



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1745 OF 2015

KENYA PLANTATION & AGRICULTURAL WORKERS UNION...CLAIMANT

VERSUS

AGRICULTURAL EMPLOYERS ASSOCIATION.....1ST RESPONDENT

WESLEY SIELE.....2ND RESPONDENTS

RULING

1. ON 2ND FEBRUARY 2016 the Claimant union filed application dated 1st February 2016 seeking for leave to commence contempt proceedings and committal of the Respondents Association chief officer Mr Wesley Siele (Siele) and any other officer of the Association acting on the Respondents behalf and committal to civil jail of 6 months or other punishment for contempt of Court judgement dated 15th October 2015. That Mr Siele should appear in Court in person to show cause why he should not be committed to jail for disobeying Court order of 15th October 2015. Other orders sought by the Claimant are that the respondents should be cited for contempt of Court and a fine imposed against them for kshs.1,000,000.00 and in default of such fine immovable assets of the 1st Respondents be attached and sold in execution to satisfy the penalty for contempt. That a fine of Kshs.5, 000,000.00 be imposed against the 2nd respondent, Siele and in default of such payment of the fine an order be committed to civil jail for 6 months.

2. The application is supported by the annexed affidavit of Thomas Kipkemboi and on the grounds that on 15th October 2015 the Court delivered judgement herein and despite the order of the Court being clear the Respondents has in contempt refused or neglected to obey the same and has not shown any willingness to obey the orders to date. Efforts by the Claimant urging the Respondents to comply have been defied while the Claimant continues to suffer irreparably and the reputation of the Court is at stake. The continued disobedience of the Court order by the respondents is act of impunity and hurts the dignity of the Court and the Respondents officers should be directed to obey the orders of the court.

3. In the affidavit of Mr Kipkemboi, he avers that as the deputy secretary general of the claimant, on 29th September 2015 the Claimant filed an urgent application and memorandum of Claimant and the issue in dispute was refusal of the Respondents to grant access to the Claimant and refusal to amend and review the Recognition agreement. The dispute arose upon the Respondents letter dated 24th August 2015 refusing to recognise elected workers representatives elected on 15th August 2015 and denying Henry Omasire and Philip Mutua access to any of their farms.

4. On 15th October 2015, the Court issued an order and restrained the Respondents from denying access to the Claimant officials to hold meeting with its members outside working hours, represent its

members on dealing with the Respondents members and conduct ballot with its members. The Respondents was made aware of these orders upon service and thus there was an obligation to obey these orders and in default full liability for disobedience arise.

5. Upon service of the Court orders on the respondent, the Court directed the parties to appear before a Conciliator on 25th November 2015 to negotiate and agree on the two issue in dispute. The Respondents has since maintained a hard line stand and declined to solve the matter during conciliation. The 2nd Respondents has issued directions to its members and written to the Claimant denying its Nanyuki area secretary – Philip Mutua and its national Organising secretary – henry omasire from accessing the 1st Respondents member's premises to hold meetings, to recruit members or conduct ballot in accordance with the union constitution. The actions of the Respondents in denying the Claimant officers/official access to the farms as confirmed by the letter dated 25th January 2016 is in direct contempt of Court orders herein issue don 15th October 2015. Efforts have been made to engage the chef officer, Siele but is stubbornly adamant.

6. Mr kipkemboi also avers that the conduct of the respondents defies the authority and dignity of the Court and the orders sought should issue by the Court citing the respondents for contempt of Court and failure to comply, an order do issue committing Siele to civil jail for 6 months and or there be a fine and where there is default, the property of the 1st Respondents be attached in execution.

7. The Claimant has relied on the following cases – **Wasted & Environment Management Association of Kenya (wema) versus Nairobi city County, Petition No.210 of 2015; Raeli Tapsabei versus David Rono, Misc.Appl. No.41 of 2013(Kericho); Nicholas Mahihu versus Ndimia Tea Factory Ltd & Another, Appeal No.101 of 2009; Republic versus Nairobi City County ex parte David peter Ndambuki, HCCC No.398 of 2012; KTGA versus Francis Atwoli & 5 Others [2012] eklr.**

8. In reply, the Respondents relied on the Replying Affidavit of Wesley Siele filed on 14th October 2015 filed in response to the application of the Claimant dated 29th September 2015. Though the Affidavit of Siele is undated, counsel for the Respondents submitted that the orders of the Court on 15th October 2015 were issued *ex-parte* pending haring scheduled for 3rd November 2015. The issued orders gave Claimant access to Respondents farms. On 3rd November 2015 both parties were in Court and the Court ordered that the two issues in dispute – access by the Claimant official to the Respondents premises and amendment of the Recognition Agreement – be taken before a Conciliator and parties to attend and the Conciliator submit the report in 45 days. That at this stage the interim orders were not extended.

9. Counsel also submitted that pending hearing the Respondents acted in good faith and has allowed henry Omasire access to conduct union activities and has continued to engage with the Claimant officials awaiting determination of the matter herein. Conciliation failed and the Respondents put in motion clause 2(j) (x) of the Recognition Agreement which grant Respondents the power to deny access to any union official that fails to abide by the terms of the agreement. When parties appeared before the Conciliator there were different versions of the Recognition Agreement where clause 2(j) (x) is different. The Conciliator was not able to tell which Recognition Agreement was genuine. The Claimant should have come to Court for interpretation of the problematic clause and not apply for contempt proceedings as this should be a last resort. The application should therefore be dismissed as it is incompetent.

