



**IN THE COURT OF APPEAL AT NAIROBI**

**(CORAM: GITHINJI MUSINGA & ODEK, J.J.A.)**

**CIVIL APPEAL NO. 49 OF 2018**

**BETWEEN**

**KENYA TEA GROWERS ASSOCIATION.....1ST APPELLANT**

**UNILEVER TEA KENYA LIMITED.....2ND APPELLANT**

**AND**

**KENYA PLANTATION AND AGRICULTURAL**

**WORKERS UNION.....RESPONDENT**

*(Being an appeal from the Order made in Employment and Labour Relations Court at Nairobi*

*(Monica Mbaru, J.) on 17th January 2018*

*in*

**ELRC No. 1578 of 2017)**

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**Consolidated with**

**ELRC No. 1576, 1579 & 2078 of 2017**

**Misc. Appl. No. 154 and 155 of 2017**

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**JUDGMENT OF THE COURT**

[1] This is an appeal from the order of Employment and Labour Relations Court (**ELRC Court**), (**Monica Mbaru, J.**) dated 17th January, 2018 where the court made an order in terms partly thus:

**“In the interim all workers arising from the same series and strike subject herein as consolidated with file from Kericho should be back at work unconditionally. Hearing on 31/1/2018 with regard to all pending applications.”**

The effect of the impugned order was to reinstate the unionisable employees of the appellants whose services had been terminated following a strike called by the respondent.

[2.1] The brief background relating to the present dispute is as hereunder,

The 1st appellant, as its name indicates, is an employers’ association in the tea industry (**employers**). Its members include **Unilever Kenya Limited (2nd respondent)**; James Finlay Kenya Limited; the Sotik Tea Company, Williamson Tea Kenya Limited, Kapchorua Tea Co. Ltd; Kipkebe Limited and several other Companies. The members of the 1st appellant have employed thousands of workers involved in tea picking and processing. The respondent is a trade union (**Union**) representing the workers in tea plantations and in other agricultural enterprises.

[2.2] The **Collective Bargaining Agreement (CBA)** between the parties for the period from 1st January 2016 to 31st December 2017 became due for review on 1st January, 2016. By a strike notice dated 31st July 2017, the respondent called a strike of the workers of the employers from 20th August, 2017 on the ground that the 1st appellant had unilaterally refused to make any counter-offer towards reviewing the terms and conditions of service of its employees.

[2.3] On 7th August, 2017, Unilever Tea Co. Limited filed Nairobi **Case No. 1576 of 2017** in the Employment and Labour Relations Court against the Union and an interlocutory application to restrain the Union from instigating, engaging or inciting members to engage in any strike in respect of the strike notice dated 31st July, 2017 or the 2016/2017 CBA.

On 9th August, 2017, the appellant, Kenya Tea Growers Association (KTGA), also filed **Nairobi Case No. 1578 of 2017** and an interlocutory application seeking an interlocutory injunction against the Union in similar terms. Siret Tea Company Limited and three other companies who are members of KTGA also filed a separate **Nairobi Case No. 1579 of 2017** and sought a similar interlocutory injunctive order against the Union in respect of the strike notice dated 31st July, 2017. All the three causes were filed through the firm of Kaplan & Stratton Advocates.

[2.4] On 9th August, 2017 the ELR court granted an *ex parte* injunction in causes Nos. 1576/2017 and 1578/2017, *inter alia*, restraining the members of the Union from engaging in any strike in respect of the outstanding issues pertaining to CBA for the years 2016/2017. The court also ordered that the applications to be served and be listed for directions on 16th August, 2017. On that date the interim orders were extended to 21st September, 2017. The record does not show what happened on 21st September, 2017. However, on 28th September, 2017, the court consolidated the three applications, extended the orders and fixed the applications for hearing on 7th November 2017.

In addition, the court ordered all parties to appear before the Labour Commissioner for negotiations on the subject matter of CBA. By a letter dated 5th October, 2017, the Labour Commissioner informed the parties to appear before him for a meeting on 11th October, 2017 and asked the parties to present their respective proposals to facilitate an amicable settlement in good time before the date of the meeting. By a strike notice dated 11th October, 2017, the Secretary General of the Union gave a strike notice and instructed its members to withdraw labour from midnight of 17th October, 2017 on the ground that the reconciliation meeting before the Labour Commissioner held on 11th October, 2017 did not resolve the dispute due to the hard-line stance, unwillingness and negative attitude exhibited by the employers.

[2.5] The applicants in the three consolidated applications filed another application dated 13th October 2017 for orders, *inter alia*, that the Union and its Secretary General do purge the contempt by retracting the strike notice issued on

11th October, 2017 and directing and ensuring its employees do not engage in any strike. On 16th October, 2017 the court extended the previous orders, ordered the Union to withdraw the strike notice dated 11th October 2017 by close of business of that day and fixed all applications for hearing on 7th November, 2017.

