



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 77(N) OF 2009

**KENYA UNION OF DOMESTIC, HOTELS,
EDUCATIONAL INSTITUTIONS, HOSPITALS & ALLIED WORKERS
GEORGE CHESIRE & 84 OTHERS.....CLAIMANTS/APPLICANTS**

VERSUS

NAIROBI CLUB.....RESPONDENT

RULING

1. The Claimants through their application and Notice of Motion filed on 16th December 2015 are seeking for orders that;

1. Spent.

2. The court herein be pleased to find and hold that Mr Michael Muyangi – the Nairobi Club Secretary is in contempt of the court’s judgement made on the 24th September 2009 by the Hon. Chemmutut MBS by failing to reinstate all the Claimants and failing to pay them their salaries, wages and benefits from the date they stood reinstated on the 24th of October 2009 to date.

3. Pursuant to the grant of order 2 above the court commits Mr Michael Muyangi – the Nairobi Club to 6 months imprisonment for contempt of court orders made by Hon. Chemmutut MBS on the 24th days of September 2009.

4. Court be pleased to issue mandatory injunctive orders to the Respondent directing them to comply with the judgement of the Hon. Chemmutut MBS delivered on 24th days of September 2009 as read together with the ruling of the Honourable Monica Mbaru J dated 10th day of May 2013 by carrying out the following:

a. Paying the Claimants all their 9 months back wages totalling the sum of kshs.21, 109,185.67 calculated from the date of termination to the date of the delivery of the court’s decision.

b. Paying the claimants’ salaries, wages and benefits as from the date they stood reinstated being the 24th day of October 2009 up to the date of the issuance of the court’s decision.

c. The unconditional reinstatement of the remaining 32 Claimants back to employment.

d. Payment of costs and interest of this suit.

5. Interests on clause 2a an 2b above

6. Costs of this application.

2. The application is supported by the annexed affidavit of George Chesire and on the grounds that the Claimants are former employees of the Respondent who filed the claim in 2009 challenging their unfair termination of employment. Judgement was delivered on 24th September 2009 when the court decreed that the claimant should be reinstated to their former employment with all back wages or salaries, privileges and other benefits within 30 days from the date of the court award. That the 30 days of the judgement being 24th October 2009, all the Claimants stood reinstated and were entitled to their full salaries and benefits as stipulated by the judgement.

3. Other grounds in support of the application are that other than reinstate the claimants, the Respondent initiated a process of forum shopping to challenge the judgment issued in favour of the claimants. The Respondent filed Misc. Judicial Review No.605 of 2009 which was heard and dismissed owing to the fact that the jurisdiction of the JR Court was wrongly invoked. The Respondent then filed an appeal Civil Application No.287 of 2011 (Nairobi) which was dismissed.

4. In both cases filed by the Respondent they were denied stay of execution thus the orders that the Claimants be reinstated and paid back wages still stands. Upon failing in both case, the Respondent sought to have an out of court settlement with the Claimants in 2012, which was 36 months after judgement, the Claimants were entitled to 9 months of back wages since date of reinstatement. In the settlement deal, the Respondent offered 18 months' pay, which 50 Claimants accepted but 35 out of the total 85 claimants, insisted on unconditional reinstatement and payment of back wages.

5. Of the 35 claimant who rejected settlement of the claim, 3 died and there remains 32 claimant seeking reinstatement and payment of back wages.

6. On 25th March 2013, the Respondent made application seeking interpretation of the concept of back wages and for the determination within which it should be calculated. The issue determined was on *back wages* only. The court ruled that such a matter related to the date of termination to the date of judgement – January 2009 as date of filing suit to September 2009, date of judgement – and covered 9 months. The court did not therefore address the question of reinstatement and thus the order remains valid as there is no valid appeal.

7. The Claimants have written to the Respondent with regard to the ruling on back wages amounting to kshs.21, 109,185.67; made demand with regard to due salaries, wages and benefits from 24th October 2009 to September 2015, the date of application for the dues amounting to kshs.171, 807,278.00; and also made demand that they be reinstated in accordance with the court judgement. The Respondent has failed to abide and insisted that the Claimants are only entitled to the 9 months' pay in back wages and therefore refused to reinstate the Claimants or pay the due salaries, wages and benefits. Even the 9 months dues not contested have not been paid.

8. The claimant's further grounds in support to their application are that they have suffered great injustice as they have a judgment in their favour yet they have never enjoyed the fruits of the same. This has led to continued suffering as the Claimants remaining unemployed waiting to be reinstated. In the interests of justice, the application should be allowed as prayed with costs.

