



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1641 OF 2012

BENARD NYANYUKI NYAKINA AND

301 OTHERSCLAIMANTS

VERSUS

POLYSACK LIMITED RESPONDENT

RULING

1. This is an application dated 10th December 2012 brought by Notice of Motion under Section 16 of the Industrial Court Act, and Rule 32 of the Industrial Court (Procedure) Rules. The application was see for stay of the orders issued on the 26th November 2012 and/or any further and/or consequential proceedings pending the hearing and determination of the application and the main prayer was for the court to vary/review and/or set aside its orders herein issued on the 26th November 2012 in there entirety and that pending the hearing of the application, all the 69 employee of the applicant/respondent herein who were summarily dismissed from duty be restrained from in any way assessing, entering upon and from any manner interfering with the applicant business and welfare in any way whatsoever.
2. The application was opposed by the claimant in their Grounds of Objection dated 17th December 2012 noting that the court had no jurisdiction as matters herein are *factus officio* the court having punished the contemnor for contempt and that the 69 claimants have resumed their duties, the contemnor has not purged the contempt and has failed to pay all the claimants dues salaries.
3. The applicants base their application on the Affidavit of Diamond Nurani Lalji and on the grounds that there is an industrial dispute herein between the parties which culminated into the filing of the application for contempt dated 6th November 2012 and that this application was based on untrue and unsubstantiated allegations that the Managing Director of the Applicant/Employer was in breach of court orders dated the 20th of September 2012 and 5th November 2012. It was argued that the employer had dismissed 69 employees despite firm orders to the contrary and that the 69 employees were summarily dismissed on 19th September 2012 after notices were put up on the employer's premises citing the 69 employees' refusal to commence duties after engaging in an unlawful strike.
4. Further grounds are that despite incessant warning and demands on the part of the employer directed to the employees to resume their duties as sanctioned by the District Labour Officer, Thika, the 69 employees were defiant prompting the employer to put up notices summarily dismissing them from duty on the 19th of September 2012. That when the claimants came to court

- on 20th September 2012 they had already been summarily dismissed the previous day and hence there were manifest misrepresentation and misapplication of the law relating to contempt by the very nature of the retrospective application of the orders of this court.
5. That there can never be contempt in anticipation of court orders as is the scenario herein thus it would be prudent and fair that the orders dated 26th October 2012 be set aside. That the contempt order was never served upon the employer and the court finding contempt was in error of the law. That despite the said orders now contested, the employer has granted the employees summarily dismissed to unconditional access the premises despite their disruptive character, intimidation and harassment towards the rest of the workforce doing their duties. That the danger imminent is that the 69 employees may re-enter the employer premises and commit acts that shall be detrimental to the employer hence the application for orders of stay and injunction to preserve the status quo pending the hearing.
 6. In the Supporting Affidavit, Diamond Lalji Norani states that the employer engages their employees on a 6 months contract basis renewable upon expiry depending on the availability of work at any given time. That in July 2012 the respondent company received correspondent from the workers representatives citing grievances for which they sought to be addressed and sent to the employer on 20th July 2012 enumerating these grievances. This was taken by the respondent Human Resource Department and the Shop steward of the Kenya Chemical and allied Workers Union. On 25th July 2012 the management responded to the employees substantially addressing all the grievances. On 30th July 2012, another letter was given to management noted as a 'reminder' noting that the management had ignored the grievances as contained in the earlier letter. This letter had a 7 days ultimatum to the respondent to address the raised grievances by the 'polysack workers' failure to which they would paralyse operations from 16th August 2012.
 7. That in August 2012 the respondent put up a notice at their premises advising workers that they would close for 4 days starting on 4/5th August 2012 as a normal company practice and policy where during periods of surplus production; lack of orders and accumulations of stock, the employees would be notified in advance of the intention to close down the business albeit for a limited duration of time. subsequent on 7th August 2012 the employees downed their tools on the basis that their grievances had not been addressed and the management sought the intervention of the District Labour Officer, Thika who advised them to convene a meeting on 8th August 2012 and also to put up a notice advising the employees to return to work and await the outcome of this meeting. That despite the notice as advice by the Labour Officer, the employees refused to return to work.
 8. That the District Labour Officer, Thika called for another meeting with a representative of the employees and the respondent where new demands were raised different from the ones tabled on 8th August 2012 where the employees proposed to introduce new contracts with better terms and more comprehensive which they adamantly wanted signed to be able to return to work. That at the meeting a representative of 'Polysack workers' complained that an employee called Samuel Masese should be removed from his position and that he should not hold any position at the respondent company. That while the meeting was ongoing, some workers held a demonstration outside to intimidate, harass and cause threats.
 9. That on 8th August 2012 the management and the representatives of workers executed a 'return to work formula' at 5.30pm before the District labour Officer while the workers converged outside the company premises awaiting the meeting outcome but failed to attend to their duties which caused the Labour Officer to advice the workers representatives that they must meet their end of the bargain to the return to work formula otherwise they risked facing the consequences. That at 6.30pm management met workers at the company premises and read out the return to work formula agreement but they refused to resume their duties and demanded to have new demands addressed which was agreed was to be settled by the District Labour officer the following day.
 10. That on 9th August 2012 the workers converged at the company premises in defiance to the return to work formula and the District Labour Officer had to be called in. that new grievances emerged with a demand of 40% salary advance contrary to company practice and policy which required salary advance on the basis of a 20-25% basis and which was at the discretion of the employer.
 11. That on 11th August 2012, the Wages Clerk Josephine Wanjiku was confronted by an Assistant

