



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 338 OF 2014

BETWEEN

KENYA FERRY SERVICES LIMITED.....
CLAIMANT

VERSUS

DOCK WORKERS UNION [FERRY BRANCH] RESPONDENT

1. MUSA HASSAN

MUSA

2. THOMAS TUVA KENGA ALLEGED
CONTEMNORS

RULING

1. The Court made an Award on 22nd May 2015 adjusting the wages of the Respondent's Members, who are Employees of the Claimant. The Claimant and the Respondent consented at the time the Award was delivered, to have the Award implemented with effect from 1st July 2015. The Respondent has come back to Court, through an Application dated 10th August 2015, alleging the Claimant did not implement the Award as ordered. It is sought to have the Claimant's Chief Executive Officer Mr. Musa Hassan Musa, and the Human Resources and Administration Manager Mr. Thomas Tuva Kenga convicted for contempt of Court. The Respondent prays the Court to:-

- a. Fine the Alleged Contemnors Kshs. 2,000,000 for contempt.
- b. Commit the Alleged Contemnors to Civil Jail for a period not exceeding 6 months.
- c. Alternatively the Alleged Contemnors are fined Kshs. 500,000 each.

The Application is supported by the Affidavit of the Respondent's General Secretary Mr. Simon Sang, sworn on the 10th August 2015. It is made under Section 12 of the Industrial Court Act; Rule 31 of the Industrial Court [Procedure] Rules 2010; and Section 5 of the Judicature Act Cap 8 the Laws of Kenya.

2. The Alleged Contemnors both filed Replying Affidavits sworn on the 21st August 2015. The Claimant filed Grounds of Opposition on the 24th August 2015. Parties were heard on 25th August 2015.

3. The Respondent's position is that there is no evidence from the Claimant, to show the Award has been implemented. There is no payroll or payment schedule. The Claimant alleges to have paid, but at the same time, states it needs the approval of the Ministry. The Directors had proposed a 20% pay increment before the Award, and the Budget Speech was read in June 2015. The Claimant must therefore have budgeted

well in advance. There is no reason why the Claimant should disregard the lawful orders made by the Court. Mr. Kenga is properly cited for contempt. He wrote a letter impeding the decision of the Court. There was no meeting between the Parties to discuss implementation as alleged by the Claimant. The Respondent submits an order of the Court cannot be varied outside. The Parties cannot engage outside. The Respondent urges the Court to find the Alleged Contemnors culpable, and convict accordingly.

4. The Claimant replies there is no contempt, and the orders of the Court are being implemented. The 1st Alleged Contemnor invited Trade Union Officials in early June 2015, where he informed them of the Claimant's intention to pay the salary adjustments made in the Award, with arrears for 2013/14, in July 2015. The arrears for 2014/2015 were to be paid by December 2015.

5. The Board of Directors held a special sitting on 24th June 2015 to discuss implementation. The Directors resolved to implement the Award. Arrears of salary at Kshs. 49,914,938 were payable as at 30th June 2015. The Board, taking into consideration the Claimant's financial position, proposed to pay arrears for 2013/14 amounting to Kshs. 25,577,305. This was met from internally generated funds, and paid together with all other increments granted by the Court in the month of July 2015. Errors in computations in cases of certain Employees were noted, and Employees informed these would be rectified in the month of August 2015.

6. The Claimant wrote to the Ministry seeking funding on the balance of Kshs. 24,337,663 with regard to the arrears for period 2014/15. The Ministry concurred on the implementation, while noting it would be difficult to convince Treasury to release the money immediately in light of the Budget Speech having already been delivered. The Ministry offered to have the issue considered in the Supplementary Budget. *This remains the only aspect of the Award which has not been implemented. As for Employees on contract, Heads of Departments are analyzing the work performed, and those Employees doing work of unlimited duration will be absorbed on permanent terms. The understanding of the Company was that the implementation of the Court Award is a process.*

The Court Finds:-

7. The Award issued on 22nd May 2015. The Parties' CBA negotiations broke down in June 2014. The Claim was filed by the Employer, to stave off a strike by the Employees which was intended to further the Employees' position in the stalled CBA. The Court gave Orders which averted the strike at the Ferry, which is an essential facility, and proceeded to hear the dispute on an accelerated basis, culminating in the Award of 22nd May 2015. One would have expected the Award to calm the waters at the Ferry.