9. In his supporting affidavit, George Chesire avers that he is one of the Claimants and has authority to make the affidavit in support of the application. All the Claimants were former employees of the Respondent but the Respondent has failed to comply with the orders of the court to reinstate, pay the back wages and the salaries and due owing since reinstatement. The Claimants should be granted orders sought to stop the grave injustice now visited upon them and are not able to enjoy the fruits of their judgement.

The refusal to comply with the court orders is an act of contempt of the court that should not be left unpunished unless it is purged by conforming to the order of the court.

10. In the **Supplementary Affidavit of George Chesire**, he avers that the Respondent have not set out the truth as there was no stay of execution until the appeal was dismissed. There is no compliance with the court orders of 30th September 2009 and 50 Claimants did not get reinstated and contempt has not been purged. The Claimants were entitled to back wages until the date of reinstatement and despite the Respondent computing back wages of 9 months they have not reinstated the claimants. Such should be done before the Respondent can be found as having purged the contempt.

11. The Respondent filed **Replying Affidavit sworn by Michael M Mukayangi** and avers that he is the Chief Executive Officer (CEO) of the Respondent and thus authorised to swear the affidavit. That there were orders of stay of execution issued by the High Court in JR 605 of 2009 which orders extended to the Court of Appeal in Civil Appeal No.287 of 2011 (Nairobi) the orders of stay lapsed after the Court of Appeal dismissed the substantive application for stay. Thereafter the Respondent elected to comply with the orders of the court and by a newspaper advertisement of 19th April 2012, all dismissed employees were reinstated. Of the 85 claimants, only 50 took up their re-employment with the 35 others refused and insisted on being paid their back wages. Of the 35, many are dead while others cannot be found. On this basis the Respondent applied to the court seeking an interpretation of what *back wages* are and the court delivered a ruling on 10th May 2013.

12. Mr Mukayangi also avers that the ruling of the court on 10th May 2013 found that each former employee of the Respondent was entitled to a payment of 9 months' salary in back wages, far worse than the 18 months the Respondent offer as negotiated. The court also directed that parties compute the back wages for respondent's compliance which was file don 20th May 2013.

13. The Claimants were dissatisfied with the ruling of 10th May 2013 and made attempts to appeal. The Claimants did not file any computation of their dues and the respondent's record remain the same. There has been no failure by the Respondent to frustrate the orders of the court at any moment. Save for the question of payment of back wages, there is nothing else outstanding as the Claimants have been invited to take up their employment but declined to do so and cannot be heard to say that there has been breach by the respondent.

14. The application before court should be dismissed with costs.

Submissions

15. The Claimants submit that the judgement of the court on 24th September 2009 reinstated the Claimants to their former employment with back wages to the date of judgement. With the reinstatement, the Claimants were not formerly terminated. However the Respondent through applications to the High Court and Court of Appeal made efforts to seek stay of court judgement and also commenced an out of court settlement. Some Claimants opted to accept a settlement. 35 Claimants insisted on pursuing their rights per the judgement. On 19th April 2012 the Respondent by a notice through print media reinstated the Claimants but without leave of court or sending the same through their advocates.

16. The ruling of court on 10th May 2013 related to the interpretation of *back wages*. The judgement of the court was not set aside and a reinstatement still stands. The Respondent has demonstrated that they are aware of the orders and have deliberately chosen not to obey as held in **Basil Criticos versus AG & 8 Others [2012] eKLR**. That the fact of the Respondent was served with the orders and have knowledge of its existence as held in **Kenya Tea Growers Association versus Francis Atwoli & 5 Others, pet. No.64 of 2010**. The court should punish for contempt to safeguard the rule of law as held in **The Africa Management Communication International limited versus Joseph Mathenge Mugo & Another [2013] eKLR**.

17. In this case the court should find the Respondent in contempt of court.

18. The Respondent also submit that upon the court judgement herein on 30th September 2009, they enjoyed stay of execution orders of 16th October 2009; 24th November 2011; 30th January 2012; all by the High Court and 6th February 2012 by the Court of Appeal. 50 Claimants accepted reinstatement while 35 rejected it. The court has since ruled on the question of back wages.

19. The Respondent have not been in contempt of court orders. What remains outstanding is taking accounts so as to establish what is owed to the claimants. That the application lacks merit and should be dismissed with costs.

Determination

Whether there is contempt of orders of 24th September 2009 by the respondent; and

Whether mandatory injunctive orders should issue directing the Respondent to comply with judgement of 24th September 2009 and ruling of 10th May 2013.

