



**Ashton Mombasa Apparel (EPZ) Limited v Tailors and Textile Workers Union
(Cause E014 of 2024) [2024] KEELRC 1408 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1408 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E014 OF 2024**

**M MBARŪ, J
MAY 16, 2024**

**BETWEEN
ASHTON MOMBASA APPAREL (EPZ) LIMITED CLAIMANT
AND
TAILORS AND TEXTILE WORKERS UNION RESPONDENT**

RULING

1. The ruling herein relates to two applications. Application dated 26 February 2024 by the claimant and one dated 26 March 2024 by the respondent.
2. Application dated 26 February 2024 is filed under the provisions of Article 41 of *the Constitution*, Sections 54, 76, 77, 78 and 80 of the *Labour Relations Act* and Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules* and seeking orders that;
 1. ...
 2. ...
 3. pending the inter parties hearing and determination of this application or until further orders of the court, this court be pleased to issue a conservatory order restraining or prohibiting the respondent union’s members who are engaged by the claimant at its production lines in Jomvu, Changamwe and in Mtwapa from engaging in or participating in any unprotected and therefor illegal lockout, strike or any other form of unprotected and illegal industrial action.
 4. Pending the hearing and final determination of this claim, this court be and is hereby pleased to issue a conservatory order prohibiting or restraining the respondent union by itself, its officials, agents and/or any of its members in any manner whatsoever causing calling form instigating or inciting any of the claimant’s employees at the claimant’s production line in



Jomvu, Changamwe and in Mtwapa to engage in or participate in any unprotected and therefore illegal lockout strike or any other form of unprotected and illegal industrial action.

5. Pending the hearing and final determination of this claim, this court be and is hereby pleased to issue a conservatory order prohibiting or restraining the respondent union's members who are engaged by the claimant at its production lines in Jomvu, Changamwe and in Mtwapa from engaging in or participating in any unprotected and therefore illegal lockout, strike or any other form of unprotected and illegal industrial action.
 6. Costs of this application be borne by the respondent.
2. The application is supported by the Affidavit of Abizer Lokhandwala the general manager of administration and that on 2 January 2024 the claimant, following a significant financial investment commenced operations in the manufacturing of garments for export in Kenya under the Export Processing Zone (EPZ) programme. Due to a lack of space for centralised operations, the claimant operates 3 production lines; unit 1 in Jomvu, Unit 2 in Changamwe within Mombasa County and Unit 3 in Mtwapa within Kilifi County.
 3. On 2nd January 2024, the respondent recruited eligible members of the claimant's employees as its members without any impediment. Following receipt and validation of the Check-Off forms from the respondent, the claimant has been withholding the prescribed union dues from all employees who are members of the respondent. The respondent has not recruited a simple majority of the unionisable employees and cannot formally seek to be recognized by the claimant to negotiate the collective agreement (CBA).
 4. In his affidavit, Lokhandwala avers that despite the respondent not being recognized by the claimant, it has continued to issue threats and instigated its members who are employed by the claimant to take part in illegal strike so as to compel management into recognizing the respondent, the respondent has not attained the legal threshold for recognition, due to these threats, on 29 to 31st January 2020, for 3 days the respondent caused its members to go on a go slow on all production lines and ultimately cessation of work. On 29 January 2014, the union officials and some members deliberately breached the peace at the production lines in Jomvu and Changamwe by causing violent disruption and beating up and assaulting the claimant's line managers. Several employees were unable to attend their work peacefully.
 5. Arising from the violence, the claimant took a management decision to secure its premises and hence ceased production for 2 lines and later stopped the entire production on 1st and 2nd February 2024. Following the violence, notices were issued to the subject employees and notice of summary dismissal pursuant to clauses 6(i) and 6(t) of the contracts of employment and Section 44 of the [Employment Act, 2007](#) (the act). The claimant also wrote to the regional commissioner about the incident of violence at the Jomvu and Changamwe premises and requested for enhanced security.
 6. The employees who had been assaulted also made complaints to the investigative agencies. The respondent took the decision of summary dismissal by acts of retaliation by continued instigation of the claimant's employees. In an effort to amicably resolve the matter, on 2 February 2024 the claimant engaged the respondent under the Joint Chairmanship of the Deputy Commissioner and Mombasa Labour Officer for a return to work formula. It was resolved that the employees who were on strike but on contract to resume work unconditionally the claimant to first track the signing of the Recognition Agreement and all parties would desist from using abusive language and following the laid down company procedures. Despite the RTF, the respondent and local politicians insisted that they should address the claimant's employees and hence on 3 February 2024 there was no production, Production resumed on 5 February 2024 but the respondent continues to cause a go-slow among its members until recognition. This has occasioned the claimant huge loss and despite the RTF, the respondent through



