REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 364 OF 2015

BETWEEN

HAKIKA TRANSPORT SERVICES LIMITED…….…..
CLAIMANT

VERSUS

KENYA LONG DISTANCE TRUCK DRIVERS & ALLIED WORKERS UNION ……..…..
RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Isaac Onyango Advocate, instructed by Isaac Onyango & Company Advocates for the Claimant

Mr. Martin Tindi Advocate, instructed by Martin Tindi & Company Advocates for the Respondent

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RULING

1. On 8th June 2015, the Court gave an Order, directing among other things, that Employees of the Claimant, who had been locked out prior to 4th June 2015, should have resumed work by 4th June 2015. If there were any Employees who were locked out by the Claimant after 4th June 2015, the Court directed they resume work immediately, on the date of the Order, the 8th June 2015.

2. The Respondent, a Trade Union representing the Employees, complains that the Claimant did not comply with the Order. The Respondent therefore, filed an Application dated 15th June 2015, seeking the following orders:-

a. Hakeem Abdul the Managing Director, and Richard Okwiri the Transport Manager of the Claimant, are cited for contempt of Court for disobeying the Order of 8th June 2015.

b. Hakeem Abdul and Richard Okwiri are arrested and committed to civil jail for 6 months or any other period the Court deems fit.

c. The Claimant is compelled to pay for damages suffered by the Respondent.

3. The Application is supported by the Affidavit of the Respondent's National General Secretary Nicholas Mbugua, sworn on the 15th June 2015. The Respondent cites the Civil Procedure [Amendment No. 2] Rules 2012 Part 81 [application & procedure in relation to contempt of Court], as the law under which the Application is made.

4. The Claimant filed a Notice of Preliminary Objection dated 6th July 2015, arguing that the Court does not have jurisdiction to hear and determine the Application. Transport Manager Richard Okwiri also filed a Replying Affidavit on 7th July 2015. It is not clear when the same was sworn. The second Replying Affidavit was sworn by the Director Abdulhakim Lahmar on the 7th July 2015. Again it is not clear to the Court, if Abdulhakim Lahmar, is the same person named Hakeem Abdul by the Respondent in its Application. The Court directed both the Application for Contempt, and the Preliminary Objection, are argued simultaneously, on the 27th July 2015. The Parties' Advocates addressed the Court on both aspects of the Application, on the 27th July 2015.

Respondent's Position

5. The Respondent, Kenya Long Distance Truck Drivers and Allied Workers Union, submits that the Claimant deliberately refused to comply with the Order given on 8th June 2015. The Respondent adopts the Affidavit sworn by its General Secretary. Employees were not allowed to resume work on the 9th June 2015. On 12thJune 2015, 61 Drivers were locked out. They were told to go and get a remedy from the Trade Union.

6. The Order was served and Affidavit of Service filed in Court. The Advocate for the Claimant was in Court when the Order issued. Service was nonetheless done. Relying on CA of Kenya decision in ***Shimmers Plaza Limited v. National Bank of Kenya Limited [2015] e-KLR***, the Respondent argues that knowledge of the Court Order, supersedes service. As long as a Representative of the Contemnor is present in Court at the time the Order issues, the Contemnor cannot be heard to say he did not know about the Order. The Respondent disputes the assertion in the Replying Affidavits filed by Richard Okwiri and Abdulhakim Lahmar which took issue with service. The Respondent urges the Court to adopt the decision in Industrial Court at Nairobi in the case of ***Teachers Service Commission v. Kenya Union of Teachers & 2 Ors [2012] e-KLR***. The Industrial Court concluded it has the power to punish for contempt under the Judicature Act, and proceeded to impose fines on the Contemnors.

Claimant's Position and Preliminary Objection

7. The Claimant submits it is aware Orders of the Court must be obeyed, and agrees knowledge of the Order by the alleged Contemnor, is sufficient to attract penal consequences in event of non-compliance. The Claimant submits that the Order must be clear and capable of performance. It is submitted the Court must have jurisdiction, to punish for Contempt. The Claimant complied with the Order as extracted, though the Order was ambiguous. No evidence has been supplied by the Respondent, indicating there was violation of the Order.

