



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 80 OF 2016

(Before D. K. N. Marete)

KENYA UNION OF DOMESTIC, HOTELS, EDUCATION
INSTITUTIONS AND HOSPITAL WORKERS (KUDHEIHA).....CLAIMANT

VERSUS

B.O.M KAPMASO SECONDARY SCHOOL.....RESPONDENT

RULING

This matter is originated by way of a Memorandum of Claim dated 9th November, 2017. The issue in dispute is herein cited as;

“Refusal by the Board of Management to comply with the court orders as directed by court judgement dated 19th July 2017 delivered by Employment and Labour Court Relations Court at Kericho hence liable for contempt of court citation.”

However, this is an application for contempt of court and seeks the following orders of court;

- 1. That it is our humble prayer that the court finds the respondent in breach of the orders issues by this court vide judgement dated 19th July 2016 and hence liable for citation of contempt and imprisonment for 6 months.*
- 2. That the respondent be ordered to immediately sign the said recognition agreement within 7 days and commence CBA negotiations within the next 30 days.*
- 3. That the respondent be ordered to practice prudent industrial relation devoid of threats and intimidation of union membership and be ordered to remain in deduction and remittance of union dues till advised otherwise by the membership.*
- 4. That the cause of this suit be borne by the respondent for acting frivolously and vexatiously prompting the matter to be filed in court once again.*

By an application by way of Notice of Motion dated 31st September, 2017 and in court vide a Certificate of Urgency of even date the applicant had sought and been awarded leave to commence contempt proceedings against the respondent for disobedience of court orders aforesaid.

The respondent does not reply to this application and has not participated in these proceedings or at all until 23rd November, 2017 when she came on record. However, something very curious is apparent on these pleadings from day one – the heading to this application comes out in the face of a Claimants Memorandum of Claim/Pleadings. Why is this? Was not the applicant aware that the pleadings at hand were intended and supposed to be by way of an application?

We may not be able to discern the mind of the applicant or be able to answer the above. We are also warned of the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 which provides as follows;

159 (2) (d) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

a)...

b)...

c)...

d) Justice shall be administered without undue regard to procedural technicalities; and

e) ...

Overall, contempt of court proceedings are a specialized and serious piece of litigation. It is acknowledged that these are *quasi* criminal and therefore their

peculiar procedural requirements and requisitions. They are more often than not likely to affect the personal liberty of the respondent (s) in the event of proof of breach or violation as is complained of. Parties, and especially respondents in these proceedings must clearly be alerted that they are being invited to contempt of court proceedings and the consequential implications of the same. This is not done here. Why?

Article 159 (2) (d) does not dispel technicalities *in toto*. It only provides for situations where justice shall be administered without undue regard to procedural technicalities. A disqualification of the application in the present case would not necessarily be regarded as undue technicality.

Again, we must be able to draw a distinction between a technicality and procedure or procedural processes. Civil Procedure, a necessary tool in the articulation and administration of disputes in courts and tribunals is founded on law. This is statutory or statutory based. We cannot therefore apply Article 159 (2) (d) as an excuse to run away from the reality of procedure and the law. A clear balancing act must be had to accommodate the provisions of Article 159 (2) (d) and procedural requirements as provided in law.

So why did the applicant in the present circumstances bring out her application in this form? The best I can guess is that this is a consequence of utter carelessness and lack of due diligence. Is this excusable? My answer is no. This is an act of extreme pervasion of process and must be highlighted, disapproved and discouraged.

I am therefore inclined to strike out this application with orders that each party bears their own costs of the application.

Delivered, dated and signed this 11th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Joseph Okwach for the claimant/applicant union.
2. Mr. Mr. Kirui instructed by J.K. Kirui & Company Advocates for the respondent.