



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 269 OF 2014

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 3RD DECEMBER, 2014)

ANTONY SIYUYU KISIANG'ANI 1 ST CLAIMANT

DUNCAN WAFULA WEKESA 2ND CLAIMANT

-VERSUS-

NZOIA OUT-GROWERS CO. LTD 1ST RESPONDENT

JOASH WAMANG'OLI 2ND RESPONDENT

ROBERT KIKAI WAMWANJA 3RD RESPONDENT

MULATI WANGA KUYEFWE 1ST INTERESTED PARTY

ERIC LUMUKILE MURUMBA 2ND INTERESTED PARTY

R U L I N G

The application before court is the one dated 5.11.2014. The application is filed through a notice of motion and brought under S. 5 of the Judicature Act, Rule 31(2) of the Industrial Court Procedure Rules 2010 and all other enabling provisions of law.

The applicants seeks orders that:-

1. **This honourable court be pleased to order that the following persons be committed to civil jail for a period of six months for contempt of court:-**
 - i. **Fredrick Ndala, suspended Acting General Manager of the 1st respondent.**
 - ii. **Albert Macho, a Director of the 1st respondent.**
 - iii. **Philemonah Bitonyake, a Director of the 1st respondent**
2. **This honourable court to make any other order as it may deem fit and just to grant.**
3. **The costs of this application be granted to the applicants.**

The application is based on the annexed affidavit of Duncan Wafula Wekesa and on the following grounds:-

(a) That the said Fredrick Ndala, Albert Macho and Philemonah Bitonyake have called for a Special Full Board Meeting of the 1st respondent against the order of this honourable court.

(b) That it is in the interest of justice and fairness that the orders sought herein be granted.

The applicants contend that on 15.10.2013, this court issued orders in the following terms:-

- 1. This application is hereby certified as urgent.**
- 2. This honourable court be pleased to grant leave to Mulati Wanga Kuyefwe and Eric Lumukile Murumba Wambasi to be enjoined as interested parties to this suit.**
- 3. This honourable court hereby grants an order of temporary injunction barring the 1st respondent from holding its Special Full Board Meeting scheduled for 16.10.2014 or any other meeting pending hearing and determination of this application.**
- 4. The OCPD Bungoma South District is hereby ordered to ensure compliance with the orders of this honourable court.**
- 5. Inter partes hearing shall be on 27th October, 2014.**

The persons names Fredrick Ndala in the suspended Ag General Manager of the 1st respondent and Albert Macho and Philemonah Bitonyake are directors of the said respondent. The applicants aver that, in direct contempt of the court order on 4.11.2014, of 15.10.2014, the said Fredrick Ndala, Albert Macho and Philemonah Bitonyake through letters dated 4.11.2014 called for a Special Full Board Meeting of the 1st respondent as per the letters marked **ADWW/2(a) & (b)**. The applicants contends that this action was calculated to put this court in contempt and therefore the contemnors should be punished.

The contemnors Fredrick Ndala, Albert Macho and Philemonah Bitonyake filed a joint replying affidavit on 17.11.2014 opposing this application. Their contention is that they held a Special Full Board Meeting of 1st respondent on 6.11.2014 without knowledge of an order for maintaining the *status quo* to be maintained. They contend that their advocates Mr. Sichangi never informed them that the court had ordered the *status quo* to be maintained and this order was not served on them.

They also aver that leave of the court to institute contempt proceedings was not sought and so the contempt proceedings are a *non – starter*. They therefore ask the court to dismiss this application.

I have considered the averments of all the parties and the submissions filed. The issues for determination by this court are as follows:-

- 1. Whether leave of court has to be sought before contempt proceedings are instituted.**
- 2. Whether the alleged contemnors had knowledge of the court order of 15.10.2013.**
- 3. Whether the contemnors committed any act or omission in contempt of the said order.**
- 4. If yes, what punishment can be meted on the alleged contemnors.**

On the 1st issue, the rules governing contempt of court proceedings in Kenya are found under S. (1) of the Judicature Act which provides that 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.

The law as it stands in England is as enunciated under the Civil Procedure (amendment No. 2) Rules 2012. Part 81 of these rules deal with applications and proceedings in relation to contempt of court.

Rule 81.4 relates to committal for breach of a judgment, order or undertaking. Under these rules, the application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically each alleged act of contempt and be supported by affidavits containing the evidence relied upon.

The Court of Appeal in the case of **Christine Wangari Gachege V Elizabeth Wanjiru Evans & 11 Others** [2014] eKLR discussed the law of contempt as it is now and held that:-

“We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application like the one before us, for committal for contempt relating to breach of this court's order ---”

That is the law as restated and I rely on it wholly and I find that the application before me is not a non – starter for the applicants not having sought leave of the court to institute this application. Leave of court is no longer required and I find the application is competent and rightly before this court.

