



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 223 OF 2019

KENYA NATIONAL UNION OF NURSESPETITIONER

AND

THE CABINET SECRETARY FOR EAST AFRICA COMMUNITY

LABOUR AND SOCIAL PROTECTION..... RESPONDENT

RULING

1. The claimant brought this suit under certificate of urgency on 5.4.2019 seeking the following reliefs:

a. An order compelling the Respondent to issue a gazette Notice authorizing the AIC Kijabe Mission Hospital Board of management to deduct Six Hundred and fifty Shillings (Kshs.650) from the wages of each employee in their employment as Agency fee in respect of the Collective Bargaining Agreement (CBA) registered in court on 26.4.2018;

b. An order compelling the Respondent to issue a gazette Notice authorizing the Moi Teaching and Referral Hospital Board of management to deduct Six Hundred and fifty Shillings (Kshs.650) from the wages of each employee in their employment as Agency fee in respect of the Collective Bargaining Agreement (CBA) registered in court on 26.4.2018;

c. Declaration that the actions of the respondent is in contravention of the provisions of Article 47 of the Constitution of Kenya, 2010, Part II section 3 & 4 of the Fair Administrative Actions Act and section 49 of the Labour Relations Act

d. Costs of the suit.

2. The respondent entered appearance on 15.4.2019 through State Law Office but failed to file any defence to oppose the reliefs sought.

3. On 2. 10. 2019, the suit came up for mention for pre-trial direction and the defence counsel requested the court for 14 days to enable the respondent to act on the matter in dispute and the court fixed the suit for mention 12.11.2019 for settlement..

4. On 12.11.20219, the defence counsel sought for a further 14 days to comply contending that the respondent had faced some challenges. The claimant agreed to the request by the defence and Court directed the respondent to sign the gazette notice within 14 days of that day.

5. Again, the respondent failed to comply with the order to sign the gazette notice and the claimant brought the Notice of motion dated 29.9.2020 seeking the following orders:

a. Leave to commence contempt proceedings against the respondent/Contemnor, Mr. Simon Chelugui, Cabinet Secretary for East Africa, Labour and Social Protection;

b. An order against Mr.Simon Chelugui Cabinet Secretary for East Africa, Labour and Social Protection to show cause why contempt of court proceedings should not be commenced against him;

c. The respondent/Contemnor be denied audience in this matter until he purges the contempt by issuing gazette notice for deduction of Agency fees from the salaries of the staff of AIC Kijabe Mission Hospital and Moi Teaching and Referral Hospital who are covered by the CBA registered in court as RCA No. 99 of 2018 and RCA no.98 of 2018 respectively

d. costs.

6. The application is premised on the grounds set out on the body of the motion and it is supported by the Affidavit sworn by the claimant's Industrial Relations Officer Ms. Eudius Nyambura on 29.9.2020. The application is opposed by the respondent through the Replying Affidavit sworn on 4.11.2020 by the respondent personally.

7. The claimant's case is that the court made the material order on 12.11.2020 directing the respondent to sign gazette notice sought by the claimant in the suit; that the respondent was aware of the order because it was given in the presence of the respondent's counsel and later it was served on the Attorney General and the respondent through their respective offices; that gazetting of the legal notice for deduction of Agency fees in favour of trade unions is provided for by section 49(1) of the Labour Relations Act; that the respondent disobeyed the court order deliberately; that as a result of the default to gazette the legal notice, the claimant has lost Ksh. 2,160,000 from 80 nurses of AIC Kijabe Mission Hospital and Kshs. 4,221,000 from nurses in Moi Teaching and Referral Hospital.

8. In view of the foregoing, the claimant submitted that it has established the essential elements for civil contempt of court, namely:

a. The terms of the order were clear , not ambiguous and binding on the respondent;

b. The respondent was aware of existence of the order and the terms thereof;

c. The respondent acted in breach of the terms of the order;

d. The respondent's conduct was deliberate.

9. Accordingly, the claimant urged that the respondent be cited for contempt of court and punished in order to uphold the dignity and authority of this Honourable Court. In support of its submissions, the claimant relied on **Republic v The Kenya School of Law & others [2015] eKLR**, **Wildlife Lodges Ltd v County Council of Narok & another [2005] 2 EA 344 (HCK)**, and **Council of Governors v Seth Panyako & others [2019] eKLR**.

10. The respondent opposed the application and averred that failure to sign the gazette notice as directed by the court was not deliberate; that the order was not served on him personally; that he did not have personal knowledge of the order until the contempt application was brought to his attention; that there is no proof of contempt against him; that the application is premature and the orders sought are undeserving.