8. The Employment and Labour Relations Court [formerly Industrial Court], is created pursuant to Article 162 [2] [a] of the Constitution of Kenya. It has the status of the High Court of Kenya. As held in the CA of Kenya at Malindi in ***Karisa Chengo & 2 Ors. v. The Republic [2015] e-KLR,*** status is not the same thing as power. Courts with the status of the High Court, cannot deal with matters reserved for the High Court.

9. The Employment and Labour Relations Court [the Court] derives its mandate from the Employment and Labour Relations Court Act [the Act]. Its jurisdiction is given under Section 12 of the Act. Section 20 grants general powers to the Court.

10. The Respondent's Application is made under the Civil Procedure Amendment Rules. These are only

applicable in so far as Section 5 of the Judicature Act Cap 8 the Laws of Kenya is concerned. The Power to punish for contempt is specifically vested in the High Court and the Court of Appeal, under this law. Article 165 of the Constitution defines the High Court. Section 5 of the Judicature Act grants the High Court and the Court of Appeal, the power to punish for contempt. Section 14 of the repealed Labour Institutions Act No 12 of 2007, granted the former Industrial Court the power to punish for contempt. The repeal left an unfortunate gap, where the current Court cannot punish for contempt. It is not the role of the Court to enact legislation; this role must be exercised by the Legislature.

11. The jurisdiction of the Court cannot be invoked under Section 5 of the Judicature Act. The Claimant argues that the case of the ***TSC v. KNUT*** was decided before the Court of Appeal at Malindi clarified status is not power, in ***Karisa Chengo***.

12. The Claimant proceeds to pose the following question: encountered with this dilemma, what is the Court to do? The Claimant suggests that the Court is not without recourse. Section 20 of the Employment and Labour Relations Court Act makes it an offence to disregard the Orders of the Court. Section 82 of the Labour Relations Act No. 14 of 2007, grants the Court the general power to preside over prosecutions arising out of the violation of any provision of that Act. With all these laws, the Claimant concludes the Court is not disabled.

13. The Respondent has not however, approached the Court in any of the ways suggested under paragraph 12 above. There are no charges. There is no charge sheet. The Civil Procedure Amendment Rules say the Application shall not be made without the permission of the Court. No leave has been sought and issued. The alleged Contemnors must be allowed a fair hearing. These lapses cannot be viewed as procedural technicalities. Article 159 of the Constitution, as observed by the High Court at Nairobi in ***Jane Nasimiyu v. Samuel Kamau [2013] e-KLR,*** is not meant to trash all the requirements of the law.

Claimant's response to the Substantive Application

14. In responding to the substantive issues raised in the contempt Application, the Claimant states the Order as extracted was ambiguous. It did not conform to the Order made by the Court. The Respondent did not specify which Employees were locked out. Did it include Employees sacked 5 years ago? That was not the intention. There was need to be specific.

15. Among the Employees alleged to have been locked out in defiance of the Order issued by the Court were Steven Mwangi, Peter Lidonde, Saidi Mganda, Daniel Koech, Benard Onchiri and Stephen Mulinge. The Claimant attached these Employees' records in the Affidavit of its Director Abdulhakim, showing they were in active duty, and were paid for their work, in days after the 4th June 2015, when they are alleged in the Respondent's annexure 'NM1,' to be among Employees who continued to be locked out.

16. The Claimant submits the Respondent is intent on misusing the Court Process. The Attendance Register does not support the position on the ground, as portrayed by the Respondent. The General Secretary of the Respondent Union was not at work. He has deponed to facts he has no knowledge of. Contempt of Court must be proved beyond reasonable doubt. There was no penal notice at any time, served on the Claimant. The Claimant terms the Application for contempt as comprising nothing more than a circus.

Respondent's Answer to the Claimant's Submissions

17. The Respondent replies that the case of ***Karisa Chengo*** has been misinterpreted. Its import was that the Employment & Labour Relations Court cannot deal with criminal matters. The proper position on the jurisdiction of the Court was laid out in CA at Nairobi in an Appeal involving ***Daniel N. Mugendi v. Kenyatta University & 3 Others [2013] e-KLR***. The Appellate Court upheld the jurisdiction of the Court in dealing with employment and labour relations disputes. The Court must have power to enforce its own decisions. Section 12 of the Employment and Labour Relations Court Act defines the Court's jurisdiction. Section 13 empowers the Court in enforcing its decisions. The Court does not have to look to the High Court to do this. Leave is no longer necessary in seeking to punish Contemnors. If a Party is dissatisfied

with the Orders issued by the Court, the proper recourse is to appeal under Section 27 of the Act. If the Order was in any way ambiguous, the Claimant should have reverted to the Court and sought clarification. The lockout should have ended on 4th June 2015. There is a difference between an Employee being paid a salary, and being reinstated. The jurisdictional challenge is meant to cover up the Claimant's disobedience of a valid Court Order. The Respondent prays the Court to throw out the Preliminary Objection, and allow the Application for contempt, with costs to the Respondent.

