



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 18 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

KENYA ENGINEERING WORKERS' UNION.....CLAIMANT

VERSUS

JOKALI HANDLING SERVICES LIMITED.....RESPONDENT

JUDGMENT

The Application before Court is dated 22nd June 2016, wherein the Claimant/Applicant seeks for orders that:

1. That the matter be certified as urgent and heard on priority basis.
2. That an order be issued against the Respondent Directors (Mr. Alfonse Lokoye, Ernest Kataka, Ezekiel Lukoye, Charles W. Lukoye and Evanson Maseti plus her senior supervisor Joshua Bap Kagori) to appear in Court to show cause why contempt proceedings can not be preferred against them and or OCS of Athi-River and Kondele Police stations be directed to arrest and produce them in the Honourable Court to be committed to Civil jail.
3. That any other Orders the Honourable court may deem fit to grant.

The Application is supported by the grounds:

- a) That the Honourable Court did issue orders to maintain status quo specifically no redundancy pending hearing and determination of the Application.
- b) That the aforesaid Orders were served upon the Respondent who received by acknowledging and signing on our copies on 26th May 2017. The Affidavit of service was filed in Court.
- c) That the ruling on the Application dated 25th January 2017 was delivered. The ruling allowed the application and ordered the Respondent to comply with Section 48 of the Labour Relations Act 2007 and nullified the redundancy.
- d) service filed in Court
- e) That to date the Respondent has refused to allow the Applicant members back to work or pay salaries contrary to the Court Orders and at the time of filing the application the accrued salaries stood at Kshs.5,691,600/=
- f) That the Respondent also is yet to comply with Section 48 of the Labour Relations Act 2007 by way of deducting and remitting union dues as ordered by the Honourable Court which is 2% of the foresaid figure of Kshs.5,691,600/= (Kshs.113,832/=).
- g) That the Applicant/Claimant did make efforts to amicably resolve the matter by requesting for a joint meeting to foster good industrial relations but the Respondent declined.
- h) That the orders sought should be granted to protect the dignity and integrity of this Honourable and serve as an example to those who wish to disobey Court Orders with impunity.

i) That the action of Respondent herein is against Article 41 of the Kenya Constitution on fair labour practice.

j) That if orders sought herein are not granted the Applicant and her members shall suffer irreparable damages.

The Application is also supported by the affidavit of Charles Natili Wekesa wherein he reiterates the grounds on the face of the Application.

The Respondent opposed the Application by filing an affidavit sworn by one Charles Lukoye wherein he states that the Respondent is a human resource firm that hires, supplies and manages employees for companies.

That in the instant case the Respondent was contracted by Abyssinia Iron & Steel Limited Kisumu to provide employees for its factory in Kisumu for one year which contract commenced on 1st March 2016 to 28th February, 2017.

That the Respondent's contracted employees supplied to Abyssinia Iron & Steel Limited were all working in the rolling mills section which positions became redundant after a directive from the Kenya Bureau of Standards stopped all the rolling mills from manufacturing twisted iron.

He further states that the respondent company has no collective bargaining agreement with the Claimant union and as such the Claimant lacked locus to institute the instant suit.

That the impugned orders were issued when the contract between the Respondent and Abyssinia Iron & Steel Limited had expired and the service was never extended. Further that the salary claimed by members of the Claimant union are for the months of March, April and May 2017 after the contract between the Respondent and Abyssinia Iron and Steel Limited had expired. They pray for the application to be dismissed with costs.

Submissions

The Applicant submits that the issue of whether the Respondent is an employer was already settled in **Civil Appeal No. 67 of 2015 ABYSSINIA IRON & STEEL LIMITED VS KENYA ENGINEERING WORKERS UNION AND JOKALI HANDLING SERVICES LIMITED**.

That the Respondent is in contempt for the reason that the Court orders were properly served, a fact not in dispute and the said orders were not set aside before declaring the Applicants' members redundant.

That the contract expired on 28th February 2017, which was extended to May 2017, the orders were therefore issued during the pendency of the employment relationship. It is submitted that the orders should be granted in order to preserve the dignity of the Honorable Court and the rule of law.

