



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.1596 OF 2013

TRANSPORT WORKERS UNION CLAIMANT

VERSUS

NEW GATITU SERVICE STATION (1977) LTD RESPONDENT

RULING

1. The Claimant filed application dated 21st January, 2016 on equal date. The Respondent was served and on 23rd February, 2016 the Respondent advocate asked to have time to reply and was granted 7 days to do so. On the 9th March, 2016 the Court directed parties to make oral submissions on 30th march, 2016. On due dates the Respondent was not ready for hearing. On the next hearing date for 1st September, 2016 the Respondent was absent. On the subsequent hearing dates on 19th September, 2016 and 12th October, 2016 the Respondent was absent. On 17th October, 2016 at the next hearing, the Respondent asked to file written submissions.

2. It thus became apparent that the Respondent was keen to stall the hearing of this matter and was not willing to abide by directions issued on 9th march, 2016. The issue on the mode of hearing of the claimant's application that has been due and waiting for the better part of the year was to be heard by oral submissions. The Respondent has chosen to be absent from Court in all session save to send various advocates to hold brief and without appropriate instructions to facilitate the progress of the matter.

3. Noting the above, the Court directed the delivery of the due ruling based on filed documents.

4. The claimant, by application dated 21st January, 2016 is seeking for orders that;

1. Spent.

2. The Court did certify that the orders issued/delivered on 29/11/2013 and 5th/12/13 were to be implemented and obeyed.

3. That the said orders that the Respondent to pay union dues from the check off forms signed by the Claimant union members.

4. That the Respondent is restrained from intimidating, threatening or dismissing some of the union members or forcing them to revoke their membership.

5. Spent.

6. *That the sole proprietor/owner of the Respondent to be and is hereby summoned to Court to show cause why he has not complied with the court's award/orders dated 29/11/2013 and 5th/12/13.*

7. *The sole proprietor/owner of Respondent be committed to civil jail for a period of one month or until the order of paying union dues to the Claimant is paid/addressed/implemented and paid in full to the Claimant as from the time the orders were delivered by the Court on 29/11/2013.*

8. *The Court do issue such orders and give such directions as the Court to assert its authority by detaining the owner of the Respondent until it may consider fit and just to grant*

9. ...

5. The application is supported by the annexed affidavit of Tonny R NDEGE and on the grounds that on 29th November and 5th December, 2013 the Court delivered ruling and awarded Claimant orders that the Respondent to pay union dues per the check off forms signed by the union members; the Respondent was restrained from intimidating, threatening or dismissing the unionised employees who the Respondent was forcing to revoke their union membership; and the orders were to remain in the interim and pending hearing of the claimant's application dated 20th September, 2013 that was scheduled for hearing on 24th January, 2014.

6. That the Claimant served the Respondent with the Court orders and through the Court process server, Peter Mwangi but the Respondent refused to obey and implement the same. That it is important for the Court to assert its authority and detain the owner and proprietor of the Respondent for disobeying Court orders. Court orders should not be issued in vain.

7. In the supporting affidavit of Mr Ndege, he avers that he is the Claimant and applicant in the matter and thus competent to make the affidavit. The affidavit is in support of the orders sought and the grounds thereto.

8. In reply, the Respondent filed **Replying Affidavit sworn by Alveer Anwar Hussein** who avers that he is the general manager of the Respondent and that they have never been served with the Court orders and no return of service exists to this effect. He had written to the Court on the unbecoming conduct of the Claimant but the Court file went missing.

9. That the application before Court is ambiguous and not clear as to the nature of orders sought; the orders sought are not tenable as the orders sought be enforced have since lapsed. There is no worker of the Respondent being harassed and no such affidavit has been submitted. That Mr Ndege is not an honest person with regard to averments in his affidavit. The orders of 27th December, 2013 and 20th March, 2013 were irregularly obtained through gross misrepresentation of material facts.

10. Mr Hussein also avers that Application dated 29th November, 2013 has never been heard. The application raises very serious factual and legal issues and only fair that this be fixed for hearing.

Determination

11. The orders sought by the Claimant vide application dated 21st January, 2016 are premised on the facts that the Respondent has disobeyed the orders of the Court issued on 29th November, 2013. That as a result of such disobedience, the Respondent proprietor should be sanctioned with one month imprisonment.

12. My reference to the orders of 29th November, 2013 is that the Court gave interim orders directing the Respondent to pay the claimant, union dues based on the check off forms the unionised members had signed; the Respondent was stopped from harassing unionised employees; the orders were to have effect and force until the application dated 26th November, 2013 was heard; the Respondent was given 14 days

to file reply; and hearing of the application was scheduled for 24st January, 2014.

13. On the due date the Respondent was absent. Court allocated hearing date for 25th March, 2014.

14. All along, the orders of 29th November, 2013 and subsequent amendments done on 5th December 2013 were never extended. When the hearing date of 24th January, 2014 came and went, the interim orders were not extended to ensure the Claimant was insulated against any disobedience thereof.

15. Several other applications have been filed since, but the foundation of the same has been disobedience of the initial orders of 29th November and 5th December, 2013. Without the extension of the orders issued, their lapse is obvious.

16. It has been over 25 months since. To seek to commit and have the Respondent sanctioned over orders that lapsed since 24th January, 2014 is not an appropriate move by the claimant. Such cannot issue as this is a Court of justice. The Memorandum of claim filed way back on 26th November, 2013 has never been prosecuted. Such is of utmost importance that it be heard on its merits as to move with interlocutory application without addressing the foundation of the same is not a good practice.

17. The essence of granting interim orders is not to make such a permanent feature. Interim orders are granted to allow the preservation of subject matter pending the hearing of the pending matter by both parties. Timelines for the hearing of an application filed under Certificate of Urgency is to enable an applicant effect service and bring to the attention of a Respondent that there exists an order of the Court and allow such a Respondent to file a response for *inter partes* hearing. When the due date for hearing passes, and the interim orders are not extended, the same laps automatically.

18. The Claimant avers that the Respondent has since been intimidating unionised employees to revoke their membership with the Claimant union. It would be important for the Court to be apprised of such matters to know as to whether there exists changes of membership and whether the check off forms forming the basis of application dated 29th November, 2013 are still the same. To order the Respondent as requested and noting the work changes that are likely to have occurred in the last 25 months would not be in the interests of justice.

19. I also note that the application by the Claimant is supported by the annexed affidavit of Mr Ndege, he avers that;

1. That, I am the claimant/applicant herein and therefore competent to swear this affidavit

20. These averments are factually not correct. The Claimant herein is the *Transport Workers Union* and has never been *Tonny R Ndege*. To move as such, Mr Ndege will be committing perjury and the averment by the respondent, Mr Hussein who seeks that Mr Ndege be called for cross-examination is apparent on the basis of his averments in the supporting affidavit and the same being factually not correct.

21. For the Court to ensure effective justice and that the matter is addressed on its merits and without undue regard to technicalities in terms of the nature of orders sought that cannot issue in this instant case, the application by the Claimant and dated 21st January, 2016 shall not be allowed. Parties shall take hearing dates for the main Claim dated 29th November, 2013.

Application dated 21st January, 2016 is hereby declined. Costs in the cause.

Orders accordingly.

Ruling delivered in open Court at Nairobi at Nairobi this 14th day of December, 2016.

M MBARU JUDGE

In the presence of:

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