



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

APPEAL NO.1 OF 2007

NICKY NJUGUNA..... 1ST APPELLANT
STEPHEN M KYALO..... 2ND APPELLANT
STEPHEN M KARANI..... 3RD APPELLANT
PAUL GICHURU MARUA4TH APPELLANT

VERSUS

THE REGISTRAR OF TRADE UNIONS..... 1ST RESPONDENT
THE ATTORNEY GENERAL..... 2ND RESPONDENT

AND

CENTRAL ORGANISATION OF TRADE UNIONS (KENYA) INTERESTED PARTY

RULING

1. The Appellants by application and Notice of Motion dated 23rd September, 2016 and seeking for orders that;

1. ...

2. *This court be pleased to cite for contempt of court the following persons;*

a) *The Registrar of Trade Unions,*

b) *The Attorney General*

3. *Further to payer 1 above this court do commit; the Registrar of Trade Unions and the Attorney General to civil jail for a term of six months for contempt of court for having deliberately disobeyed orders of this court issued on 14th June, 2013.*

4. *This court to fine E.N Gicheha (Mrs) the Registrar of Trade Unions and the Attorney General Kshs.500, 000.00 each for contempt of court.*

5. ...

2. The application is supported by the annexed affidavit of the 1st Appellant, Nicky Njuguna and on the grounds that on 14th June, 2013 the court issued orders allowing for the formation, joining and participation in union activities members of the National Police Service. The state was given 4 months to amend statutory provisions and lay a framework to guide the new Police Union. The appellant made application for a certificate to promote the establishment of the Kenya Police Union with the 1st respondent in terms of section 12 of the Labour Relations Act on 15th October, 2013. The 1st respondent has refused to issue the certificate or show cause why the same cannot be issued despite numerous reminders by the appellants. The 2nd respondent facilitated the amendments to the National Police Service Act No.11A through National Police Service (Amendment) Act 2014 but refused and ignored to make amendments to section 47(3)(e) as ordered by the court. The Respondents have deliberately disobeyed the court and the orders sought by the Appellants should issue.

3. The Respondents filed Grounds of Opposition to the application and sets out that the Appellants have failed to demonstrate with precision how the Respondents herein are in contempt of the court orders of 14th June, 2013. The Respondents as public officers are not in breach or in disobedience of court orders hence cannot be cited for contempt of court. The 2nd respondent, the Attorney General was not a party and there were no orders of compliance by either this office or the 1st respondent office that the contempt proceedings herein have been made.

4. The Respondents also oppose the application on the grounds that the power to legislate is with the national assembly by dint of article 94 of the constitution which is independent from the offices of the respondents. The orders sought do not lie with the Respondents as there is no statutory duty imposed on the two offices to act as demanded.

5. Section 47(3) (e) of the National Police Service Act in line with article 41 and 24 of the constitution clearly prohibits officers from the police service from joining or participating in the activities of trade union and the court ruling of 14th June, 2013 is subject of appeal at the **Court of Appeal in Civil Appeal No.251 of 2014, Registrar of Trade Unions versus Nicky Njuguna & 5 Others** and the Respondents are herein pursuing the appeal.

6. In submissions, the Appellants state that by judgement and orders of this court on 14th June, 2013 the court directed that section 3(b) of the Labour Relations Act and section 47(3) (e) of the National Police Service Act unconstitutional to the extent that it takes away the right of all members of the National Police Service to form, join and participate in trade union activities. There were 4 months given to make amendments to the law and that the 1st respondent and Inspector General of Police (IG) to be served within 10 days. The Appellants served the orders on the respondents, the interested party and the IG and filed affidavit of service on 5th March, 2014.

7. The Appellants have made follow up and applied for certificate to promote the union but the 1st respondent has refused to issue. There was publication of amendments to the National Police Service Act but the amendments directed by the court were not addressed in terms of section 47(3) (e).

8. The Respondents have disobeyed court orders despite being aware of their existence and therefore the consequences to contempt proceedings. There is an appeal pending and challenging the judgement and orders herein but there is no stay of execution. In **Shimmers Plaza Limited versus National Bank of Kenya Limited [2015] eKLR** the court of Appeal held that court orders are not optional but mandatory and a person cannot choose whether to obey or not. The orders sought herein should issue.