11. The respondent contended that on 31.7.2018 and December 2018 respectively, claimant made application under section 49 of the Labour Relations Act for an Order for deduction of union dues and Agency fees from uninisable staff of Moi Teaching & Referral Hospital and AIC Kijabe Mission Hospital; that the issue of gazetting union dues and Agency fees has had challenges and had been pending for some time; that he sought advice for the Attorney General and he was advised that Ministry had the option of amending the existing Regulations or replacing with new ones; that the Ministry in Conjunction with the Office of the Attorney

General are in the process of developing the Labour Relations (Trade Union Dues and Agency Fees) Regulations 2020 to guide the procedure for gazettelement of the Orders.

12. The respondent averred that there is a gap in the law relating to making of Orders under section 48 and 49 of the Act, and as such, the gazettelement of the orders will have to await the completion of this process. Consequently, according to the respondent the failure to comply with the court order was not deliberate and requested for more time to conclude the said process.

13. In support of his submissions, the respondent relied on **Koinange Investments & Development Ltd v Robert Nelson Ngethe [2014] eKLR, Republic v Cabinet Secretary, Ministry of Labour & Social Protection & another, Ex parte Kenya union of Secondary Schools Non-Teaching Staff [2019] eKLR, Samuel M.N. Mweru & National Land Commission & 2 others [2020] eKLR**

Analysis and determination

14. I have carefully considered the application, affidavits and the written submissions filed by the parties. It is a fact that on 12.11.2019, this court made an order directing the respondent to sign the gazette notice for deduction of agency fees from the earnings of the nurses working in the said two hospitals. It is also a fact the respondent did not comply with the said order and did not challenge the same by an appeal or review. The issue for determination is whether the respondent should be cited for contempt of court for disobeying the said order from this court.

Threshold for citing alleged contemnors

15. It is trite law that the power to punish for contempt of court must be exercised carefully because of its potential to cost a person his/her liberty. Consequently, certain thresholds must be met before punishing for contempt of court orders, namely: -

- a. Proof of personal service or knowledge of the decision, decree or order of the court on the part of the contemnor;
- b. Proof of violation of the decision, decree or order of the court by the contemnor; and,
- c. Proof that the violation of the decision, decree or order was deliberate.

Proof of personal service or knowledge

16. In Kenya, contempt proceedings are governed by the law of procedure applicable in England at the time the proceedings are instituted. Under Rule 81. 5 of the English Civil Procedure (Amendment No.2) Rules 2012 provides that a Judgment/Order of the Court must be served upon the person required to do the act in question. However, the Court can dispense with such personal service under Rule 81.8 of the Rules which provides:

“(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—

(a) by being present when the judgment or order was given or made; or

(b) by being notified of its terms by telephone, email or otherwise.”

17. The foregoing position has been embraced by courts in this country in a plethora of cases. In **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**, the Court of Appeal held:

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings” We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in

our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case. [Emphasis Added]

18. Again in *Basil Criticos v Attorney General & 4 others* [2012] e-KLR Lenaola J (as he then was) held that:

“... the law has changed and so as it stands today, knowledge supersedes personal service and for good reason... where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that service must be proved is rendered unnecessary.”

19. In *Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waitthaka* [2019] eKLR the Court held:

“It is also notable in this regard that the counsel for the Respondent did appear in Court to defend the said application for contempt of court, and did seek time to pay the decretal sum. It is therefore evident from the pleadings and submissions made that the Respondent was aware of the orders of this Court of 13th July 2016.”

20. In this case, Ms. Akuno, learned state counsel appeared and sought the court to give 14 more days for the respondent to comply with her earlier undertaking to sign the Gazette Notice and the court with the consent of the claimant granted the request by directing the respondent to sign the Gazette notice within 14 days and come for a mention on 29.11.2019 to confirm compliance.

21. Thereafter, the claimant extracted the order and served the Attorney General's office and the Respondent's Office on 9.12.2019 as per the Affidavit of Service sworn by the Process Server on even date. Consequently, I find and holds that despite there being no personal service, the respondent was aware or had the reason to know about the existence of the order dated 12.11.2019 and its terms.

22. Since the respondent admitted that he never complied with the said court order, I will proceed to consider whether failure to comply was deliberate.

Whether the failure to comply was deliberate

23. In *Republic v Ahmad Abolfathi Mohammed & another* [2018] e KLR the Supreme Court held that:

“This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she wilfully acted in a manner that flouted the Court Order.” [Emphasis Added]

24. The respondent cited the reason for his failure to comply with the court order as lack of personal service and legal gaps. He explained how he sought advice from the office of the Attorney General and initiated the process of formulating Regulations for facilitating granting orders for deduction of union dues and Agency fees under section 48 and 49 of the Labour Relations Act.