By a further application dated 18th October, 2017, and filed on 19th October 2017, the applicants in the three consolidated applications sought orders, *inter alia*, that the Union's Secretary General and Assistant Secretary General be summoned to appear in court on 23rd October, 2017 to explain why they failed to comply with the orders of 16th October, 2017 and for committal to civil jail for contempt of the court.

By orders dated 19th October 2017, the court directed the Union's Secretary General and Assistant Secretary General to attend court on 24th October, 2017 to explain why they failed to comply with the order of 16th October, 2017. Further, the court ordered that the orders of 16th October, 2017 would remain in force and allowed the applicants to source police assistance where the employees were on strike.

[2.6] Earlier on 17th October, 2017, **James Finlay Kenya Limited (Finlay Flowers)** had filed **Nairobi Cause No. 2078 of 2017** against the Union and an interlocutory application in the case, in connection with the strike notice of 11th October, 2017. On 17th October, 2017, the court granted an interim injunction restraining the Union, its officials and members from engaging in the strike and requiring police officers in-charge of police stations in Kericho to enforce court orders and to protect the destruction of its properties.

[2.7] Between 18th and 19th October 2017, three companies Kipkebe Limited, Unilever and James Finlay allegedly summarily dismissed a total of 336 employees for continuing with unprotected strike. That action brought about a series of applications. On 19th October 2017, the Union filed a claim, **Miscellaneous Application No. 6 of 2017** in the ELR court at Kericho and an accompanying interlocutory application for an order of injunction to restrain KTGA and four companies from victimizing and dismissing any employee in respect of the strike notice dated 11th October, 2017 or outstanding issues pertaining to the 2016/2017 CBA. The ELR court at Kericho (**Njagi Marete, J.**) granted *ex parte* orders on 19th October, 2017 pending the hearing of the application *inter partes* on 31st October 2017. The Union filed a similar claim and application in **ELR Court Kericho Misc. Application No. 7 of 2017** against James Finlays (K) Limited on 21st October, 2017 and a similar interim injunction was granted by the ELR court, Kericho on 23rd October, 2017.

[2.8] On 24th October, 2017, KTGA and five companies filed an application in **Kericho Misc. Application No. 6 of 2017** for setting aside the order granted on 19th October, 2017 and for transfer of that application to ELR court Nairobi for consolidation with the other three pending applications. A similar application was filed on 27th October 2017 in respect of **Kericho Misc. Application No. 7 of 2017**. On 30th October, 2017, the Union filed an application for committal to civil jail of the officers of KTGA and of four companies for disobedience of the court order dated 19th October, 2017.

[2.9] The application filed on 19th October, 2017 for committal to civil jail of Union Officials for disobedience of the order dated 16th October, 2017 was listed for hearing on 7th November, 2017. However, the court adjourned the hearing of the application and made orders, *inter alia*, that the workers should return to work unconditionally within 24 hours and that the employer should ensure that employees resume work "**without victimization of any nature**".

When the Union complained that the employers had victimised workers by dismissing them, the employers filed an application dated 17th November, 2017 for clarification and interpretation of the phrase "**without victimization of any nature**" in the orders of 7th November 2017.

The employers contended that the dismissal of the employees who proceeded on unlawful strike with full knowledge of the orders of 9th August 2017, 28th September 2017 and 16th October 2017 did not amount to victimization.

When that application came for hearing on 17th January, 2018 the employers' counsel applied for adjournment on the ground that the senior counsel who was dealing with the dispute was away attending a meeting of a task force on Legal Sector Reform. The Union's counsel did not oppose the application for adjournment but made an oral application that 362 employees be allowed to go back to work pending the hearing of the application.

The employers' counsel opposed the oral application and stated in part:

**“Staff already dismissed cannot be reinstated at this stage. A hearing is required. Those on strike and not dismissed should be at work. The order does not have retrospective effect on reinstatement ... To reinstate would render claimant's application non effective.”**

The court thereupon adjourned the hearing of the application and made the order appealed from, as already quoted at para. 1 of the judgment.

[3] The employers complied with the order of reinstatement but sent the 336 affected employees on leave with full pay and benefits pending the outcome of this appeal. The appellants submit in this appeal that by 30th June, 2018, Kipkebe Limited; Unilever Tea Co. Limited and Finlay had paid salaries of Shs.16,462,464/-; 7,720,736.1/- and 3,449,880/- respectively, in addition to housing and medical expenses.

[4] The chronology set out in the preceding paragraphs paves the way for the consideration of the appeal.

The appellants assail the order of reinstatement on several grounds namely; that it was made at an interlocutory stage without full hearing on the substantive dispute; the order was made without formal application and the court lacked jurisdiction, the order pre-empted the hearing of the application dated 17th November, 2017 and the substantive hearing of the consolidated suits and contravened the appellants' right to fair hearing; the order was against public policy and the rule of law as it reinstated employees who had contravened court orders; the order had the effect of nullifying the previous court orders; the order interfered with the appellant's managerial right to run their company affairs and that the learned judge was biased and partisan.