Claimant's response to the Respondent's Submissions on the Preliminary Objection

18. Lastly the Claimant submits it does not hold that the Court is helpless; it has pointed out avenues through which the Court can act in punishing Contemnors. There are criminal sanctions. The case of ***Mugendi*** is on status. With regard to jurisdiction, the focus is on the Act creating the Court. Unless Section 5 of the Judicature Act is amended, we remain with the law of contempt as it has been; punishable exclusively by the High Court and the Court of Appeal. The Claimant does not question the jurisdiction of the Court in dealing with employment and labour relations matters. The case of ***Karisa Chengo*** drew the line between status, and power. The Claimant urges the Court to uphold its Submissions, allow the Preliminary Objection, and throw out the Application for contempt, with costs to the Claimant.

Questions raised by the Application

19. ***The first question the Court must deal with is whether it has jurisdiction to punish for Contempt. The second question is whether the Respondent has established a case for contempt of Court. Thirdly, what punishment should be meted out on the Contemnors, if the first two questions are in the affirmative?***

Jurisdiction.

20. It is important, to note from the outset that Superior Courts in Kenya, comprise the Supreme Court; the Court of Appeal; the Employment and Labour Relations Court; the Environment and Land Court; and the High Court. Article 162 of the Constitution which is on the System of Courts defines Superior Courts.

21. Under the common law, Superior Courts were Courts of general competence, with unlimited jurisdiction with regard to civil and criminal jurisdiction. They were not limited in their pecuniary jurisdiction, and entertained appeals from the Lower Courts. In the English System, Superior Courts were the Royal Courts. They had supervisory jurisdiction over baronial and local Courts.

22. The Royal Courts had the power to punish for Contempt of Court. This extended to upholding the authority and dignity of the baronial and lower Courts. Section 5 of the Judicature Act Cap 8 of the Laws of Kenya has its historical foundation in the English legal system.

23. The Judicature Act is an old piece of legislation, with a commencement date of 1st August 1967. The Republic of Kenya was barely 3 years. It is a piece of legislation which must be read with both a pen and a pen-knife, in arguing jurisdiction under the new transformative constitutional era.

24. The Superior Courts in existence under the Act are the Court of Appeal and the High Court. These are supposed to be the equivalent of the Royal Courts with regard to contempt jurisdiction, under the Act. They are vested with the power to punish for contempt. The High Court has the power to punish for contempt occurring in the Lower Courts, and to uphold the Lower Courts' authority and dignity. This System was recognized under the old Constitution of Kenya.

25. The Industrial Court was not recognized as a Court within the Kenyan Judiciary. Those who recognized it as a Court categorized it as a Tribunal or a Subordinate Court. The Court was actually a Court, existing outside of the Judiciary, within a labour dispute settlement mechanism, facilitated by the Ministry of Labour. It was not a Subordinate Court or a Tribunal in the understanding of the legal

structure then in place. It did not exist in the judiciary space. It sat at the top of a dispute settlement structure which involved, and continues to involve, other voluntary and statutory dispute settlement mechanisms. It was after alternative dispute settlement mechanisms were exhausted, that the relevant Minister certified the dispute unresolved, and Parties referred to the Court for adjudication. It was a Court created initially through a tripartite agreement involving the Government, Employers and Labour. It was subsequently established by the Trade Disputes Act Cap 234 the Laws of Kenya, and later re-established by the Labour Institutions Act 2007.

26. Section 17 of the Trade Disputes Act provided that Awards of the Industrial Court were final, and Awards, Decisions or Proceedings would not be questioned or reviewed, and would not be restrained or removed by prohibition, injunction, certiorari or otherwise, either at the instance of the Government or otherwise. Decisions of the Court were to be published in the Kenya Gazette to take effect. The System, created by the Social Partners, was meant to be self-sufficient and not looking to the Judiciary for support, in undertaking the proceedings of the Court, or giving effect to the outcomes of such proceedings.

