present

Miss Chege holding brief for Litoro for the Respondent – Present