



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 976 OF 2016**  
**KENYA PLANTATION AND**  
**AGRICULTURAL WORKERS' UNION ..... CLAIMANT**  
**-VERSUS-**  
**MIGOTIYO PLANTATION LIMITED ..... RESPONDENT**

M/S Guserwa for claimant/applicant

Mr. Kipkoech for 1<sup>st</sup> and 2<sup>nd</sup> respondents

**RULING**

1. The claimant/applicant moved court on 27<sup>th</sup> May 2016 by a notice of motion seeking injunctive relief against the respondent's intended action to dismiss all its unionsable employees and close the business following a strike action.
2. The application was granted by Hon. Lady justice Mbaru as follows *inter alia*;
  - a) That parties shall maintain status quo as at 12.00 hours (noon) 30<sup>th</sup> May, 2016.
  - b) That the claimant shall immediately serve the respondent with the court papers for court attendance on the 2<sup>nd</sup> of June, 2015.
3. On 2<sup>nd</sup> June, 2015, the court issued further orders as follows;

*“An injunctive order be and is hereby issued restraining and prohibiting the respondent, its agents, assigns, servants and/or representatives from terminating, dismissing, evicting and denying essential services and or shopping facilities to any employee pending fresh service and hearing on 20<sup>th</sup> June 2016.”*
4. The respondents were served with the order and in particular, the Human Resource manager M/s Lucy K. Njagi on 4<sup>th</sup> June 2015.
5. It is the applicant's case that the respondents blatantly defied the court orders and dismissed all the employees and evicted them from Migotiyo Plantations where they had been house during the period of

employment and demolished the workers camp so that the employees would not be able to return again.

6. By an application dated 20<sup>th</sup> June 2016, the claimant/applicant filed an application seeking leave *inter alia* to institute contempt proceedings against the respondent which leave was granted on the same day and the present application dated 20<sup>th</sup> June 2016 was filed seeking under prayer 3 – 8 the following orders:-

7. Migotiyo Plantations and one Lucy K. Njagi the Human Resource Manager and/or any other party acting on behalf respectively of Migotiyo Plantations be committed to civil jail of six months or to other punishments as the court may deem fit for contempt of this Honourable Court's judgment dated 9<sup>th</sup> June 2016.

8. That the said Lucy K. Njagi – be and is hereby summoned to appear in person before this Honourable Court and show cause why he should not be committed to imprisonment for six (6) months or such other Judgment as the court may deem fit to grant for disobeying the order of this Honourable court delivered on 9<sup>th</sup> June 2016.

9. That the 1<sup>st</sup> and 2<sup>nd</sup> respondent be and is hereby cited for contempt of court for disobedience of the order issued on 9<sup>th</sup> June 2016.

10. That upon grant of prayer (4) above, the Honourable court do impose a fine of Kshs.1,000,000/= (Kshs. one million) against the 1<sup>st</sup> respondent and in default of payment of such fine all movable and immovable assets of the 1<sup>st</sup> respondent including land and building be attached and sold in execution of this order to satisfy the penalty of contempt.

11. That upon grant of prayer (4) above, the Honourable court to impose a fine of Kshs.500,000/= (Kshs. Five hundred thousand) against the 2<sup>nd</sup> respondent and in default of payment of such fine an order do issue for them to be committed to civil jail for a period of six (6) months.

12. That the 1<sup>st</sup> and 2<sup>nd</sup> respondent do meet the costs of this application.

13. The respondents were served with the said application on 21<sup>st</sup> June 2016, but instead of replying to the same, the respondents filed counter applications dated 21<sup>st</sup> June 2016, seeking to set aside the interim orders granted by the court and another dated October 2016 seeking recusal of the trial Judge, Mbaru J. on various grounds.

14. Hon. Mbaru J. recused herself. The application to set aside will be considered as a response to this application and considered together.

15. The application is opposed and both parties have filed written submissions.

### **Determination**

16. Issues for determination are as follows;

(i) Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents Migotiyo Plantations and Lucy K. Njagi respectively are in willful defiance of the court orders and therefore guilty of contempt of court.

(ii) What reliefs are available to the claimant/applicant.

### **Issue (i)**

17. Contempt of court Act No. 46 of 2016 is the law applicable to contempt proceedings in Kenya. Its date of commencement was 13<sup>th</sup> January 2017.

18. The alleged contempt in this case occurred on or about June 2016 and this Act cannot operate retrospectively in respect of the alleged contempt therefore.