- a letter dated 12 February 2024 raised additional complaints in response to the alleged victimization of its members and also false allegations that the claimant had forced employees who had been assaulted to record statements with the police.
7. It is clear to the claimant that the respondent is keen to completely disrupt operations unless it is recognized. Through a letter dated 15 February 2024, the respondent indicated that they would cause their members to take industrial action unless recognized without achieving the legal threshold.
 8. Lokhandwala avers that the claimant is gravely concerned that it may not be possible to amicably resolve the conflict in time before the threatened illegal strike or industrial action, given the respondent's conduct the orders sought should issue to protect the claimant, and its employees and continued operations. The claimant is likely to suffer irreparable loss and damage arising from the consequential loss of product and inability to meet and continue meeting existing contractual engagements with its overseas buyers, possible loss of production material and destruction of property and loss of revenue. The court should protect the claimant by restraining the respondent from exercising its right to engage in industrial action without following the prescribed statutory process.
 9. In reply, the respondent filed the Replying Affidavit of Rev. Joel Kandie Chebii aver that indeed the claimant is a merger of two companies that were the respondents in ELRC No. E119 of 2023 where a Consent Order was recorded and party implemented it. The claimant wound up the companies in order to frustrate the respondent's recruitment drive as well as the recognition process.
 10. Rev. Chebii aver that the claimant's previous legal outfit, Ashton Apparels EPZ Limited and Mombasa Apparels EPZ Ltd laid off its employees by way of redundancy based on restructuring and recognition of its operations. The claimant took over the employees of some of the respondent members on 2 January 2024 but were profiled and earmarked for termination on account of their union membership.
 11. The union has made every effort to engage the claimant in meetings to be able to acquire a fair working atmosphere for its unionisable employees but these efforts have been frustrated. The allegations that the union is planning a strike is without evidence and only applied by the claimant as a disguise to terminate employment and removal of unionisable employees. The claims and orders sought are based on misleading information and should be dismissed with costs.
 12. The claimant also filed a Further Affidavit of Lokhandwala who avers that he is the general manager of Ashton Mombasa Apparel EPZ Limited, the claimant and formerly the general manager of Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited. He is conversant with all matters relating to the three companies. The claimant is not a merger of Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited as alleged by the respondent and this assertion has no evidence.
 13. Ashton Mombasa Apparel EPZ Limited, the claimant is an incorporated company. Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited are distinct companies, separate from the claimant company.
 14. The claimant was incorporated on 9 November 2023 and licenced as an EPZ on 20 December 2023. Subsequently, it acquired the assets and entire business undertakings of both Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited. The claimant only began operations as an EPZ enterprise on 2 January 2024 and in this regard employed on fixed-term contracts all the former employees of Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited. Following the acquisition, Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited ceased operations and are no longer operating companies. It is not correct for the respondent to claim that the 3 companies are the same whereas Certificates of Incorporation indicate these are distinct and separate legal entities.



