



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 199 OF 2011

**UNION OF NATIONAL RESEARCH
AND ALLIED INSTITUTES STAFF
OF KENYA (UNRISK).....CLAIMANT/APPLICANT**

VERSUS

**KENYA INDUSTRIAL RESEARCH AND
DEVELOPMENT INSTITUTE (KIRDI).....1ST RESPONDENT
DR. MECHAH C.Z. MOTURI.....2ND RESPONDENT**

RULING

1. The Claimant/Applicant seeks through the Notice of Motion Application dated 29th December 2014 and filed on 14th January 2015 for the following orders:-
 1. That the 1st Respondent attend court in person and show cause why the award delivered on 2nd February 2012 and decree thereof issued on the 12th November 2014 should not be executed.
 2. That the Respondent attend court in person and show cause as to why he cannot be convicted for contempt of Court.
 3. That the 1st Respondent be and is hereby convicted for contempt of court.
 4. That the costs of this application be paid by the Respondent.

The application was supported by grounds on the face of the motion.

2. The application was opposed by the Respondents who filed a Replying Affidavit on 13th February 2015 sworn by the 2nd Respondent on 9th February 2015. He deponed that the application was misplaced and mala fides. He deponed that the application as filed is a misconception of the application for execution by the applicants. He deponed that the decree was issued on 12th

November 2014 and the Claimant/Applicant had moved the Court for contempt without seeking to execute the decree issued and that if the 1st Respondent executes the CBA as drawn the employees would suffer underpayment. He deponed that the Claimant/Applicant was misusing the court process by filing a multiplicity of applications on matters that the Court has already determined.

3. In reply to the Replying Affidavit the Claimant/Applicant filed on 16th March 2015, the Claimant's secretary general deponed that the 1st Respondent is the duly appointed director of the 2nd Respondent and cannot run away from his responsibilities as the chief executive and must be held responsible for the violation of the court order. The deponent deposed that in the replying affidavit the Respondent was trying to raise issues that were not before the Court and therefore were not part of the Court order.
4. The parties consented to urge and oppose the application through written submissions. The Claimant/Applicant filed submissions on 15th April 2015 and the Respondent on 22nd April 2015. The Claimant has reorganized the order of parties in the pleadings. The Claimant refers to the 2nd Respondent as the 1st Respondent and vice versa. To ensure there is consistency, the Court will refer to the parties as they appear in the pleadings filed and not according to the Claimant's altered sequence. I have read the submissions of the Claimant as if references to the 1st Respondent were to the 2nd Respondent and vice versa.
5. The Claimant submitted that the personal attendance of the 2nd Respondent was not mala fides or misplaced as that was consistent with the law requirements for execution of a specific performance order against a juristic person; he being the director of the 1st Respondent. It was submitted that the Respondent's were misleading the Court in respect to the Collective Bargaining Agreement which seeks to cover all the job groups.
6. No supporting affidavit was attached to the Notice of Motion though mention of a supporting affidavit was made in the motion itself as well as the Claimant/Applicant's affidavit in reply to the Respondent's replying affidavit.
7. The Respondent opposed the application and filed a detailed replying affidavit. It is clear from the parties rival positions and the submissions filed that the Claimant has obtained a decree of the Court. In an attempt to have the decree satisfied the Claimant has filed this application. The application seeks committal or punishment of the 2nd Respondent for contempt of Court for disobeying a court order. The law of contempt is well settled in Kenya. In Kenya we have to have recourse to the Judicature Act as a starting point. In addition there are the provisions of Section 20(7) of the Industrial Court Act which provides 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 a term not exceeding 6 months or to both. That said, the true basis of the law of contempt is Section 5 of the Judicature Act Cap. 8 Laws of Kenya. Section 5 of the Judicature Act 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.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court. (underline mine.)

8. To prove contempt, the applicant (accuser or prosecutor) must prove the following four broad elements of contempt:
 - a. That there is in existence of a lawful order,

- b. The person accused of contempt had knowledge of the order
 - c. The person accused of contempt had ability to comply with the order; and finally
 - d. The person accused of contempt failed to comply with the order
9. These ingredients must all be in place. The order must be lawful and the accused person must have had knowledge of the order and failed to comply with the order in spite of having the ability to comply. The proof required is slightly above the balance of probabilities but below proof beyond doubt applicable in criminal cases.
10. The Claimant did not move the Court as contemplated in the law. Indeed it seems the Claimant is out to execute the decree through this application. That surely is not grounds for grant of the order of committal. The Claimant should revisit the execution process as set out by the rules of the Court or the Civil Procedure Rules and accordingly seek to enjoy the fruits of the determination of this Court.
11. The upshot of the foregoing is that the application is devoid of merit and is dismissed with costs to the Respondents.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of **June** 2015

Nzioki wa Makau

JUDGE