On 15.10.2013, the applicants came before this court *ex parte* and were granted orders in terms of prayers 1, 2, 3, & 7, the nature of which are that:-

- 1. This application is hereby certified urgent.**
- 2. This honourable court be pleased to grant leave to Mulati Wanga Kuyefwe and Erick Lumukile Murumba Wambasi to be enjoined as interested parties to this suit.**
- 3. This honourable court hereby grant an order of temporary injunction barring the 1st respondent from holding it's Special Full Board Meeting scheduled for 16.10.2014 or any other meeting pending hearing and determination of this application.**
- 4. The OCPD Bungoma South District is hereby ordered to ensure compliance with the orders of this court.**
- 5. Inter parties hearing shall be on the 27th October 2014.**

On 27.10.2014, when the matter came up for hearing at 9 am, the 2nd and 3rd respondents were present. There was no advocate for the 1st respondent. The court ordered that advocates who had filed notice of appointment for 1st respondent i.e Kraido & Co. Advocates be served with the order of the court and be ordered to appear in court on 30.10.2014. The *status quo* was also ordered maintained.

At 10.30 am, Mr. Sichangi now appeared stating he is on record for the 1st respondent. Counsel for applicant Mr. Ouma was also present. The court directed that the issue of representation by counsels be clarified and the matter should proceed for hearing on 13.11.2014. The court also ordered the *status quo* maintained in the presence of Mr. Sichangi who was on record stating he is for the 1st respondent.

On 13.11.2014, the issue of contempt of this court's order were brought to the court's attention. Several other application had been filed in the intervening period but the court directed that the application dated 5.11.2014 be disposed of first.

The question is whether the alleged contemnors had knowledge of the court order dated 15.10.2014. From the record of the court, the contemnors were served with this order on 16.10.2014. From the affidavit of the process server Patrick Simiyu dated 16.10.2014, the process server proceeded to the 1st respondent premises on 16.10.2014 at 9 am and was directed to serve the same upon J. W. Sichangi & Co. Advocates. Service was received by Sichangi & Co. Advocates who received the order, and motion and annexures under protest indicating that the meeting had already taken place.

The fact that Mr. Sichangi had been instructed is evidenced by his attendance in court on 27.10.2014 and on subsequent occasions. Despite Mr. Sichangi's assertion that the meeting had taken place already, this is not true because on 6.11.2014 is when the meeting took place and present were the alleged contemnors and Mr. Sichangi, their counsel. The minutes are those dated 6.11.2014 marked **FN, AM, PB 1**. They are signed by Christopher Sifuna and Fredrick Ndala on the same day.

The counsel for alleged contemnors attended court all the time. As an officer of the court, he was aware that the court had made the orders stopping the meetings of 1st respondent. The alleged contemnors cannot allege ignorance of the said orders. The fact that some of them were served is clear and it is this court's finding that they were aware of this court's orders and ignored them.

Did they commit or omit to do any act in contempt of this court's order of 15.10.2014. The answer is evidenced from the minutes of the meeting held on 6.11.2014 on the file. This was in total disregard of

the court order and is contemptuous and any acts or omission committed against the order of this court are all null and void.

As stated in the law and has from time to time been restated by the honourable courts, court orders are not mere papers. They ought to be obeyed. This court in its ruling on the Petition No. 286/2014 **Nelco Masanya Sagwe & Anor V County Secretary, Kisumu County Y Others** reiterated that court orders must be obeyed however unpalatable they may seem and the court has a duty to uphold the dignity and integrity of the court and the rule of law. I will not hesitate to punish where the court is treated contemptuously.

In the **Teachers Service Commission V The Kenya National Union of Teachers & 2 Others Case – Nrb Ind. Court Pet. No. 23 of 2013** the learned Judge **Ndolo J** pronounced herself correctly on this issue and stated that:-

“ A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with ---”

I do agree with the sentiments and findings of the learned judge.

It is therefore this court's finding that the persons named as contemnors i.e **Fredrick Ndala, Albert Macho** and **Philemonah Bitonyake** are all guilty of contempt of court and I accordingly cite them as such. Counsel for the contemnors Mr. Sichangi though not named as a contemnor is equally guilty being an officer of this court and who was present when the order was given but who went ahead and not only misadvised his clients but also attended the meeting with the contemnors in total disregard of this court's orders.

HELLEN S. WASILWA

JUDGE

3/12/2014

Appearances:-

Asuna h/b Owino for Edwin for applicants present

Kraido & Sichangi for 1st respondent present

Yogo for 2nd and 3rd respondents present

CC. Wamache