15. Lokhandwala aver that following the acquisition of the assets and entire business undertaking of Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited, as a precondition for the granting of approval for the same by various regulators in Kenya, the claimant absorbed and employed all former employees of the 2 companies on new fixed term contract. It is not correct for the respondent to state that the claimant profiled and earmarked some of its members for termination of employment on account of unionization. The respondent alleges that the claimant threatened to unlawfully lay off its members after staging an unlawful strike. The respondent also allege that the claimant is in violation of the return to work formula dated 2 February 2024 by suspending and dismissing unionisable employees unlawfully which are matters without proof. Indeed the claimant made reports to the police but this was not to intimidate unionized employees.
16. The respondent together with union officials and other members are in deliberate breach of peace at the claimant's production lines at Jomvu and Changamwe in Mombasa which amounts to gross misconduct under Section 44 of the *Employment Act, 2007* (the Act). This constitutes grounds for the claimant to summarily dismiss the various employees who had meted violence and assault against their colleagues at the claimant's premises.
17. Lokhandwala aver that as an employer, the claimant is entitled to take measures to secure and protect the employees and property of the company and in this regard decided to summarily dismiss the employees who were dismissed and that it was absolutely of no consequence whether or not these employees were union officials or members of the respondent. Each employee who meted out violence to his or her colleagues was summarily dismissed.
18. The claimant has not frustrated the respondent in engaging to negotiate fair working conditions as alleged. Efforts to engage to find a solution have been met with unreasonable and illegal demands. The respondent is only interested in being recognized by the claimant outside the law hence efforts to cause chaos. Through letter dated 15 February 2024 the respondent threatened to call a strike unless its demands are met.
19. Lokhandwala aver that it is not correct that it is reducing its workforce for reduced productivity. The recent disruption of operations due to chaos negatively impacted on production lines and affected the ability of the claimant to meet existing orders and hence exposed the claimant to cancellation of existing orders by her overseas buyers. Cancellation of existing production orders put at grave risk the continued viability of the claimant's going concern. It also put at risk jobs of all employees and the actions of the respondent may aggravate the situation. It is thus not correct that the claimant is running away from formalizing its relationship with the respondent by signing the Recognition Agreement;
20. The claimant had not seen a draft Recognition Agreement until these proceedings commenced. Recognition of the respondent is contingent upon meeting the required statutory threshold. The respondent has not secured such a position given the number of employees recruited as members to attain the status for recognition by the claimant. The allegation that the claimant is laying off its employees to defeat the recognition status is without proof. The dismissed employees related to matters of gross misconduct.
21. Application dated 26 March 2024 is filed by the respondent union seeking orders that;
 1. ...
 2. This court be pleased to find and hold that the claimant herein Ashton Mombasa Apparel (EPZ) Limited through its MD/CEO Mr. Abizer Lokhandwala and the HR Manager Mr. Stephen Mureithi has disobeyed, defied and/or ignored the Court Order/Decree issued



herein on the 29 February 2024 aforesaid and to be subsequently committed to civil jail for a period not exceeding 6 months pending compliance with the court orders.

