



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 61 OF 2013

(Originally Nairobi Cause No. 245 of 2013)

KENYA LONG DISTANCE TRUCK DRIVERS

& ALLIED WORKERS UNION

CLAIMANT

v

KYOGA HAULIERS LIMITED

RESPONDENT

RULING

1. On 28 June 2013 this Court pronounced judgment in which Kyoga Hauliers Ltd (Respondent) company was ordered to grant Kenya Long Distance Truck Drivers & Allied Workers Union (Union) recognition and also to deduct and remit to the Union members subscriptions forthwith.
2. On 1 August 2013 the Union filed a motion dated 31 July 2013 under section 13 of the Industrial Court Act, rules 29(4), 31(1) of the Industrial Court (Procedure) Rules, 2010 and other enabling provisions of the law seeking that the Directors of the Respondent be committed to civil jail for six months for failure to comply with the decree issued on 4 July 2013 and costs.
3. When the motion was placed before Court on 23 August 2013, the Court directed that it be heard on 26 September 2013 with liberty to the Respondent to file a reply.
4. On 23 September 2013, a few days before the committal application came up for hearing, the Respondent filed its own application under certificate of urgency seeking the setting aside of the judgment/decreed, stay of execution and grant of leave to defend the Cause. The Court certified the motion urgent and directed that it be heard on 26 September 2013.
5. On 26 September 2013 the Union sought time to respond to the Respondent's motion and the Court gave it time to do so and directed that both applications be heard on 23 October 2013. The Court did not sit on the scheduled date and the matter was next mentioned on 13 November 2013 when the parties informed the Court that they were negotiating. As a result, the hearing of the two applications was adjourned to 13 March 2014.
6. On 13 March 2014 when the applications came up for hearing, none of the parties made mention of the negotiations they had indicated they were going to carry out but instead stated they were ready to argue both applications. In the event, both applications were argued.

The committal motion

7. The Union, on the face of the committal application stated that the Respondent was served with a decree on 5 July 2013 and that it failed to deduct and remit union members' dues or grant the Union recognition.

8. The affidavit in support of the application was sworn by Nicholas Mbugua, the Union's General Secretary and he deposed that the Respondent was served with the decree and annexed an affidavit of service sworn by one Bernard Njoroge Mungai on 5 July 2013.
9. The affidavit further deposed that the deponent visited the Respondent's offices on 25 July 2013 with copies of a recognition agreement for execution but was denied entry. Photos of the deponent taken at the Respondent's gate showing him in discussions with security guards were annexed.
10. The deponent also annexed a copy of a letter dated 4 July 2013 written to the Respondent's Managing Director asking that a recognition agreement be signed on 24 July 2013.
11. The affidavit of service sworn by Benard Njoroge Mungai deposed that he went to the Respondent's premises on 5 July 2013 to serve the decree and found a security guard who took the decree, went inside and returned after about five minutes and informed the deponent that the Respondent's Legal Officer, one Hamadi had accepted the document but declined to endorse his signature on a copy.
12. In submissions, the Union stated that the letter of 4 July 2013 was delivered through G4S. Otherwise the submissions repeated what was deposed to in the affidavits.
13. In reply to the committal application, the Respondent relied on the replying affidavit of Ismail Golan, Respondent's director sworn on 1 October 2013.
14. The deponent deposed that he had confirmed from the Respondent's Legal Officer that no decree was served on 5 July 2013 and also denied receipt of the letter dated 4 July 2013.
15. It was also deposed that the Respondent had not willfully refused to deduct union members' dues and that the Union had not met the threshold of 50% + 1 to be granted recognition.
16. In submissions, Mr. Ngure for the Respondent stated that the contempt proceedings were against a party who was not a party to the proceedings and further that the Respondent was not served with the decree. The Respondent became aware of the decree only when served with the contempt application on 12 August 2013.
17. The deponent further deposed the committal proceedings were against an entity that was not a party to the proceedings. The Respondent had not refused to grant the Union recognition or deduct and remit union dues.