20. On the issue of contempt of court orders, **Committal to civil jail as sought by the claimant should be a last resort. If any other alternatives are available, these should be applied on priority. This cannot be overemphasized for purposes of meeting the ends of justice. Even courts will endeavour to apply alternatives than a committal to jail in civil proceedings as held in prof. Francis M Njeru versus prof. Mabel Imbuga, Cause No.1539 of 2013.**

21. The orders sought with regard to contempt of court orders are serious and has severe consequences against the alleged contemnor. This is not an order to be simply asked for and granted on a whim. It has serious impact to the safeguard of the rule of law which is fundamental in the administration of justice as submitted by the claimant and their application of **The Africa Management Communication International Limited case**, cited above. The consequences against the alleged contemnor is the denial of civil liberties of the alleged contemnor if proved.

22. The Court in Dr. Ibrahim Haji Isaak versus Kenya Meat Commission and Another, Industrial Cause No. 1052 of 2013 held that;

... the essence of dealing with contempt is to safeguard of the fundamental supremacy of the law and custody of the rule of law. Otherwise the entire system of administration of justice would be rendered ineffective, clamped and of no consequence. That view is not to be encouraged even on the face of disobedience of simple directions geared towards the administration of justice as these incrementally total to access to justice.

Has the applicant complied with the prerequisites for the grant of order of contempt against the respondent?

23. In this case the Claimants admit in the affidavit of George Chesire and in submissions that the judgement delivered on 24th September 2009 reinstated them into employment. Reinstatement was due on 30th October 2009 and stay of execution was granted on several instances; 30 days lapsing 24th October 2009 vide judgement date; 19th October 2009 pending filing judicial review and lapsing on 15th December 2009; and 22nd December 2011 to 25th January 2012. Pending and while there was stay of execution, the Respondent also went to the Court of Appeal. On 6th February 2012 the Respondent was granted stay of execution pending hearing and determination of appeal, which was dismissed on 13th March 2013.

24. Therefore, from 30 September 2009 up and until the dismissal of the appeal, the Respondent enjoyed various orders of stay of execution. These orders are attached to the claimants' or Respondent affidavit and submissions.

25. Also, the Claimants have submitted that on **19th April 2012**, the Respondent by notice in the print media reinstated the claimants. I find no challenge that the Claimants did not see this notice. The only issue raised is that it was not sent to their advocates.

26. It is also admitted the parties engaged in negotiations and 50 Claimants conceded leaving 35 Claimants seeking reinstatement out of whom, 3 have since died. Also, on 10th May 2013 the court ruled on the issue of back wages and the Respondent filed their computations.

27. However, the Claimants fall short of one detail – stating why they have not reported to work with the Respondent since 19th April 2012 per the notice issued. I find the Claimants have frustrated orders in their favour. This cannot support the orders sought against the Respondent with regard to contempt.

28. On whether an injunction should issue compelling the Respondent to reinstate the claimants, I find no ambiguity with the orders of court on 30th September 2009 on the reinstatement of the Claimants to warrant another affirmation by the court on the same issue already ruled upon and orders made. To revisit the same as invited, the court would be reopening a case and matter afresh. This is not the objective of the court.

29. However, noting the notice issued to the Claimants on 19th April 2012 to report to work, which I find was not adhered to, the lapse of time since and save for the negotiations and settlement with some claimants, the consequence of failing to be at work has its implications. As set out in the ruling of court on 10th May 2013 page 10 at second paragraph thus;

Any party that was aggrieved by the failure to comply within the terms of the Court Award within 30 days set out by the court had recourse in law ... any subsequent action or actions taken by either party to preserve their rights or in any other way cause any delay, there is equally recourse in law. ...

30. On 17th September 2013 the Claimants applied seeking leave to file appeal against the orders of the court of 10th May 2013. As this was ongoing, the Respondent filed computation of back wages due to the claimants. The Claimants were to reply with their computations but have not done so. The Claimants have not reported to work and been refused work/employment. It is since 51 months or a period of over 4 ½ years.

31. On this basis, the claimants cannot be found to say that they were not aware of the terms applicable on their reinstatement or that the Respondent has failed to comply with the orders of the court. The Claimants chose to keep out of work and engage the Respondents outside of work. Therefore, the Respondent cannot be said to be in default or in contempt of orders of 30th September 2009.

32 The Claimants should not continue dancing and dangling the reinstatement orders ordered on 30th September 2009 at the Respondent and when directed to report to work on 19th April 2012 fail to abide only to file an application such as this one. Litigation should come to an end.

33. I find the application before court is only meant to re-open a matter already arbitrated upon to conclusion. I also find this to be abuse of process and will not get affirmation by the court.

In conclusion, the application before court seeking the committal of Respondent officer for contempt of orders of 30th September 2009 and the reinstatement of the Claimants with back wages to date lacks merit; such orders are an abuse of court process; and the application dated 16th December 2015 is hereby dismissed with costs.

Delivered in open court at Nairobi this 8th day of September 2016.

M. MBARU

JUDGE

In the presence of:

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