The Respondent on the other hand submits that the duty to obey the law by all individuals and institutions is contained in the maintenance of the rule of law and the due administration of justice as was held in **Hadldnson -vs- Hodkinson (1952) ACC ER567**, where **Romor ,Jr** stated –

“it is the 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 rules and until the 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.”

It is submitted that it is trite that court orders must be served and personal service is the most formal mode of service due to the penal consequences that follow in the event of disobedience of the court orders.

In the supporting affidavit to the application and the affidavits of service filed as proof of service it is alleged that Joshua Bap Kagori and Charles Lukoye were served and as such the replying affidavit paragraph 12 clearly states that Alfonce Lukoye ,Ernest Kataka,Ezakiel Lukoye and Evanson Moseti were not served and as such the contempt application cannot succeed against them for want of service of the court orders that was allegedly disobeyed by the respondent.

Turning to the question whether Joshua Bap Kagori and Charles Lukoye were served, it is submitted that there is need to interrogate the affidavits of service filed as proof. That regarding service of the orders upon Joshua Kagori an affidavit of service by Nadebu P. Caleb has been filed as appendix A2 and paragraphs 3 and 4 the process server clearly stated that he served Joshua Kagori who is the Senior supervisor of the respondent and the in charge of the office. The Respondent questions whether Joshua Kagori acting in his capacity as the supervisor was capable of implementing the court orders served and whether a supervisor as a recognized officer of a company can be cited for contempt of court . They answer the question in the negative owing to the fact that as at the time that the orders were obtained the contract between the respondent which is a human resource company had expired.

That the orders, the subject matter of the instant application were made on 8th March 2017 and purportedly served upon the supervisor on 17th March 2017. The contract between the respondent and the primary employer of the claimant's members was a one year contract starting from 1st March 2016 to 28th February 2017 and it was never extended which fact was uncontroverted.

It is also submitted that there was no personal service of the said orders of 4th May 17 upon Charles Lukoye. That the burden of proof envisaged under Section 107 and 108 of the evidence Act Cap 80 Laws of Kenya has not been discharged and therefore the application ought

to be dismissed with costs.

Determination

On 8th March 2017, this court made the following orders in the presence of representatives from both parties –

1. The application is taken out of today's hearing list and fixed for hearing on 27th March 2017.
2. The respondent is directed to file and serve response to the application on or before 20th March 2017.
3. The status quo to be maintained specifically no redundancy before hearing and determination of the application.

The application dated 25th January 2017 was subsequently heard and ruling delivered on 4th May 2017 as follows –

1. The respondent is directed to deduct and remit union dues from all members of the applicant/claimant union in its employment on the date of this order and remit to the union effective May 2017.
2. The respondent is restrained from declaring any workers redundant without strictly complying with Section 40(1) of the Employment Act.
3. I declared any redundancy effected by the respondent on or after the orders of this court on 27th March to be void and any employee so declared redundant is deemed to be in service until and/or unless declared redundant in compliance with Section 40(1).
4. Costs of this application shall be in the cause.

It is these orders that the claimant avers were disobeyed by the respondent. The respondent does not deny that it failed to comply with the said orders. Its argument is that the orders were served on 17th March 2017 while the contract between the respondent and Abyssinia Iron and Steel Limited expired on 28th February 2017 and was not extended, and that this was after the employees had been declared redundant.

The claimant/applicant submits that the respondent's contract was extended to the end of May 2017 but no evidence has been adduced to prove the extension of the contract.

In view of the fact that the claimant/applicant failed to prove that at the time of service of the orders of this court dated 8th March 2017 there was a valid contract between the respondent and Abyssinia Iron and Steel Limited, it is not possible to hold the respondent in contempt of the orders of this court that are the subject of these court proceedings.

For the foregoing reasons the application is dismissed on grounds that no contempt has been proved by the claimant/applicant. There shall be no orders for costs.

DATED AND SIGNED AT NAIROBI ON THIS 12TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 6TH DAY OF DECEMBER 2018

MATHEWS NDERI NDUMA

JUDGE