Shop Steward, Harun Ongori who issued threats to the effect that if she did not abide by the demands of 40% salary advance she would face dire consequences. However she did a notice that salary advances would follow the company policy on a 20-25% which was disbursed to respective employees accounts.

12. On 18th September 2012 the company management was informed of a planned illegal strike by the workers causing them to schedule a meeting with workers representatives. On 19th September 2012 the workers staged a demonstration by converging at the reception demanding to be addressed by the Financial Controller on the grounds of salary advance and the District Labour Officer advice management to issue a memo directing all workers in shift A to return to work within 2 hours as theirs was an illegal strike, and that those who failed to return to work would be summarily dismissed from their respective duties; which notice was issued and copied to the District Labour Officer and the workers Union.
13. Following this notice, 42 employees returned to work and the 69 who failed to resume duty stood summarily dismissed and a memo was issued enlisting the 69 so dismissed. Effectively by 19th September 2012, 69 employees who failed to return to work were no longer the employees of the respondent.
14. That on 13th September 2012 the workers had filed an application in court which was scheduled for hearing on 20th September 2012 where they sought injunctive orders. On 20th September 2012 this application was heard inter parties and order issued on 25th September 2012 restraining the respondent from forcing the claimants to execute and/or entering any temporary employment contract which Order was served on the respondent on 25th September 2012, which order the respondent obeyed. However the dismissed employees resorting to barricading and blocking the respondent factory gate and threatening other employees, customers and persons seeking employment from the factory supportably acting on the strength of the court order which had not addressed their reinstatement but meant to intimidate the respondent and its employees.
15. On this basis, the claimant failed to inform the court that by the time they came to court and the orders dated 25th September were issued, they had already been dismissed by the respondent and hence this order should be set aside.
16. That on 5th October 2012 an order was issued directing the respondent not to force the claimants from signing temporary contracts and that the claimants should stop blocking and barricading the respondent company gates, threatening, intimidating and using actual physical harm against employees, customers and job seekers of the respondent and from trespassing into the respondent property and premises.
17. On 6th November 2012, the claimant filed an application for contempt claiming that the Mr. Diamond Lalji had disobeyed a court order dated 20th September 2012 and the one dated 5th September 2012, which orders he now contests were never served upon him personally and that the alleged process server Peter Muindi Keli is unknown to him and that he has never met him. That the orders alleged to have been disobeyed were that the respondent had dismissed the employees, which was not correct as the dismissals had been effected on 19th September 2012, upon the advice of the District Labour Officer. That this matter was in court on 20th September 2012 and the orders issued herein were after the said dismissals and thus the application for contempt was based on falsehoods and deceit claiming that termination was done on 6th October 2012 and the order was only served upon the respondent advocate then (FKE) on 25th September 2012 a time after the summary dismissals had taken effect.
18. That in essence no order of the court could have been issued in anticipation as the summary dismissals took place on 19th September 2012 before the order alleged to have been disobeyed on 5th October 2012. That even in a scenario where the orders dated 20th September 2012 may have been served the same could not take effect as they could not be enforced by way of contempt.
19. That as a result to the foregoing the court found Mr. Diamond Laji guilty of contempt and ordered to pay Kshs.20, 0000.00 or face 3 months imprisonment. That this finding was in disregard of the fact that he had not been served with any court orders that he failed to obey and that for this court to make its determinations it must balance between the interests of employees as well as legitimate interests of employers and thus being aggrieved by the orders of this court to find him in contempt seek a review since there is a manifest error and misapprehension of the law. That employers are