3. The court be pleased to deny the claimant audience in this matter until and unless they purge the Contempt of the Court committed herein by withdrawing all the termination letters issued to the applicant's shop floor level representatives and unionisable employees.
4. The claimant be ordered to pay for the costs of this application.
22. The application is supported by the Affidavit of Rev. Joel Kandie Chebii the general secretary of the respondent union and on the grounds that on 29 February 2024 the court issued an order directing parties to maintain peace at the workplace by maintaining the status quo pending the hearing and determination of the claim herein. Despite this court order, the claimant unlawfully dismissed over 500 unionized employees and members of the claimant in the leadership of the respondent. These are shop stewards and other leaders at the shop floor level. The respondent has written to the claimant requesting them to comply with the court order but there is no response except defiance.
23. Rev. Chebii in his affidavit aver that it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is varied, discharged and or set aside. The actions by the claimant are an upfront attack on the integrity of the judicial process and the rule of law which action must not be countenanced.
24. In reply, the claimant filed the Replying Affidavit of Lokhandwala averring that the claimant is aware that on 29 February 2021, this court exercised its discretion and granted orders with regard to the application dated 26 February 2024 an interim order to the effect that both parties should ensure that industrial peace is maintained at the shop floor. On 13 March 2024 when the matter came up in court for hearing, these interim orders were extended.
25. The respondent seeks to cite the claimant officers for contempt and to be directed to purge contempt but this application is devoid of merit and filed with improper motives and abuse of the court process.
26. Lokhandwala aver that together with the HR Manager Mr. Stephen Mureithi, they are upstanding and law-abiding citizens who respect and hold court in high esteem and would never deliberately disobey court orders as alleged. The claimant's business is a model with manufacturing garments under EPZ programmes worldwide. The claimant has a policy that its employees are employed under fixed-term contract that are at all times wholly and dependent on the claimant's existing contracts with her overseas buyers.
27. However, due to the constant disruptions to production operations deliberately triggered by the respondent and union officials, the claimant's ability to service existing contract orders has been severely affected. This led to the cancellation of orders and through an email dated 14 March 2024, a major overseas buyer through the Global Sourcing Director expressed its discontentment with the claimant's ability to meet production and delivery timelines as contracted. The buyer decided to shift production to other vendors for May, June and July 2024. It was hence not economically viable for the claimant to renew each contract on the fixed term contracts upon expiry on 25 March 2024.
28. Lokhandwala aver in reply that there is no disobedience of court orders as alleged. The claimant has acted within the law and the application by the Respondent should be dismissed.

Both parties attended court made oral submissions and relied on filed pleadings.

Determination

29. The issues which emerge for determination in the two applications are;



Whether the claimant is in contempt of court orders issued on 29 February 2024;

30. Whether the court should issue a conservatory order prohibiting or restraining the respondent union's members who are engaged by the claimant at its production lines in Jomvu, Changamwe and in Mtwapa from engaging in or participating in any unprotected and therefore illegal lockout, strike or any other form of unprotected and illegal industrial action.

Whether the claimant is in contempt of court orders issued on 29 February 2024.

31. At the core of the matter herein is the case that the respondent has engaged its members in the employment of the claimant in unprotected and illegal industrial action. The respondent on the other hand asserts that the claimant is in violation of court orders issued on 29 February 2024 by failing to keep industrial court and hence in contempt of court and should be punished.
32. The principles governing the court on whether or not have been developed by the court over time. The locus classicus is the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* where the court held that conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.
33. In *Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others (Interested Parties)* (Constitutional Petition E128 of 2022) [2022] eKLR the court held that the principles for consideration by a court in exercising its discretion on whether to grant conservatory orders have been developed by courts over time and should issue based on the merits of each case.
34. In the case of *Board of Management of Uburu Secondary School v City County Director of Education & 2 others* [2015] eKLR, the court summarized the principles for grant of conservatory orders as;
- a. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
 - b. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - c. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - d. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
35. Does the claimant have a prima facie case to justify the issuance of conservatory orders?
36. In this case, the claimant commenced operations on 2 January 2024. It took in employees who were members of the claimant inherited from previous employers and entities who the claimant acquired.
37. Under new employment, to secure recognition by the claimant, the respondent should secure the mandatory legal threshold under Section 54 of the *Labour Relations Act*, 2007 (the LRA). This threshold must be achieved with each employer and is not transferable.
38. Pending recognition, the respondent has members in the employment of the claimant. The respondent enjoys the right to represent its members' rights pending securing recognition threshold with the claimant and upon which a collective agreement (CBA) over terms and conditions of employment can be gone into. This is the gist of Section 54 of the LRA.