27. The System was found inherently weak in that the Court did not have coercive powers, to enforce its decisions, or in upholding its authority and dignity. Dissatisfied Parties frequently resorted to the High Court under the Judicial Review Mechanism in challenging decisions of the Court, or in seeking enforcement. The Court was itself named as a Party in such Judicial Review proceedings which did its authority and dignity no good at all. Gradually it was recognized the legal framework under which the Court operated, and related with the Judiciary was deficient. The Court could not punish for contempt under the Trade Disputes Act, let alone enforce through judicial coercion, simple orders issued by it. Although its decisions were final and binding, there were no mechanisms within the Court, to enforce those decisions, and resort to the High Court to fill these gaps, exposed the Court to the characterization of a toothless Subordinate Court or Tribunal.

28. In 2001, the Government of Kenya and the International Labour Organization put up a Task Force, headed by renowned Industrial Court Judge, the late Saeed Cockar, with the mandate to comprehensively review Kenyan Labour Law, to bring it up to International Labour Standards developed by the ILO. The result was the Labour Laws enacted in 2007/ 2008, among them, the Labour Institutions Act 2007.

29. The Industrial Court was re-established under Section 11 of this Act. It was conferred wide and exclusive jurisdiction in employment matters under Section 12. In deciding any matter, the Court was authorized to make any other order it deemed necessary in promoting the purpose and objects of this Act. Under Section 6, it was stated that any decision of the Court, would have the same force and effect, as a Judgment of the High Court. Section 14 importantly, and as Submitted by the Claimant, gave the Court the power to enforce its own decisions. Under sub-section [a] monetary Awards would be enforced through sale and attachment of debtors' assets, while under subsection [b] ***the performance of or non-performance of any act, would be enforceable by contempt proceedings in the Industrial Court.*** Section 12 (12) empowered the Court to judicially review among others, any decision taken, or any act performed by the State, in its capacity as an Employer.

30. The Court was therefore granted the **status** of the High Court, but the lingering problem, was that this elevation, was done through an Act of Parliament, while the Constitution of Kenya establishing the System of Courts, which created the High Court and defined its supervisory jurisdiction, remained unchanged. The intention of the People of Kenya expressed through the Social Partners, to reposition the Industrial Court and give it the status of the High Court was not achieved. Between the year 2008 and 2010, the old doctrinal tension that defined the Industrial Court vis-à-vis the Judiciary, remained. Judicial Review of the decisions of the Industrial Court at the High Court continued. There was no coherence in employment and labour law, particularly on termination of employment, given that disputes in this area were heard and determined in two separate legal systems. It was not that we had two separate Courts, but two separate legal systems whose relationship was ill-defined, and which did not enjoy judicial comity and co-operation.

31. Article 162 [2] of the Constitution adopted in 2010 was aimed at properly repositioning the Industrial Court in the Constitution, to avoid the mischief which the Labour Institutions Act, did not do away with.

This Court is of the view that this Article, is rooted in the history of the Industrial Court, the Environment and Land disputes having been competently dealt with by the High Court, in exercise of its Civil jurisdiction. The debate about 'status' was essentially drawn from the historical question on the positioning of the Industrial Court within the System of Courts. 'Status' in dictionary sources such as Merriam Webster and ***Black's Law Dictionary 9th Edition***, means standing, rank, position, level, or condition to which varying degrees of responsibility, privileges and esteem are attached. ***James Hardley in 'Introduction to Roman Law, 106, [1881]'*** describes 'Status' as the position a Person [read Institution] holds with reference to the rights which are recognized and maintained by law. The word signifies nothing more than the position of a Person or Institution, before the Law. It entered the constitutional lexicon through the question on the standing of the Industrial Court in the Judiciary. It was not just about the standing in the judiciary organogram, but by extension, about what the Court could do, recognized and maintained by the law, which would suggest 'status' was both about hierarchy and jurisdiction. The debate about the position of the Industrial Court has been about its hierarchy and jurisdiction. The two cannot be completely severed as suggested by the Claimant. By drawing in the Environment and Land jurisdiction, and creating the Environment and Land Court, the authors of the Constitution merely added confusion on the working, administration, hierarchy and jurisdiction of Courts. The Environment and Land function has always been discharged by the High Court, under the Civil Procedure Act. The Industrial Court existed outside the Judiciary, with its own procedural law. The creation of the Environment and Land Court as a separate Court from the High Court, and its baptismal as a 'Court of Status' was unnecessary, because the status of the Environment and Land matters had never been in issue. Its creation caused some of the problems which the Court of Appeal grappled with in ***Karisa Chengo.*** The question of 'status' was essentially a question about the 'status' of the Industrial Court.

