



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1641 of 2012

BENARD NYANYUKI NYAKINA AND 301 OTHERSAPPLICANTS/CLAIMANTS

VERSUS

POLYSACK LIMITED.....RESPONDENT

RULING

The application before Court is the Notice of Motion dated 6th November 2012. The application is filed under certificate of urgency by the Applicant/Claimants herein through the firm of Njau & Mageto Advocates. The application is brought under S.14 of the Labour Institutions Act 2007, Section 12 and 13 of the Industrial Court Act 2011, Section 5 of the Judicature Act and all the enabling provisions of Law.

The Applicants seek orders that

- 1. That this Honourable Court do cite Diamond Lalji, the Managing Director for contempt of Court orders made on 20th September 2012 and 5th October 2012 and he be committed to jail for Six months or such other period that this Honourable Court deems fit and/or until they purge the contempt and such further orders be made as may seem just to the Court.***
- 2. The Contemnors do purge the contempt by reinstating the 69 Claimants who were victimized and unlawfully dismissed on 19th October, 2012 when this case was pending in Court to their workplace, pay them all their salary earned from 19th September 2012 until reinstatement, 4 days salary for all Claimants for the month of July 2012 and 14 days salary for the period between 19th September 2012 and 5th October 2012 in respect to 233 of the Claimants who have been working.***
- 3. The Officer Commanding Kilimani Police Station Nairobi do execute the Orders herein.***
- 4. The Cost of this application be borne by the Contemptors.***

The application is grounded on the following grounds and on the annexed affidavit of Benard Nyanjuki Nyakina;-

- 1. The Applicants filed this cause on 13th September 2012 and although brought under certificate of urgency, it was directed to be heard interpartes on 20th September 2012.***
- 2. The application dated 13th September 2012 was duly served upon the Respondent Company on 18th September 2012.***

3. *On 20th September 2012, when both the Applicants and the Respondent were present in Court, the honourable Court gave an interim order dated the same day restraining the respondent from dismissing the applicants from their employment and forcing the applicants to sign employment temporary contracts and the Applicant's Application dated 13th September 2012, was fixed for hearing inter partes on 9th October 2012.*

4. *Meanwhile the Respondent filed an application seeking to vacate the orders given on 20th September 2012 and the two application were consolidated and heard together on 1st October 2012.*

5. *On 5th October 2012, the Honourable court delivered ruling in which it ordered the respondent not to dismiss the Applicants from employment or order the applicants to sign new temporary employment contracts and further that the Claimants not willing to work were restrained from barricading the respondent's gate and the parties were therefore ordered to maintain industrial peace.*

The Applicant told Court that this court had made orders on 20th September 2012 and the same orders were confirmed on 5th October 2012. The orders were served upon the Respondents but the same have not been complied with. The Applicants aver that the Court had made a finding that the workers the Respondent had presumably terminated should resume duty. Another issue was the signing of temporary contracts with another company which the Court also found that the workers could not sign at the time. The 69 workers who were said to be barricading the factory were ordered to desist from doing the same. The Applicants also contend that some workers who were continuing with work did not receive their pay from 18th September 2012 up to a day in October and the 69 who were to go back to work have not been allowed back and they were not paid their salary. The Applicants contends that this is in clear contempt of this Courts order. They also argue that the Affidavit on the file has not made by the contemtor and the deponent is a total stranger to this case.

In relation to the replying affidavit made by the Respondents the Claimants contend that it does not answer to the application. They also argue that payments purportedly made to Thika Labour Office are a clear contempt of this Court's orders as the respondents are proceeding on the presumption that the said workers have already been dismissed and should be paid their terminal benefits. They also aver that failure by the contemtor from attending Court when he has been served is not explained and is contemptuous. They urged Court to issue a warrant of arrest against the contemtor Mr. Diamond Lalji and also deny the Respondents audience until they comply with orders issued by court.