- also entitled to fair labour practices as per the letter and spirit of Article 41 of the Constitution and that it would be fair for this court to review its orders herein in the interests of justice.
20. On jurisdiction of the court to hear this application, I note the inherent powers of this court where the Constitution confers wide jurisdiction on this Court in relation to the interpretation of the Bill of Rights where Article 41 of the Constitution and matters relating to labour relations. These matters are also outlined by various statutes as passed by the legislature apart from matters that are exclusively within the exclusive jurisdiction of the Supreme Court. Legislation further gives this Court more powers as well as the residual or inherent jurisdiction conferred under Article 165 (5) of the Constitution. In this respect this Court may hear all matters that are not excluded from its jurisdiction by the Constitution or by legislation.
21. The application before this court relate to setting aside orders of this court as well as a prayer seeking this court to review its own orders. These are matters that are within the inherent jurisdiction of this court to determine as under Section 26 of the Labour Institutions Act as read together with Industrial Court Act, Section 16.
22. Therefore, the objections raised herein lack good grounding and will be dismissed. This court has the powers to review or set aside its orders.
23. A Court can review a judgement where a new and important matter of evidence is produced that was not possible to be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. Therefore the criteria for the court to apply in an application for review are;
- Discovery of new and important matter or evidence;
- There is an error or Mistake apparent on the face of the record; or
- For any other sufficient reason.
24. The Court reading of these principles that apply in an application for review only apply where the aggrieved party has not preferred an appeal as a good ground for appeal is not necessarily a good ground for review. In an application for review, the error or omission must be self evident and it is not sufficient to say neither that the Court would have taken another view nor that the judge proceeded on an incorrect exposition of the law and therefore reached an erroneous conclusion of the law. Therefore a misconstruction of the law or other provisions of the law is not a good reason for a review.
25. Looking at the history of this matter, there are several orders that were issued in quick succession culminating in the order that the respondent now seeks to be reviewed being the one issued on the 26th of November 2012. This order was issued following the alleged disobedience of the orders issued on 20th September 2012 and 5th of October 2012. These two applications were consolidated and heard together on 1st October 2012.
26. It is evident from these proceedings that this matter while ongoing for hearing of various applications under Certificate of Urgency was also being resolved by the District Labour Officer, Thika. These concurrent processes should have been complimentary as they serve a very specific constituency and purpose in the labour economy in Kenya. Unfortunately, the parties herein seem to have used these two processes independently and only when either served their particular purpose. This has resulted in this court issuing several orders even before the previous order was enforced or given time for enforcement.
27. A good example is the orders subject of this review. I note the order dated 25th of September 2012, was issued on 20th September 2012 and therefore could not have taken effect before the official seal on the date the Court Registrar signed it. Equally the orders granted on 5th October 2012 were only signed by the Registrar on 11th October 2012. So any contempt proceedings regarding these two orders could only issue after the date they were signed being 25th September and 11th October 2012 respectively. Hence the affidavit of service indicating that the respondent officer Diamond Lalji was personally served with these orders on dates before the above stated dates and hence in contempt of these orders cannot stand.
28. These are matters of fact that should have been clearly presented before the court when the parties