Those grounds of appeal were amplified in the appellants' written submissions which were highlighted by **Fred Ojiambo, SC. Mr. Achiando**, learned counsel for respondent, did not file written submissions. He instead relied on the further supplementary affidavit sworn by **Meshack Khisa** in answer to the appellants' application dated 17th November, 2017.

[5] Reinstatement is one of the remedies under **section 49** of the **Employment Act (Act)** that the court may give to an employee whose services have been terminated by the employer either through wrongful dismissal or unfair termination. However, the remedy is discretionary and before the court can give such remedy, it has to take into account the factors stipulated in **section 49(4)** of the Act which includes the circumstances in which termination took place including the extent, if any, to which the employee's conduct caused or contributed to the termination; the practicability of reinstatement and the principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances.

Further, by **section 44(4)** of the Act, it is a gross misconduct justifying summary dismissal for an employee, *inter alia*, to absent himself from the place of work without leave or lawful cause, or for an employee to willfully neglect any work, which he has a duty to perform.

In **Kenya Tea growers Association & Another v Kenya Plantation and Agricultural Workers Union [2018] eKLR** this Court said at para 30:

**“We agree entirely with the statement by Rika, J. in Alfred Nyungu Kimungii v Bomas of Kenya [2013] eKLR that ‘ordinarily reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues (sic) as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer, and employee.’”**

The appellants also rely on the interlocutory ruling of the then Industrial Court in **Richard Muimo Parsitau v Kajiado County Government & 2 Others [2014] eKLR** in which the court said in respect of an interlocutory application for reinstatement;

**“The court has to address this issue on several occasions and the general view is that courts are reluctant to issue orders of reinstatement at interlocutory stage of hearings. Section 49(3) of the employment Act as read together with section 12(3)(vii) of the Industrial Court Act, 2011 gave this court powers to reinstate an employee only after reaching a conclusion that the employee was unfairly terminated and considering the other factors under section 49(4) of the Employment Act.”**

[6] In this case, the court on 9th August, 2017 restrained the members of the Union from engaging in any strike pursuant to strike notice dated 31st July 2017 in respect of the outstanding issues pertaining to CBA for the years 2016/2017. The orders were extended on 28th September, 2017 when a second strike notice dated 11th October, 2017 was issued. The court on 16th October, 2017 extended the previous orders and ordered the Union to withdraw the strike notice by the close of business of that date.

When the court was informed through a formal application that the orders of 16th October, 2017 had not been complied with, on 19th October, 2017 it summoned the officials of the Union to essentially show why they should not be committed to civil jail for contempt of court orders and further, ordered that the orders of 16th October 2017 would remain in force.

All those orders were in force when some of the employers summarily dismissed the employees for gross misconduct namely; absenting themselves from the work place. The dismissal letters which were before the learned judge when the impugned orders were made showed that the summary dismissals were pursuant to **clause 25** of the current Collective Bargaining Agreement and section **44(4)(a)(c)** and **(e)** of the **Employment Act, 2007**. Although the ELR court at Kericho issued orders on 19th and 21st October, 2017 restraining the employers from victimization or dismissing the employees, the employers contended that those orders were served on or about 23rd October, 2017 after the employees had already been summarily dismissed.

[7] In addition, at the time the impugned orders were issued, there was a pending application dated 17th November, 2017 seeking the clarification and interpretation of the order of the court dated 7th November, 2017 requiring the employees to return to work unconditionally and without victimization of any nature. The affidavit relied upon by the Mr. Achuondo was filed in reply to the application for clarification and interpretation of the orders of 7th November 2017. In that affidavit, the Union essentially refutes the employers' averments that the Union had disobeyed court orders; that the employees failed to report to work on 18th October, 2017 and that the summary dismissal of the employees was lawful.

Thus, the issue of summary dismissal was a contentious issue.

[8] By **Article 27(1)** of the Constitution both the employers, the Union and its members have equal protection and equal benefit of the law. In the instant case, there was a *prima facie* ground for summary dismissal of the employees in question. There was also affidavit and documentary *prima facie* evidence that the employees had been summarily dismissed before the order of 7th November, 2017 was made. The summary dismissal being a contentious issue, it required judicial determination in proper proceedings after a full hearing. In the circumstances of this case, we find that the order of reinstatement was improperly made at an interlocutory stage through an oral application and erroneously granted without due consideration of its implication on the previous orders and the pending proceedings. It is apparent that the order of reinstatement not only stultified the application dated 17th November, 2017 but also impeded a proper adjudication of the pending claims and applications.

[9] For the foregoing reasons,

- (i) The appeal is allowed with costs to the appellants.
- (ii) The order dated 17th January, 2018 reinstating the employees unconditionally is set aside.
- (iii) The oral application for reinstatement is dismissed. Orders accordingly.

***Dated and Delivered at Nairobi this 20th day of December, 2018.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

***D. K. MUSINGA***

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***JUDGE OF APPEAL***

***J. OTIENO-ODEK (Prof.)***

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***JUDGE OF APPEAL***

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**