



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1273 OF 2014**

**KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS  
UNION....CLAIMANT/APPLICANT**

**VERSUS**

**TUSKER MATTRESSES LIMITED.....  
.....RESPONDENT**

**RULING**

1. The Claimant/Applicant filed a Notice of Motion Application on 17<sup>th</sup> November 2014 under the provisions of Section 12 of the Industrial Court Act, Sections 5 and 6 of the Judicature Act and Article 47 and 50 of the Constitution of Kenya 2010. The motion sought the following orders:
  1. That this Application be certified urgent and be heard *ex parte* in the first instance.
  2. That this application be served upon the contemnors named in the face of the application
  3. That leave be and is hereby granted to the Claimant/Applicant to commence contempt of Court proceedings.
2. The Claimant seeks through this Motion orders of committal for contempt of Court against the Respondent's directors and officers namely Mr. George Kamau, Mr. Anderson Mathai and Mr. Francis N. Kimani for disobeying the Court order issued on 1<sup>st</sup> August 2014 by Marete D. K. Njagi J. The Notice of Motion Application was filed under Section 12 of the Industrial Court Act 2011, Section 5 and 6 of the Judicature Act Cap 8. Laws of Kenya and Article 47 & 50 of the Constitution of Kenya. The application was supported by grounds on the face of it and the affidavit of Mr. Michael O. Oranga sworn on 13<sup>th</sup> November 2014. In the application and supporting affidavit, the Claimant/Applicant averred that the Claimant obtained orders in its favour from the Court on 1<sup>st</sup> August 2014 and served the orders on 1<sup>st</sup> August 2014 upon the Respondent and that the Respondent in defiance of the orders effected the requirement to sign key performance indicators.
3. The Respondent filed a Statement of Grounds of Opposition on 11<sup>th</sup> December 2014. In the Grounds, the Respondent averred that no notice was served on the Hon. Attorney General nor was service of the statement and affidavit served on the Attorney General. Further the Respondent averred that the order was not personally served upon the persons sought to be committed and the Claimant had combined the application for leave with the application for committal. The Respondent held the application to be *ex facie* incurably defective.

4. Parties agreed to argue and oppose the application by way of written submissions. The Claimant filed its written submissions on 6<sup>th</sup> February 2015. In the submissions the Claimant stated that it obtained interim orders restraining the Respondent from forcing employees to sign key performance indicators and performance benchmarks pending hearing and determination of the application filed on 1<sup>st</sup> August 2014. The Claimant submitted that the Respondent acted contrary to the Court orders despite correspondence reminding the Respondent of the orders of the Court. The Claimant notified the Respondent's officials of the intention to commence contempt of court proceedings against the contemnors prior to the initiation of the contempt applications. The Claimant submitted that it had made a full and frank disclosure to the Court in the application before it.
5. The Respondent filed its skeletal submissions on 11<sup>th</sup> February 2015. It submitted that the Notice of Motion dated 13<sup>th</sup> November 2014 was opposed through the Statement of Grounds of Opposition filed by the Respondent on 11<sup>th</sup> February 2015. The Respondent submitted that the jurisdiction for punishment for contempt is through Section 4 of the Employment and Labour Relations Court Act (as renamed through Statute Law (Miscellaneous Amendments) Act 2014 which established the Court pursuant to Article 162(2) as Court of status of the High Court. The power to punish for contempt is under Section 5 of the Judicature Act, cap 8 laws of Kenya. The Respondent relied on the cases of **John Mugo Gachuki v New Nyamakima Co. Ltd [2012] eKLR**, **Andrew Kamau Muchuha v The Ripples Ltd [2001] KLR 75** and **M v S [2008] KLR 271**. Regarding full disclosure the Respondent submitted that the Claimant had concealed the fact that seven of the employees had been served with notices to show cause prior to termination and relied on the case of **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1**. The Respondent submitted that the Claimant should have sought and obtained leave before commencing the application for contempt. The Respondent submitted that the orders for committal for contempt are serious and the rules for contempt of Court applications are not mere procedural technicalities but a matter of substance.
6. What is the law of contempt in Kenya? In Kenya we have recourse to the Judicature Act as a starting point as correctly pointed out by the parties. Section 20(7) of the Industrial Court Act makes provision that anyone who without reasonable cause fails to comply with a Court order under Section 20(4) commits an offence and is liable upon conviction to a fine not exceeding 200,000/- or to imprisonment for a term not exceeding 6 months or to both such fine and imprisonment. That said, the true basis of the law of contempt is Section 5(1) of the Judicature Act Cap. 8 of the Laws of Kenya which provides as follows:-
  - 5.(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts. (underline mine.)
7. This Section applies *mutatis mutandi* to Courts of the status of the High Court established under Article 162 of the Constitution. The Section however, does not prescribe the procedure on how applications for contempt of court are to be made. For procedure we revert to the powers and the procedure of the High Court of Justice in England. The United Kingdom's Contempt of Court Act, 1981, as amended, remains the substantive law of contempt of Court in England. The position obtaining in this jurisdiction is as above in spite of the developments undertaken in the United Kingdom towards greater application of the Civil Procedure Rules in England as opposed to the Rules of the Supreme Court. The procedure adopted in this jurisdiction is that provided for under Order 52 of the Rules of the Supreme Court of the United Kingdom. The rules require that leave shall be obtained prior to the contempt application being made and the application MUST be accompanied by a Statement setting out:
  - i. The name and description of the applicant
  - ii. The name, description and address of the contemnor, and?