19. However Section 20, the Employment and Labour Relations Court Act provide,

*“(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.*

*(Act No. 18 of 2014, sch.).*

20. It is now trite that application for leave is not a preliquisite to move an application for contempt of court on the basis of willful defiance of a court order following the Court of Appeal decision in;-

**(i) Shimmes Plaza limited V. National Bank of Kenya Limited C.A. No. 33 of 2012; and**

**(ii) Justus Kariuki Mate and another V. The Hon. Martin Nyaga Wambora & another.**

21. It is not in dispute that the court orders were served on the 1<sup>st</sup> and 2<sup>nd</sup> respondents, hence their immediate filing of an application to set aside the orders granted.

22. The respondents however have made a defence to the effect that the 324 employees the subject of the order had been dismissed before the claimants obtained the court orders following the circular issued by the respondent to the business owners directing them to close their business and to disconnect utilities like water, electricity, housing and medical facilities to the employees.

23. The respondents allege further that these material particulars were not disclosed to the court at the time it granted the two orders on 27<sup>th</sup> May 2016 and on 2<sup>nd</sup> June 2016 respectively. The respondents pray that, on the basis of non-disclosure alone, the interim orders be set aside and this application be dismissed with costs as an abuse of court process.

24. With respect to the order issued on 27<sup>th</sup> May 2016 to the effect

*“That parties shall maintain status quo as at 12.00 hrs (noon) 30<sup>th</sup> May, 2016”* the same lacks material particulars for the purpose of holding any party to whom it is served guilty of willful

defiance of the order.

25. From the papers filed on record, it is not possible to tell, what the status quo as at 12.00 hours (noon) 30<sup>th</sup> may, 2016 was.

26. It is also not clear whether that status had changed as at the time the order was served.

27. In **Bahadural Esrahim Shanji V. Al Noor Jamal & 2 others Civil Appeal No. 21 of 1997**, the Court of Appeal stated as follows;

*“It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within its knowledge, and if he does not make the fullest possible disclosure of all material facts within its knowledge, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained.”*

28. It would appear from Annex 2 to the application filed on 27<sup>th</sup> May 2017, that the claimant/applicant made full disclosure of the status quo as at that date by disclosing the internal memo issued by the 2<sup>nd</sup> respondent to all business owners in Migotiyu Plantations dated 24<sup>th</sup> May 2016 directing them to close all their businesses with immediate effect and that the camp will be closed and demolished without further notice due to security concerns.

29. This was the status quo as at the time the court order dated 27<sup>th</sup> May 2017 was issued but the court did not elaborate on what the order was intended to stop, the directive to close and demolish having been issued on 24<sup>th</sup> May 2016.

30. It is the court’s considered view, and finding that the status quo order issued on 27<sup>th</sup> May 2016 could not stop the closure of businesses and the demolition of the camp since the same had already taken place contrary of the directive given on 24<sup>th</sup> May 2016.

31. With regard to the second order obtained on 2<sup>nd</sup> June 2016 stopping the respondents from terminating, dismissing, evicting and denying essential services and or shopping facilities to any employee pending fresh service and hearing of the application on 20<sup>th</sup> June, 2016, the court observes as follows;

it is clear from the claimant’s pleading in the memorandum of claim filed on 27<sup>th</sup> may 2016 that the effect of the memo issued by the 2<sup>nd</sup> respondent on 24<sup>th</sup> May 2016 was to:-

(i) Terminate or dismiss the employment of over 300 employees the subject of the suit and

(ii) Deny essential services like water, electricity, medical treatment, housing and shopping facilities to these employees.

32. Indeed, the main relief sought in the memorandum of claim dated 27<sup>th</sup> May 2016 is for the court to declare:-

“14     *the termination of the employees is unprocedural, unfair therefore wrongful.*

15     *The employees be and are hereby reinstated to employment without loss of privileges from the date of Judgment and in the alternative.*

16     *The respondent do pay all employees full terminal benefits calculated in accordance with the Collective Bargaining Agreement tabulated and attached herein as appendix TK3.*

17            *The respondent pay 12 months gross salary as compensation to each of the employees for the wrongful loss of employment.”*

33. It is therefore manifestly clear, that as at the time the court issued an injunction on 2<sup>nd</sup> June 2016, restraining the respondents from terminating, dismissing, evicting and denying essential services to the over 300 employees in the said camp, all the above had already taken place. The horse had bolted from the staple as it were and the order was issued in vain.

34. Accordingly, it was impractical for the respondents to comply with the orders of the court issued on 27<sup>th</sup> May 2016 and 2<sup>nd</sup> June 2016 respectively.

35. The respondents cannot be held in willful defiance of the two court orders and are therefore not in contempt of the two court orders.

36. The application lacks merit and the same is dismissed. Costs in the cause.

**Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of September, 2017.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**