32. The intention both under the Cockar reforms, and the Constitutional reforms was to have an Industrial Court, with the power to enforce its own decisions and uphold its own authority and dignity. The Cockar reforms continued to form the basis of the Social Partners' inputs in the making of the Constitution of 2010, in particular on the Industrial Court they wished to have. These inputs are indeed powerful expressions of the sovereignty of the People, which is the cornerstone of the Constitution of Kenya 2010. The result is reflected in the adoption of a large number of principles, rights and freedoms codified in the Labour Legislations of 2007/ 2008, in the Constitution. Article 162 [1] therefore includes the Employment and Labour Relations Court as a Superior Court, which under the English System, would be one of the Royal Courts, deriving its power and status from being a Majesty's Court. It ceased to be what would be a baronial or local Court or an Employment Tribunal, with the coming into force of Article 162(1).

33. It is unfortunate that in enacting the Industrial Court Act in 2011, Parliament deemed it necessary not to retain the Court's express power to punish for contempt, under Section 14 of the Labour Institutions Act. This default provides Parties alleged to be Contemnors, with ammunition to develop very attractive arguments, on the jurisdiction of the Court to punish for contempt, thereby delaying or escaping the penal consequences of their behaviour.

34. As the Court is a Superior Court under Article 162 [1] of the Constitution, Section 5 of the Judicature Act must be read in a manner that incorporates the Employment and Labour Relations Court, as a Court that has the mandate to punish for contempt, in upholding its own authority and dignity, and the authority and dignity of the Courts below it, dealing with employment and labour disputes. Section 7 of the 5th Schedule to the Constitution requires that all law, in force immediately before the effective date, continues in force and shall be construed with the alterations, adaptations, qualification and exceptions necessary to bring it in conformity with this Constitution. This is why a pen, and a pen-knife, are required.

35. The Court adopts the decision in ***Teachers Service Commission v. Kenya Union of Teachers,*** that in the absence of the equivalent of Section 14 of the Labour Institutions Act, Section 5 of the Judicature Act must be read to include the so-called Courts of Equal Status. Material jurisdiction of the Court is in the main, given by the Constitution itself to comprise, under Article 162 [2] [a], employment and labour relations matters. Contempt of Court, arising out of an employment and labour relations matter, is an employment and labour relations matter, fully to be dealt with by the Court. The range of matters that are

described under Section 12 [1] of the Employment and Labour Relations Court Act as falling within the jurisdiction of the Court should not be read as an exhaustive check list, of matters to be determined by this Court. Section 12 is carefully worded, to indicate that the matters listed, are inclusive, rather than exclusive. The word used is 'including.' Matters incidental or otherwise related to the matters specified under Section 12, and which relate to employment and labour relations, are to be handled exclusively by the Court. The material jurisdiction of the Court is principally created by the Constitution, not the Act, to cover the entire spectrum of employment and labour relations. All Superior Courts are indeed limited by the Constitution, such that the term a 'Court of Unlimited Jurisdiction' is misleading. This is what the Court understands the Court of Appeal in ***Karisa Chengo*** to be saying. Article 165 [5] limits the High Court, stating that the High Court shall not have jurisdiction in matters reserved for the Supreme Court and Courts contemplated by Article 162 [2]. The High Court cannot therefore be called upon to exercise contempt jurisdiction in matters arising from the proceedings of the Employment and Labour Relations Court. ***Karisa Chengo*** powerfully brought to the fore the history and reasoning behind the constitutional division of judicial labour. These boundaries must be retained and respected. All Courts are constitutionally limited. Courts should not veer from the principles established in ***Karisa Chengo***. The High Court in the recent case of the ***Republic v. the Principal Secretary Agriculture, Livestock and Others ex parte Douglas M. Barasa and 2 Others [2015] e-KLR*** appeared to have reverted to the era before the Constitution of Kenya 2010, arguing that the jurisdiction of the Employment and Labour Relations Court, is limited, particularly in matters of Judicial Review, where Parties are not necessarily the Employer and the Employee. The High Court took a very narrow view of what is an employment dispute and was hardly concerned with the limitation imposed upon it, by Article 165 [5]. The mandate of the Employment and Labour Relations Court must be understood to cover the traditional Tripartite Partners, and the emerging Tripartite-Plus. In this case some farmers have challenged the decision by the Authorities to renew the contract of employment of the CEO of a State Company. The Application was challenged on the basis that it is not within the mandate of the High Court, but that of the Employment and Labour Relations Court. The High Court reasserted its jurisdiction to hear and determine this employment matter. The decision in the respectful view of this Court, ignored the limitation of Superior Courts, prescribed by the Constitution. Employment and Labour legislations enacted before the adoption of the Constitution, are, like the Judicature Act, to be read in conformity with the Constitution, in particular, with regard to the limitation and material jurisdiction conferred on the Courts by the Constitution. The jurisdiction to punish for contempt in an employment and labour relations matter, is in the view of this Court, exercisable by the Court assigned the role of hearing and determining employment and labour relations matters.