25. However, the claimant contended that the respondent's failure to issue the order for deduction of Agency Fees from unionisable staff of the said hospitals was deliberate and denied existence of the alleged *lacuna* in the law. It further contended that the failure by the respondent to issue the said order has occasioned on the union financial loss running into millions of shillings.

26. Section 49 of the Labour Relations Act provides that:

“(1) a trade union that has a collective agreement registered by the Industrial Court with an employer, group of employers or an employers' organisation, setting terms and conditions of service for all unionisable employees covered by the agreement may request the Minister to issue an order requiring any employer bound by the collective agreement to deduct an agency fee from the wages of each unionisable employee covered by the collective agreement who is not a member of the trade union.

(2) A request in accordance with subsection (1) shall-

(a) be signed by the authorized representatives of the trade union and employer, group of employers or employers' organisation;

(b) supply a list of all employees prepared by the employer in respect of whom a deduction shall be made;

(c) specify the amount of agency fees, which may not exceed the applicable trade union dues; and

(d) specify the trade union account into which the dues shall be paid.

(3) An employer in respect of whom the Minister has issued an order as specified in subsection(1) shall commence deducting agency fees from the employees named in the Minister's notice within thirty days of receiving the Minister's notice.

(4) The Minister may vary an order issued under this section on application by the trade union and the employer, group of employers or employers' organisation concerned.

(5) A member of a trade union covered by a collective agreement contemplated by subsection (1) who resigns from the union, is immediately liable to have an agency fee deducted from his wages in accordance with this Section."

27. The above provision gives sufficient and detailed procedure for a trade union to apply for an order for deduction of agency fees, the discretion of the Minister, and the obligation of the employer to deduct and pay the agency fees to the trade union. Therefore, there was no basis for the Minister to decline the applications by the claimant when they were presented in 2018.

28. The respondent also did not have any justifiable reason for failure to sign the Gazette Notice after the court directed him to do so on 12.11.2019. The legislature has not amended the said law and as such the respondent has no option but to comply with the same and more so when directed by the court to do what the law commands him to do. Consequently, the court finds that the respondent, Mr. Simon K. Chelugui, being Cabinet Secretary in Charge Labour and Social Protection deliberately disobeyed the order of this Court dated 12.11.2019 and is cited for contempt of court.

29. In arriving at the above position I have respectively disagreed with the decision of my brother Nduma J in **Republic v Cabinet Secretary, Ministry of Labour & Social Protection & another, Ex parte Kenya union of Secondary Schools Non-Teaching Staff [2019] eKLR**, where he held that the Cabinet Secretary had not wilfully disregarded the court order but was prevented by the lack of enabling Regulations.

30. The respondent repeated the same explanation for his failure to comply with the court order herein but I don't find the same reasonable and I reject it. The terms of the order were as clear as the law applicable and even if there was a reason to render it hard to comply, the respondent had every opportunity to challenge it but he did not. I gather support from **Teachers Service Commission v Kenya Union of Teachers & another [2013] eKLR** where Ndolo J held that:

"Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly."

31. I gather more support from the case of **Refrigerator & Kitchen utensils Ltd v Gulabchand Shah & others Civil Application No. Nai 39 of 1990** where the Court of Appeal held that:

"It was plain clear and unqualified obligation of every person against or in respect of whom an order was made by the court of competent jurisdiction to obey it until that order was discharged, and disobedience of such order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he purged his contempt. A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular... he should apply

to the court that it might be discharged. As long as it exists, it must not be disobeyed.”

32. The claimant wants the respondent committed to civil jail for six months for the said contempt of court. In **Fred Matiang’i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR** the Court of Appeal held:

“When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who decides to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”

33. I have considered the request by the claimant and appreciated the need for swift and severe punishment to persons acting in disobedience to court orders. However, before passing sentence against the respondent, the respondent is invited in either in person or through counsel to make his mitigation on 11.11.2021 before my successor in Nairobi.

Conclusion and disposition

34. On the basis of material presented to the court by the parties, observations, reasons and findings I allow the application in the following terms:

- a. That the Honourable Cabinet Secretary, Mr. Simon K Chelugui is hereby cited for contempt of this court’s order dated 12.11.2019 by failing to sign Gazette notice for an order to deduct Agency fees in favour of the claimant under section 49 of the Labour Relations Act.
- b. The case will be mentioned online before my successor in Court 3 for mitigation and sentencing on 11.11.2021 at 9.00 o’clock or soon thereafter when the respondent will be at liberty to attend in person or through counsel.
- c. The claimant is awarded costs of the application.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF OCTOBER, 2021

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE



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