Evaluation of the committal application

18. Two crucial issues arise in regard to the committal application. These are whether the Respondent was served with a copy of the decree and whether the directors of the Respondent are the proper parties to cite for committal. The first issue mainly turns on a finding on facts while the second issue turns on application/interpretation of the law.
19. The facts as to service are disputed. According to the Union, the Respondent was served by a process server called Benard Njoroge Mungai on 5 July 2013. The affidavit of the process server deposes that he gave the decree to a security guard at the Respondent's gate and that the guard went inside and came back after about five minutes and informed him a Legal Officer by the name of Hamadi had accepted the document but refused to endorse a copy thereof.
20. On the side of the Respondent, Ismail Gulam deposes that he confirmed from the said Legal Officer that he was not served with a decree on the stated date. The affidavit of Gulam does not address the fact that a security guard took the decree and went inside. The Legal Officer did not file an affidavit to respond to the depositions on service.
21. The Cause was between the Union and the Respondent, who are juristic persons. The decree was directed to the juristic person to commence deduction of members' union dues and remit the same to the Union and to further grant the Union recognition.
22. A juristic person, as has been said in the past, has no soul to be damned or body to be chastised. A juristic person cannot be sent to gaol.
23. Section 38 of the Civil Procedure Act has empowered the Court to enforce execution of a decree by the arrest and detention of any person in prison or in such manner as the nature of relief granted may require. If it is a money decree, the judgment debtor is entitled to be given an opportunity to show cause.
24. Order 22 rule 28 of the Civil Procedure Rules also envisages enforcement of a decree for specific performance or injunction by ordering the detention of a party against whom a decree has been issued.

25. Disobedience of courts seems to be currently in fashion like *gele* (lady's headgear). If this is left to continue, the Courts could as well down their tools. But that would be the perfect recipe for anarchy and lawlessness. A court whose orders are disobeyed and takes no action cannot be a Court. It would lose its dignity.
26. Considering that Hamadi, Legal Officer who allegedly was given the decree by the security guard and the security guard himself did not depose first hand as to what transpired, the Court on a balance finds as a fact that the Respondent was served with the decree and was aware of the decree as of 5 July 2013.
27. The Court makes no finding as to whether the Respondent was served by G4S with the letter dated 4 July 2013 seeking for a meeting to sign a recognition agreement on 24 July 2013 as no material was placed before it in this regard.
28. Taking into account the foregoing, the Court finds that the Respondent was served and was aware of the decree of this Court but has ignored, failed and or refused to comply with the decree and is therefore in contempt of Court.

The stay of execution/setting aside judgment motion

29. In its application, the Respondent seeks some 9 orders. But substantively there are three orders for consideration, and these are that there be stay of execution of the judgment/decree, the judgment/decree be set aside and the Respondent be granted leave to defend the suit.
30. The grounds stated on the face of the motion are that the Claimant did not serve the Respondent with Summons and Statement of the Claim, the draft Response raises triable issues, Respondent risks to suffer irreparable loss, Union will not be prejudiced and may be compensated with costs. Reliance was also placed on the affidavit of Hamadi Mwazito, the Respondent's Administration Manager/ Legal Clerk.
31. The affidavit as may be material, deposed that the Respondent was not served with Summons and Statement of Claim, there was affidavit of service in the Court file confirming service, no hearing notice was served prior to hearing, no notice of entry of judgment was served and Respondent got to know of the Cause when served with committal application.
32. In submissions, Mr. Ngunjiri more or less repeated the grounds. He submitted that service of summons should only be effected upon a director or secretary of a company.

Evaluation

33. The Court gave a background to this Cause in the judgment delivered on 28 June 2013 but it will recap that background as may be necessary for this evaluation. The Memorandum of Claim was initially filed in Nairobi on 22 February 2013. Together with the Memorandum was a motion under certificate of urgency. The motion was placed before Lady Justice Onyango on the day of filing. It was *ex parte*.
34. The motion was fixed for *inter partes* hearing on 7 March 2013. The Union informed the Court on the date set for *inter partes* hearing that it had not served the application. It further sought that the Cause be transferred to Mombasa. It was transferred to Mombasa and was placed before the Court on 2 April 2013.
35. On this date, I directed the Union to serve a mention notice upon the Respondent and set further mention for 23 April 2013. On 23 April 2013 Mr. Okemwa informed me that the mention notice had been served and an affidavit of service filed. The affidavit of service on record and sworn by Benard Njoroge Mungai deposed that he had served one Abdul but he declined to endorse on the process servers copy. I consequently fixed the Cause for hearing on 27 May 2013 with a direction to the Union to serve a hearing notice.
36. On 27 May 2013, Mr. Kimani for the Union informed me that the Respondent had been served with a hearing notice and an affidavit of service filed. The record bears that an affidavit of service by one Abelozza Mutua was filed on the morning of the hearing. The process server deposed that he had served the Respondent's Legal Clerk after he was summoned by a gateman. The Legal Clerk had refused to sign a copy of the hearing notice.
37. The affidavit of Hamadi Mwazito denied that the said Abelozza served him with a hearing notice.
38. The Court is called upon to determine whether there was valid service in light of the disputed