39. Section 54(1) of the *LRA* provides that;
- (1)An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
40. The case that the claimant's business and operations depend on overseas buyers and orders and hence are forced to issue its employees with fixed-term contracts is not challenged in any material way. These circumstances place the respondent on its toes to recruit and attain the recognition threshold for the next level of CBA negotiations.
41. In the case of *Civicon Limited v Amalgamated Union Of Kenya Metal Workers* [2016] eKLR the Court of Appeal recognized work dynamics and held that;
- Unionisable employees must not be confused with the total workforce engaged by the employer. Only members of staff who are eligible for membership (unionisable members) are targeted....It must be borne in mind that the trial court is only concerned with the numbers as at the time the claim is made. If verification has to be done it must relate to the number of employees stated in claim against that asserted by the employer.
42. Due to the fixed-term contracts issued to the employees, and the need to reduce production from May, June and July 2024, this must had a huge impact on the membership of the claimant and respondent's members. Pending the recognition of the respondent by the claimant, terms and conditions of employment remain as issued by the claimant based on its policy.
43. It is however prudent that the claimant supports its employees to access its workplace representatives towards the exercise of the right to unionise. This is a right secured under the Bill of Rights.
44. The claimant also asserts that the respondent has caused industrial action within the company. This is unprotected and has led to disruption of operations and loss of customers.
45. The link between the availability of work and business operations are twin issue. Where the claimant is forced to close operations due to disruptions, this automatically affects the employment of the respondent members.
46. On the issue at hand, to engage in unprotected industrial action to push for recognition would only be counterproductive to each party. Keeping industrial peace is of mutual benefit to both parties. Engaging in unprotected industrial action will only expose the respondent and its members to undesired results including stoppage of work and reduction of members. Employees who participate in an unprotected strike amount to a violation of their contract of employment and constitute a fair reason for dismissal or imposition of a disciplinary penalty. whereas employees have a right to go on strike, a strike that violates the law would cease to be legally protected.
47. In *Charles Waweru Kimani & 222 Others v Kenya Kazi Services Limited* [ELRC Cause No. E497 of 2020] The court held that an employee's participation in an unprotected strike amounts to a violation of their contract of employment and constitutes a fair reason for dismissal or imposition of a disciplinary penalty. employees and trade union must ensure that any industrial action called is conducted in line with the legally established requirements, such as those outlined in Part X of the *Labour Relations Act*. Failure to comply with the requirements would leave employees exposed to the possibility of disciplinary action by their employer. The claimants have a right to secure their employees and orders stopping unprotected industrial action are justified.



48. On the issue of contempt of court orders, the issues addressed by the respondent with regard to obedience to orders issued on 29 February 2024 are contentious. On the one hand, the claimant has admitted that due to the nature of its business, it has issued its employees with fixed-term contracts. It is also not challenged that following work disruptions and violence within the shop floor, the police were called in, several employees were assaulted and those who committed such acts of gross misconduct were issued with notices of summary dismissal.
49. Violence at work is not permissible. Acts of gross misconduct are the worst violations an employee can commit on the shop floor.
50. However, how things have moved cannot be addressed through an affidavit. The affected employees leading to the alleged disruption of peace that the court directed should be maintained should be allowed to give such evidence. From the affidavit of Rev. Chebii in support of the contempt application, he has made general averments that Mr Lokhandwala and Mureithi committed contempt and should be punished. Keeping industrial peace calls for direct interrogation of the shop floor. The actors within such a place are the employees. This necessitates call for evidence and to determine the same on affidavits would deny the crucial information.
51. The orders of 29 February 2024 must be secured. This will allow the court to hear the main claim and the counterclaim on the merits. Due to the number of employees affected by these proceedings, the court will address the claim on priority basis.
52. Accordingly, on the applications dated 26 February 2024 by the claimant and one dated 26 March 2024; the following orders are hereby issued;
 1. Pending the hearing determination of this claim and counterclaim herein a conservatory order prohibiting and restraining the respondent's members who are engaged by the claimant at its production lines in Jomvu, Changanwe and in Mtwapa from engaging in or participating in any unprotected industrial action is hereby issued;
 2. Parties shall maintain industrial peace pending these proceedings;
 3. Hearing of the claim and counterclaim shall be on a priority basis and hearing directions to issue;
 - a. To secure industrial peace, costs herein to abide the outcome of the full hearing.

DELIVERED IN OPEN COURT AT MALINDI ON THIS 16 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