- herein attended court that lead to the ruling dated 26th November 2012. These are matters that upon being established, a court has good reasons to review its orders.
29. Upon the court finding that a party is in contempt, the court on the face of it must issue a sanction for the violation. It is left to the court to determine the appropriate relief and or sanction that is appropriate in any particular case. An Appropriate sanction or relief is in essence must be a relief that is required to protect and enforce the constitutional authority of the Court. Depending on the circumstance of each particular case the sanction or relief may be a cash deposit, imprisonment, warning or any other sanction as may be required to ensure that the directions of the court are followed and the rights of each party respected.
30. As cited by the Claimant herein in the case of *Trust Bank limited versus Shanzu Villas limited & 3 Others, Civil Case No. 875 of 2001*, this case related to contempt in the face of the court as against the current case where the respondent was cited for contempt and has challenged service of the court orders. In this case where service of a court document is challenged in a matter that has a sanction of a penal nature, it must be established that such a party was personally served. For purposes of this court proceedings on matters of contempt the same must comply with Rule 24 (3) thus;

(3) The Court shall not be bound by rules of evidence under the Evidence Act; provided in criminal cases and in proceedings relating to contempt of the Court this sub-rule shall not apply but the Court will be bound by any written law applicable in Kenya.

31. These provisions of the law and the Rules of this Court are important to note as contempt proceedings are in themselves akin to criminal proceedings. A person may be sent to prison thereby lose his liberty for that offence and therefore should ensure that the ends of justice are achieved. This being a civil case and the orders being sought are of a criminal nature; the correct procedure must therefore be followed in bringing the application for contempt.
32. As cited by the Respondent herein in the case of *Margaret Ogweno okoth verus Gabriel Onyango Wade et al, HCCC No. 44 of 2003*, the court must not be left speculating on matters of contempt. The issues must be clear on the materials presented before court that indeed the facts set out establish contempt to the required standard.
33. Therefore the orders granted by the court must be clear and unambiguous for purposes of enforcement. The need for a further interpretation of the various orders issued herein arose but this seems not to have been addressed. This is indicative of the fact that there was need for clarity, removal of doubts and this has now resulted in the current application for review.
34. I note the claimants admit that indeed the respondent has been able to comply with some orders especially the return to work of some of the dismissed employees and to the claimants; the only outstanding issues are the unpaid dues to the employees. On the other hand, the respondent contest that in an effort to comply with the various orders of the court they indeed was able to return to work the dismissed employees.
35. I find these were genuine efforts on the part of the respondent to seek compliance with the court directives as they immediately sought to have the orders herein set aside and or reviewed.

On the above analysis, I note the objections by the claimants stand dismissed and there being no replying affidavit contesting the grounds raised in the respondent application direct as follows;

- a. **the respondent has substantively complied with the orders of this court issued on 26th November 2012 and it is only fair and just that the employees granted lee way to unconditionally access their premises be maintained subject to keeping the peace pending the hearing of the main course unless otherwise restrained for any other lawful course;**
- b. **The contempt proceedings, subsequent orders and sanctions herein are hereby set aside;**
- c. **The hearing of the main suit should proceed on merit to determine all the pending issues herein.**
- d. **Costs in the cause.**

Delivered in open Court and dated this 2nd day of July 2013.

M. Mbaru

Judge

In the presence of

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