8. On delivery of the Award, the Parties agreed the date of full implementation be deferred to 1st July 2015, which was a reasonable agreement, to allow the Claimant mobilize funds internally and from its Parent Ministry. But 4 months later, the Claimant concedes it has not fully implemented the Award. It now argues its understanding was that the Award would be implemented incrementally. This is not acceptable.

9. Orders of the Court are not implemented in halves, unless the Court has allowed they be so implemented, or unless Parties have met and agreed on such a mode of implementation, subsequent to the making of the orders by the Court. This is not the case here. The Claimant has complied partially and has set tentative unilateral date of December 2015, when the balance of the orders of the Court, will be acted upon. In other words, the Claimant has stayed execution of the Award on its own terms, without reference to the Court.

10. The Claimant did not bother to approach the Court, and seek extension of the period within which to implement the remaining aspects of the Award. It has not even engaged the Respondent on extension. It is instead seeking concurrence and approval of the Ministry and suggesting that the Award of the Court was subject to the endorsement of the Executive. It is the high time the Government and its Sub-divisions, realized that orders emanating from the Court are not to be implemented selectively, or at the convenience of the Government and its Organs. The mode and pace of implementation can only be modified through

the Court, or through the agreement of the Parties in or out of Court.

11. The Government seems to think the role of the Court is to stop strikes, emanating from its inability to meet its wage obligations. The Court intervened and ensured the strike action was suspended. It went on to hear the substantive dispute. The Court has done all it could to avert industrial chaos, and ensured essential services are not interrupted. By not implementing the Award in full, the Claimant is inviting back the justification for the strike action. It should not be thought that the role of the Court is to assist the Government run its affairs through injunctions. The Award must be implemented in full to avoid industrial unrest at the Ferry.

12. The Claimant concedes it has not implemented the Award in full. This is the gist of the Replying Affidavits filed by the 2 Alleged Contemnors. They explicitly acknowledge that, the orders of the Court have not been obeyed. Part compliance can only have a mitigating influence on the sentence ultimately handed down on the Contemnors. They allege to have met the Respondent's Officials to discuss implementation. The Respondent denies such a meeting has taken place. It seems the Claimant is engaging with unrecognized collective bargaining agents, which would cast doubt on its willingness to implement the Award fully, in cooperation with the legitimate Union Leaders.

13. The Alleged Contemnors are properly cited for contempt. There is adequate documentation showing the 2 Officers had the greatest responsibility in ensuring compliance. They have neither paid the Employees their dues in full, nor engaged casual or temporary staff on regular terms as directed. The process of implementation was agreed by the Parties to be, by the 1st July 2015. Other processes after this have not had the endorsement of the Court.

14. The Respondent has sought imposition of a multiplicity of sentences on the Contemnors, upon the Court convicting for contempt. One sentence is sufficient.

IT IS ORDERED:-

[a] The Claimant's CEO Mr. Musa Hassan Musa, and the Human Resources and Administration Manager Mr. Thomas Tuva Kenga, are in Contempt of the Decision of the Court made on the 22nd May 2015

[b] They shall serve a jail term of 5 months each.

[c] The sentence is suspended for 1 month during which the Contemnors are at liberty to purge the contempt.

[d] Parties may file Affidavits explaining any changes on the implementation of the Award, between now and the next Court Session.

[e] Mention on 26th October 2015.

[f] The Contemnors are to attend Court in Person on Mention and any subsequent date, until discharged by the Court.

[g] Costs of the application to the Respondent.

Dated and delivered at Mombasa this 25th day of September, 2015.

James Rika

Judge