36. The Claimant argued the case of ***Karisa Chengo*** out of context. The main issue in the that case was whether a Judge appointed to the Environment and Land Court, could sit in a Criminal Appeal, jointly with a Judge appointed as a High Court Judge. It was never an issue of the Superior Courts' power to enforce their decisions and punish non-compliance. It was about a Judge acting out of the limitations under Chapter 10 of the Constitution. It was a clarification of the Superior Courts' restrictions and powers in exercise of their separate mandates; the need for the Superior Courts to develop independently within the contours drawn by the Constitution; a powerful declaration of the un-constitutionality of liberally moving Judges manning different Superior Courts across these Courts; rather than a call, for one Superior Court to undertake the work of another.

37. To argue that a Superior Court cannot enforce its own decisions, and protect the rule of law, beats the very essence of creating the Institution of the Court. It would take the Court back to where it was under the Trade Disputes Act.

38. Section 3 of the Employment and Labour Relations Court Act gives the Principal Objective of the Act as enabling the Court, to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by the Act. The Court has an obligation to give effect to the Principal Objective. Parties and their Representatives, under subsection 3, shall assist the Court to further that objective, and to that effect, participate in the proceedings of the Court and to ***comply with the directions and orders of the Court.*** The failure to comply cannot be without consequences, imposed from within, and not from, or by use of, other Institutions as argued by the Claimant. Section 13 of the Employment and Labour Relations Court Act, allows the Court to enforce its decisions, in accordance with the Rules of the Court.

Rule 31(2) of the Industrial Court (Procedure) Rules 2010, states that Orders and Decrees of the Court are executed under the same Rules applicable in the High Court. Rules on contempt of Court applicable in the High Court are applied in our proceedings under this Rule. Rule 27 supplements Rule 31, stating that the Court may issue any other Order to meet the ends of justice. There is therefore no lack of enabling provisions of the law, even in the absence of Section 14 of the Labour Institutions Act, through which contempt can be punished.

39. Without the power to punish for contempt, the Court would cease to stand as a Constitutional Authority, as argued by ***Legal Researcher, Ochiel Dudley, in his Article, 'Re-visiting the Koinange-Gachoka Case: Reflections on Contempt of Court in Kenya, under the Constitution of Kenya 2010,' [KLR Law Journal 2015].*** The Author argues that the power to punish for contempt enables the Court to regulate its internal conduct, and safeguard against Contemnors or disruptive intrusions. He argues strongly that the rule of law is a core value in the Preamble to the Constitution and one of the National Values and Principles of Governance under Article 10 of the Constitution. Contempt challenges the supremacy of the law, not just the dignity of the Court. The constitutional underpinning to punish for contempt derives from the elevation of the rule of law as a National Value and Principle. Judicial Authority is an expression of the sovereign power of the People under Article 159 [1] of the Constitution. The Court must observe here that Courts created pursuant to the sovereign power of the people, must not fold their hands, and proclaim an inability to do justice. They must not look to other Courts for protection and enforcement. The Author rightly disagrees with the decision of the High Court sitting in Mombasa in the case of ***Mohammed Saleh Mahdi v. B.M. Ekhuubi, the Senior Resident Magistrate [2014] e-KLR,*** which concluded that the High Court has the exclusive jurisdiction to punish for Contempt.