- depositions. In his affidavit, Hamadi Mwazito has given the Respondent's address as P.O. BOX 82147.
39. The Industrial Court in Mombasa has developed a practice where the Deputy Registrar notifies parties when Causes are coming up for mention or hearing when none of the parties were in attendance or where a Cause has been transferred to it. In this regard, the record bears that the Deputy Registrar notified both the Union and the Respondent (through P.O Box 82147 Mombasa) to attend Court for purposes of mention on 2 April 2013. The notice was sent upon receipt of the file from Industrial Court, Nairobi.
 40. Weighing the different depositions and what is on record the Court is satisfied that the Respondent was aware of the Cause and that the same was coming up for mention on 2 April 2013 and that it was served with mention and hearing notices.
 41. The Court now turns to a discussion on whether the Respondent has made out a case for the setting aside of judgment/decree and grant of leave to defend based on the ground that the draft Response raises triable issues and that it stands to suffer irreparable loss.
 42. The draft Response has raised two main issues, that the Union had failed to prove it had unionisable membership within the Respondent and that it had failed to meet the threshold of 51%.
 43. The dispute between the Union and the Respondent went for conciliation before the County Labour Officer. In his report dated 29 May 2012, the Conciliator found after carrying out an inspection that the Respondent had been duly served with Form S (check-off forms) but declined to effect deductions. He also found the Union had attained 61.38% membership and there was no rival union.
 44. Apart from serving as Conciliator when appointed by the Cabinet Secretary when a trade dispute is reported, Labour Officers have a primary role to play in industrial relations. In many instances where Unions and employers are involved in a dispute, they are the first port of call. This is because of the statutory mandate placed upon them by the Employment Act, the Labour Institutions Act and the Labour Relations Act.
 45. In the course of conciliation, inspection and examination they investigate and make factual findings more readily than even the Court would be able to ascertain through evidence from the dock/documents.
 46. Their findings on fact should not be easily disturbed by the Courts. The County Labour Officer/Conciliator made findings of fact which the Respondent did not agree with. The Respondent had during the conciliation requested to be furnished with list of registered union members to cross check with their payroll. The list was submitted through the check-offs and ultimately the Conciliator made findings of fact.
 47. Article 41 of the Constitution has enshrined the rights of workers to form, join or participate in the activities of a trade union while trade unions have been assured of their rights to organise.
 48. The Respondent appears keen to stop/frustrate its employees and the Union from exercising their constitutionally guaranteed rights by using and abusing the court's process. This cannot be allowed to continue.
 49. The Respondent has not demonstrated that it will suffer any irreparable loss when it deducts union dues from its employees' wages and remits the same to the Union. The deductions are entirely from the employees with no contribution from the employer. The employer simply deducts and remits. It has further failed to demonstrate what it will lose were it to grant the Union recognition.
 50. The Court also needs to observe that the normal principles applicable in grant of stay of execution may not be exactly fit in with decrees issued by the Industrial Court due to the nature of relief/orders emanating from the Court.

Conclusion and Orders

51. The motion by the Claimant succeeds and because the Respondent is a juristic person as earlier mentioned the order that commends itself to the Court is to summon the directors of the Respondent including Mr. Ismail Gulam who described himself as a director of the Respondent to personally appear before this Court on 30 May 2014 to show cause why they/he should not be committed to civil jail for contempt of court.
52. The motion by the Respondent fails and is dismissed.

53.The Union to have costs of both applications.

Delivered, dated and signed in open Court in Mombasa on this 16th day of May 2014.

Radido Stephen

Judge

Appearances

Mr. Kimani instructed by F.N. Kimani & Associates Advocates for Union

Mr. Ngure instructed by Nabhan Swaleh Advocate for Respondent