10. Counsel also submitted that the file should be moved to Nakuru as both parties reside in Nakuru.

11. The Court has the inherent jurisdiction to prevent the abuse of its orders. Such jurisdiction can be invoked by the Court on its own motion on the face of a violation of its orders or upon being moved by either party. Such is to deal with procedural edict, both civil or criminal which may or not be related to the substantive issue(s) at hand but on the face of it, an order has not been complied with. This is to enable the Court exercise control over process by regulating its proceedings by preventing abuse of the process and compelling observance of the process. See Rev. **Madara Evans Okanga Dondo versus**

Housing Finance Co. of Kenya, HCCC No.262 of 2005 (Nakuru). This position was reiterated in the case of **Nicholas Mahihu**, and the finding that Court orders should not be issued in vain, they are subject of enforcement and where not given effect, the Court has the power to issue a sanction.

12. For the Court to therefore move and ensure compliance with its orders, there must exist and be in place clear and unequivocal orders and or directions directed to the party sought in compliance. The orders impugned must therefore be in motion as it were. Existing and alive.

13. In this case, on 15th October 2015, the Claimant was in Court under Certificate of Urgency. Interim orders were granted pending *inter-parties* hearing on 3rd November 2015. On the due date both parties were in Court and each was heard at length. Within the submissions by the Respondents counsel, Court found parts of it out of order and directed as appropriate. The Court went ahead to issue ruling instantly.

14. The ruling was to the effect that the gist of the application was seeking to access and renegotiate the Recognition agreement. The Court recognised that ILO conventions permit parties to engage in negotiations in order to better the lot of employees and benefit the employer. The court, in view of the impasse on the noted issues – access and renegotiation of the Recognition Agreement – the Court referred the matter to the Conciliator appointed by the minister. Parties were directed to report to the Conciliator on 25th November 2015 to submit their positions on the issues noted. The Conciliator was to report back to the Court within 45 days.

15. Effectively therefore, the Court directions on 3rd November 2015 were on the basis that both parties were heard and a ruling delivered. The matter was referred to the conciliator. The Court was to get the report in 45 days. Such directions, I find, were upon careful consideration of all matters submitted by either party. On the one hand the Claimant was seeking orders for access by its official within the Respondents members premises in order to undertake union activities; a finding that the Respondents was in breach of right to access of Claimant officials to Respondents members premises; and that the commissioner for labour to assist the parties to amend the Recognition Agreement between the parties herein. On the other hand, the Respondents was vehemently opposed to the grant of such orders on the basis that the parties have a Recognition Agreement and were discussing a collective Agreement but two officials of the claimant, Henry Omasire and Philip Mutua violated the Recognition agreement.

16. The ruling of the Court thus, referred the matter for conciliation. Such conciliation is a lawful process under the provisions of section 15 of the Employment and Labour Relations Court Act. This was part of the prayers made by the Claimant in seeking that the matter be referred to the commissioner for labour to assist in the amendment of the Recognition agreement. Such was directed as prayed and noting the inherent power of the Court under the same provisions under section 15 that on its own motion, the Court can make such orders as appropriate and refer the matter for conciliation.

17. The referral of the matter to the Conciliator was on condition that within 45 days a report was to be filed in court. I take it then the Court at this point made such referral for purposes of meeting the ends of justice and without tying any party under any restraint so as to engage with the Conciliator in an open manner and in good faith. Effectively, the interim orders of 15th October 2015 were not extended.

18. The matter is due for filing of conciliator's report. Such the parties must attend to.

19. The application by the Claimant therefore, seeking leave to commence contempt proceedings against the Respondents for disobedience of orders/judgement of 15th October 2015 cannot hold. Such interim orders were overtaken by events. The orders and directions of 3rd November 2015 were to refer the matter to conciliation. The interim orders lapsed then. Where there is continued engagement in activities and or act that were subject of complaint as at 15th October 2015 and the Respondents has continued to engage in unfair labour practices pending the filing of the conciliator's report, such should be presented before the Court for appropriate orders to issue or re-issue.

20. I will mention here once more as set out on 25TH February 2016, the submission by the Respondents counsel that this matter should be referred to Nakuru at this point and place is misplaced. The matter has been in Court and the Respondents made appearance since without moving the Court as such. Parties were referred to conciliation and a report is due to this court. For the ends of justice to be achieved, the Respondents should not derail that process for any other purpose.

21. The respondent recognised that the parties are social partners engaged at various levels. I take special note of the affidavit of Mr Siele filed on 14th October 2015, though not dated, it sets in motion key issues where addressed, the issues in dispute can be addressed. Such should be given consideration where the respondent is able to file the Statement of Response.

22. The Respondents made submissions that the conciliation has broken down. The factors taken into account by the Court on 3rd November 2015 with regard to submissions by the respondents' counsel, the facts set out by the Claimant in the current application, it is apparent further reference to the Conciliator will not yield fruits. It is appropriate that the claimant's application be declined and the interim orders of 15th October 2015 be reinstated in the interim pending the parties taking a hearing date as the main cause remains alive.

The application by the Claimant is declined. In the interests of justice, Orders in force as at 3rd November 2015 are hereby reinstated. Parties shall be allocated a hearing date for the main course on priority basis. Each party shall bear their own costs.

ORDERS ACCORDINGLY.

Read in open court at Nairobi this 10th day of March 2016.

M. Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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