40. The Court takes the position that the power to punish for contempt should be interpreted as residing not just in the Courts mentioned in the Judicature Act. Section 63 of the Civil Procedure Act allows Magistrates' Court to grant injunctions, and in cases of disobedience to those orders, convict Guilty Parties. Mr. Ochiel's view is that Messrs. Koinange and Gachoka were convicted by the Magistrates' Court, in proper exercise of a civil jurisdiction. Contempt arising in the Lower Courts in exercise of their Criminal Jurisdiction remains punishable by the High Court. Section 28 [4] of the Supreme Court Act grants that Court the express power to punish for contempt. It cannot be that 'Courts of Status' do not have, even a limited or inferred power to punish for contempt.

41. The options provided by the Claimant to the 'Courts of Status,' in its Submissions, are discussed by Mr. Ochiel in his Paper. In short the argument is that disobedience of Court Orders is a statutory offence under various Acts of Parliament, such as those discussed in the Claimant's Submissions. Assuming the Court's hands are tied, and it cannot have resort to the Judicature Act, it could treat the disobedience as an offence falling under one of the Statutes. The first option would be for the Director of Public Prosecutions to act under Article 157 and initiate criminal prosecution. The absurdity in this is that the prosecution would be in the Magistrates' Court, which would essentially mean a Superior Court looks to the Lower Court for enforcement of its own decisions and upholding of its dignity and the rule of law. Secondly it is suggested the 'Courts of Status' could refer cases of contempt to the High Court, for hearing and determination under the Judicature Act. Lastly, it is proposed that the 'Courts of Status' prosecute offences of this nature in the manner befitting full criminal trials.

42. The Court does not see any need to resort to these options in view of its conclusion with regard to its inclusion under Section 5 of the Judicature Act, and in light of the ***Teachers v. KNUT*** decision, all seen in the context of the Constitution of Kenya. The power to punish for contempt cannot be exercised effectively through the criminal procedure, or through other Courts other than the Superior Court where contempt is said to have taken place. To accept the position advanced by the alleged Contemnor, the Claimant herein, would only serve to deprive the Court where contempt is alleged to have taken place, the power to manage its own proceedings. The route proposed by the alleged Contemnor would ensure the Court ceases to stand as a Constitutional Authority.

43. Admittedly the lack of a clear provision such as Section 28 [4] of the Supreme Court Act, Section 14 of the repealed Labour Institutions Act or Section 5 of the Judicature Act, expressly defining the power to punish for contempt with regard to the Employment and Labour Relations Court, is a drawback that has

the potential to weaken the Court in discharge of its mandate. The weaknesses could have been avoided had the Authors of the Industrial Court Act 2011, retained Section 14 of the Labour Institutions Act. There is in general an unsatisfactory state of the law relating to exercise of the contempt jurisdiction as observed by Hon. Justice J.B. Ojwang' in ***Dima v. Arid Lands Resource Exploitation & Development [2005] e-KLR.*** The weaknesses pointed out by the Claimant with respect to the Court's power to try and punish contempt, is a re-statement of this general unsatisfactory state. The Court in ***Dima*** suggested the Attorney- General and the Kenya Law Commission undertake review of contempt law.

44. Thankfully, the Authorities have come up with the Contempt of Court Bill 2013, which under Section 4, grants every Superior Court the power to punish for Contempt of Court taking place in the Superior Court, and punish for Contempt of Court occurring in the Subordinate Courts, upholding their dignity and authority.

45. What is the Court to do before these proposals come to pass? The simple answer is that it must continue to hold onto the conclusion reached in the ***TSC v. KNUT*** case. It must fall back to the Constitution, and give an interpretation of the law, that promotes and protects the rule of law. It must exercise the power to punish for contempt, as an aspect of the sovereign power of the People, which forms the bedrock upon which Judicial Authority rests. Contemnors cannot be allowed to roam free in the corridors of justice. As stated by Willis Hugh Evander in ***'Punishment for Contempt of Court' Indiana Law Journal [1927]: vol. 2: ISS. 4 Article 2 P. 309,*** *'' unless offences of this sort can be punished, they cannot be stopped. And if they cannot be stopped, litigation will have to stop.''* Contemnors make a mockery of the supremacy of the law, and the rule of law, and must therefore be stopped dead in their tracks.