iii. The grounds upon which the contemnor's committal is sought?

8. This is the ratio of the dicta of Odunga J. in the case of **Gachuki v New Nyamakima** cited by the Respondent. From the above, it is crystal clear that the application for committal must be accompanied by an affidavit verifying the facts relied upon. The Applicant must give notice of the application for leave not later than the preceding day, in other words, at least one day prior to the making of the application to the Attorney General's Chambers or State Law Office in Kenya. After grant of leave sought, if the Application for committal is not made within the stipulated period after grant of leave, the leave so granted shall lapse automatically. The substantive application, accompanied by a copy of the statement and affidavit in support of the application for permission must be served personally on the contemnor unless the court has dispensed with service to him or if the Court thinks it just to so do.?
9. For contempt committed *ex facie* – in the face of the Court – the superior Courts may of their own motion make an order of committal in relation to a person guilty of contempt of court. No grounds shall be relied on at the hearing of an application for contempt, save for those set out in the statement, or in the application. If the alleged contemnor wishes to give oral evidence on his own behalf, he shall be entitled to do so.
10. In the case before me, there is no notice of the intention to institute contempt of court proceedings. Additionally there is no statement and there is no verifying affidavit. I granted leave to commence contempt proceedings upon hearing the application on 17<sup>th</sup> November 2014. Committal proceedings being quasi criminal in nature attract more stringent requirements than the ordinary civil process. Any party moving the Court to exercise this coercive power must do so on sound basis lest an innocent man be incarcerated or punished for contempt.
11. The Claimant urged the Court not to give undue regard to technicalities and breathe life to the application through Article 159(2)(d) of the Constitution and Section 20(1) of the Industrial Court Act 2011. As stated above, orders for committal for contempt are hardly what can qualify as procedural technicalities that can be cured by Article 159(2)(d) of the Constitution. In light of the fact that no proper application for contempt was presented it would be inappropriate for this Court to commit the alleged contemnors to civil jail or order them to pay a fine. The facts surrounding the alleged contempt have been availed in submissions of the Claimant and are inadequate to be a foundation for the committal of the Respondent's officials. The upshot of the foregoing is that the application is incurably defective and not fit for grant. I dismiss it with costs to the Respondent.

Orders accordingly.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of March 2015**

**Nzioki wa Makau**

**JUDGE**