In reply to the Application the Respondent contend that the ruling delivered by Court resolved that the issue of dismissal be resolved the main suit. That the ruling did not indicate the status of the workers deemed to have been dismissed. The Respondents indicate that in relation to the 69 employees dismissed the Respondents computed their pay and deposited it with the labour office. As to payments not being made to various employees the Respondents contends that the employees are paid depending on the number of days actually work. The Respondents also indicate that the affidavit of service of this application, does not show that Mr. Diamond was actually served. They argue that the application should be dismissed as it is unwarranted.

The Applicants in reply contend that the orders given by Court are very clear and need no interpretation. That the Court had indicated that the people allegedly "**dismissed should**" go back to work. They urge the Court to cite the contemnor for contempt and send him to jail for 6 months and compensate the Claimants accordingly.

Having heard submissions of the parties let me first examine the law of contempt. According to Black's Law dictionary contempt of court is:

"[A] disregard of or disobedience to the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the secret due to such a body"

Any act which therefore brings the standing of court lower due to the disobedience of its orders is contemptuous. That act may be believed legitimate by the perpetrator given a set of prevailing circumstances, however if it is at variance to an order of court, then it still remains contemptuous.

This were the circumstances in the case of **Kenya Tea Growers Association Vs Francis Atwoli & 5 Others [2012] Eklr the court**, whereby Honorable J Lenaola, while citing the case of **Clarke and Others Vs Chadburn & Others [1985] 1 All E.R. (PC) 211**, observed as follows;

“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Willful disobedience to an order of the Court is punishable as a contempt of Court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of Court for doing what they did, nevertheless those acts were validly done ... but the legal consequences of what has been done in breach of the Law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them ... even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.” (Emphasis added)

In deciding whether the respondent disobeyed this court order, I will determine the following:

1. Whether he was served for this order
2. Whether the Respondent disregarded this court order and therefore holds the court in contempt

To answer this question, I will refer to this court’s ruling dated 5th October 2012. In this ruling at page 6, this Court made a finding that workers could not be dismissed through a general notice placed on a notice board. This Court indicated that if the Respondents feel they had good reasons for their action of purporting to dismiss such workers then, the whole issue of legality or otherwise of such action would be resolved in the main suit. The orders clearly indicated that the action of the Respondent begged certain questions to be advanced in the main suit.

The Court then ordered as follows

- “1.
2. ***The Claimants do resume duty at the Respondents premises with immediate effect***
3.
4. ***The parties are ordered to maintain industrial peace pending the hearing and determination of this suit”.***

I do not understand what interpretation this ruling needs when it is clear that an order was made that the Claimants should resume duty immediately. The Respondents in clear contempt of this Courts order have purported to dismiss the said workers by sending their terminal benefits to the Thika Labour Office. The letters annexed to this application as BNN 6 attests to this contempt. The other mischief of the Respondent is to treat the workers they had purportedly dismissed as though dismissed when the Court made a finding that they could not purport to dismiss them through a general notice pinned on a notice board. The pay slips attached to the application and marked BNNY also show payments to several workers also the pay slips indicating that there were absent days ranging from 12 to 16 days for the workers whose pay slips are annexed. This is from the month of October 2012 when the said workers were expected to be on duty.

The Affidavit of service of this Application show that the Respondent Diamond Lalji was served but

declined to sign the suit papers. Also in clear contempt of this Court orders, the replying affidavit the Respondent is relying upon is not sworn by the Respondent Diamond Lalji but the Human Resource Manager of the Respondent. The said affidavit does not indicate that the respondent Mr. Lalji was never served nor deny the contents of the affidavit of service sworn by the process server. The process server indicates that he personally met the respondent and served him with the application and penal notice but the respondent declined to sign nor stamp on the documents. I indeed find that the respondent Mr. Diamond was served but opted to act through his advocates who actually appeared in court on his behalf and indicated that they had instructions to proceed. The issue of the respondent not being served does not arise.

I accordingly make a finding that indeed the Respondent Diamond Lalji is in contempt of this court's orders and he is hereby cited for contempt.

Dated signed and delivered this 26th day of November 2012

HELLEN WASILWA

JUDGE