46***. The Court concludes it has jurisdiction to punish Contempt of Court and the Preliminary Objection must therefore collapse***.

<u>The Substantive Application</u>

47. Has the Respondent established that the Claimant has acted in Contempt? The Claimant acknowledges in its Submissions that it is aware of the Order on record. This makes it unnecessary to discuss service, for as demonstrated in a catena of Judicial Authorities cited by the Parties, knowledge of the Order by the alleged Contemnor or his Advocate, is sufficient in determining if Contempt has taken place. It is not disputed the Advocate for the Claimant was in Court at the time the Order issued. Indeed Parties had been before the Conciliator before coming to Court, and the Order of 8th June 2015, confirmed the directives given at Conciliation.

48. The Order is unambiguous. The dispute and the Order relate to a lockout of Employees which is alleged to have taken place within a given period. It is strange that the Claimant says it was unsure if the Order relates to lockout which stretches 5 years back. The specific dispute relates to a specific breach, which is said to have happened within a specific period. It is indeed the Claimant who initiated this Claim, based on a set of facts known to both Parties, upon which this dispute is founded. The Order suffered no ambiguity as given and extracted, and this ground cannot be the reason for non-compliance.

49. The Court ordered *inter alia*:

a. The strike action remains suspended.
b. Any Employee, who had been locked out, prior to 4th June 2015, should have resumed work by 4th June 2015.
c. If there are any Employees who have been locked out after 4th June 2015, they shall resume work with immediate effect today.

These commands of the Court are as clear as daylight, and the Claimant cannot be heard to argue it did not grasp what it was supposed to do, to be compliant.

50. The Respondent's complaint is that 61 Employees were locked out even after the Court gave its Order

on 8th June 2015. Among the Employees said to have been locked out were Stephen Mwangi, Peter Lindonde, Saidi Mganda, Daniel Koech, Benard Onchiri and Stephen Mulinge. The Claimant through the Affidavit of its Director Abdulhakim A. Lahmar was able to show that these Employees worked, and were paid for their services, in days after the Order issued. They cannot therefore be said to have been continuously locked out, in disobedience to the Court Order. Lockout is defined in Section 2 of the Employment Act to mean, the closing of a place of employment, or the suspension of work, or refusal by an Employer to employ any Employees. The Respondent was not able to show the presence of a lockout fitting this description.

51. The Respondent made no attempt to answer this evidence from Lahmar. There were no Affidavits sworn by any of the 61 Employees said to have been locked out, to counter this evidence. The General Secretary in his Affidavit, paragraph 6, gives the case of an Employee, Chepkurui, in support of the Application for contempt. He states that the Employee asked for permission to attend to his sick wife, and was told by Okwiri to go and seek for such permission from the Trade Union. This, according to the Respondent is evidence of Contempt. The particular Employee is not even purported to be in the group which is affected by the lockout. He is in employment. An insult, or other inappropriate conduct by an Employer to an Employee, unrelated to the Order of the Court, cannot be evidence of Contempt of Court. The Advocate for the Respondent submitted that there is a difference between reinstatement and payment of salaries. It was not made clear to the Court why an Employer would have Employees reinstated to the payroll, while keeping them locked out, and of no utility to the Enterprise. The payment of salary even if the Employee is not reinstated and given actual duties, would not denote an intention on the part of the Employer, not to continue to employ. It does not support a case of lockout.

52. As stated by the Court of Appeal in ***Mutitika v. Baharini Farm limited [1985] KLR 229. 234*** as cited in ***TSC v. KNUT,*** the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, as beyond reasonable doubt. The Respondent has not met the standard of proof, whether on the balance of probability, on a standard almost but not exactly as beyond reasonable doubt, or on the standard of beyond reasonable doubt. In short, there is no evidence tabled before the Court that would warrant the jailing of Richard Okwiri and Abdulhakim Lahmar for Contempt of Court. There is no basis for the Respondent to seek damages from the Claimant. The Application has no merit.

53. The Court appreciates the thoroughness and incisiveness of the respective Advocates, in presenting their briefs on the subject of Contempt of Court.

IT IS ORDERED:-

[a] The Application dated 15th June 2015 filed by the Respondent, is dismissed in its totality.

[b] Costs of the Application in the Cause.

[c] Parties to fix the main Claim for hearing.

Dated and delivered at Mombasa this 28th day of September, 2015

James Rika

Judge