9. The Respondents submits that there is no contempt of court by the Respondents as contempt of court is where an order issued by the court to a person and who fails to comply can be jailed. Order of contempt is to allow a court order be complied with by punishing the person it has been directed to. The order must be clear and not ambiguous. There must be the person to whom it is directed at as held in **Gordon versus Gordon [1945] 1 All ER, Mutirika versus Baharin Farm Ltd [1985] EA**. That the court in **Lucy Wangui Gachara versus Minudi Okemba Lore, Civil Appeal No.4 of 2015 (Malindi)**, the court held

that it must be established as to whether the order was a mere prohibitory of a mandatory injunction.

10. In this case the question is whether the Respondents have refused to execute the orders of this court. While the order is clear clarity of execution is lacking. The court did not set out against whom it was specifically given and who should take responsibility of enforcing it. The actions of the Respondents are not set out in executing the orders.

11. The Respondents also submit that the orders issued by the court are not capable of being executed by the respondents.

Determination

12. Contempt of court orders is a serious matter as with such contempt the rule of law is undermined to its core. Therefore, where an order of the court is issued, compliance is required before a party can challenge its contents before the same court or lodge an appeal against the same. The rationale is that citizens rely on the courts for the impartial decision of disputes as to legal rights and obligations. As a result, once a dispute has been submitted to a court of law, citizens should be able to rely on the ability of the court to decide it impartially, independently and according to the law. See **Shah versus Shah [1989] KLR 220**.

13. As a general rule a contemnor has no right of audience in any court of law unless he is punished or purges the contempt as held in **Kenya Tea Growers Association versus Francis Atwoli [2012] eKLR**. **However, courts are always faced with unique circumstances in each case and regard must be gone into such before the general rule can be applied in a blanket manner.**

14. The Appellants case is that the Respondents have failed to comply with the court orders of 14th June, 2013 and despite service and demand to comply, they have refused. The Respondents on their part assert that the orders of the court were clear but there was no clarity as to who was to execute/enforce the same. The Respondents have not been given any particular role in execution and therefore cannot be cited for contempt.

15. the ruling and orders of the court on 14th june, 2013 were declaratory to the effect that section 3(b) of the Labour Relations Act and section 47(3)(e) of the National Police Service Act were held as unconstitutional. The court also prohibited the police officers from calling or participating in any strike in terms of section 47(3) (g) of the Act. It was ordered that;

d. There shall however be a stay of the order (a) and (b) above for four months from the date hereof to allow the state to amend the aforesaid statutory provisions and to lay down a legislative framework to guide and facilitate the new phenomenon of police unions. The said new legislation should strictly comply with Article 24 of the constitution.

e. This ruling and order shall be served on all the parties, the Attorney General and Inspector General of Police within 10 days from today. [Emphasis added].

16. The order above is in my view directed at *the state to amend the aforesaid statutory provisions*. By making such an amendment to the laws thus declared unconstitutional, the Appellants would enjoy the rights and the fruits of their ruling and orders of the court.

17. Noting the above, it is my humble view that there is need to for an extrapolation and exposition by the court as which organ of *state* reference is made herein. In further to the above my view is that unless and until there is clarity as to the organs of *state* that is responsible in terms of the orders above, it would be an injustice to proceed and cite the Respondents as herein sought by the appellants.

18. Before going out beyond myself and delving into the nature of orders made, and noting well that the application herein relates to orders and directions of my Brother and seating Judge, Onesmus Makau, J. and without going into the findings of his ruling on the merits and demerits of the same, it would only be proper and appropriate for me to request that this file be placed before the Judge to undertake and render

ruling and directions herein.

19. These findings and directions are made upon the acknowledgement and submissions that the matter has proceeded before the Court of Appeal but the parties herein have not disclosed the nature of the matters pending before the Court of Appeal. Without seeking to preside over the ruling of Onesmus Makau, J. it is only fair at this moment to stop and seek the Presiding Judge, Employment and Labour Relations Court to have the file placed before the Judge as he remains within the jurisdiction of the court for his directions.

I therefore place the file before the Presiding Judge, on 12th April, 2017 for directions on transmission of the file to Onesmus Makau, and J for his consideration of the matter(s) pending herein.

Dated and delivered in open Court at Nairobi this 9th day of February, 2017.

M. MBARU

JUDGE

In the presence of:

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