



IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: G.B.M. KARIUKI, F. SICHALE & KANTAL, J.J.A.)

CIVIL APPEAL NO. 330 OF 2013

Consolidated with Civil Appeal No. 356 of 2013

BETWEEN

KAISUGU LIMITED.....APPELLANT

AND

STEVEN GEORGE & 103 OTHERS.....RESPONDENTS

(Appeal from the Ruling of the Industrial Court at Nakuru, (Ongaya, J) dated on 29th July, 2013

in

Industrial Court Petition No. 1 of 2013)

JUDGMENT OF THE COURT

1. This Appeal No. 330 of 2013 was consolidated with Appeal No. 356 of 2013 because both spring from the same cause namely, Petition No. 1 of 2013 in the Industrial Court (now known as Employment and Labour Relations Court) involving, **Stephen George and 103 others** on the one part and on the other part **Kaisugu Limited and 2 others**. The dismissed Petition (No. 1 of 2013) alleged that the respondents who were the claimants were employed on diverse dates by the appellant, Kaisugu Limited, as tea pluckers. The Petition named **The Attorney General** and **The Minister for Labour** as the 2nd and 3rd respondents respectively. The record shows that the respondents Nos. 1 to 64 were declared redundant and lost their jobs. The claim by the respondents (who were represented by counsel was for, *inter alia*, a declaration that the appellant had violated Articles 41 and 47 of the Constitution of Kenya by failing to issue them as casual workers with written contracts; further that the appellant evicted the respondents from their houses and subjected them to inhuman and degrading treatment and violated their right to housing and also breached its promise to reinstate them in employment. The respondents prayed for an order that the appellant be compelled to compute and pay to the respondents as claimants Nos 1 to 64 “their dues and leave dues for the years worked” and an order directing the appellant as their former employer to issue all its casual workers with written contracts making them permanent employees after the statutory three months of service.

2. The learned Judge of the Employment and Labour Relations Court (E&LR Court) was persuaded and in his impugned judgment dated 4th October 2013 granted to the respondents the reliefs as shown hereunder:

“Judgment is entered for the petitioners against the 1st respondent for :

a) a declaration that the 1st respondent's conduct, acts and omissions are unlawful, illegal and unfair and the same violated Articles 27, 28, 29, 40, 41 and 43 of the Constitution and the same violated Section 40 of the Employment Act, 2007;

b) the 1st to 64th petitioners be paid by the 1st respondent as follows:

i. twelve months gross salary at rate of last monthly pay for unfair termination and in view of the violations of the fundamental

freedoms and rights;

ii. one month pay in lieu of the redundancy notice; payment for days worked prior to the termination and not paid;

iii. pay for annual leave days due but not taken as at termination; and

iv. severance pay at 15 days per completed year of service;

and further ordered the appellant:-

c) the petitioners to compute the amount in (b) and serve the computation upon the 1st respondent within 14 days from the date of the judgment for hearing of any objections on a convenient date;

d) a declaration that the petitioners are entitled to access the information from the 1st respondent under Article 35 of the Constitution and as necessary for full realization of this judgment;

e) the 1st respondent to pay the amount in (b) by 1.12.2013 in default to pay interest at court rates till payment in full;

f) the respondent to pay the petitioners' costs of the suit.”

3. The appellant was aggrieved by the said decision and therefore proceeded to give Notice of Appeal on 16th October 2013 pursuant to Rule 75 of this Court's Rules. The appellant also gave notice of appeal on 15th August 2013 against the decision of the E&LR Court dated 29th July 2013 and on 21st November 2013 lodged the record of appeal in Civil Appeal No. 330 of 2013 and on 20th December 2013 lodged record of appeal in Appeal No. 356 of 2013. In Appeal No. 330 of 2013, the appellant proffered 12 grounds of appeal in the Memorandum dated 20th November 2013 in which the appellant contended that the learned Judge erred in law by denying the appellant the right to be heard and to call witnesses; in failing to be impartial; in failing to observe principles of natural justice; in awarding respondents Nos. 1 to 100 both severance pay and compensation at the same time; in wrongly holding that the respondents' constitutional rights were violated and that compensation was due under Article 23(3)(e) of the Constitution and Section 49 (1) (c) of the Employment Act.

4. In the Memorandum of Appeal in Civil Appeal No. 356 of 2013 dated 20th November 2013 the appellant put forward seven grounds of appeal, the first six (6) of which were identical to the first six grounds in the appellant's Memorandum of Appeal in Civil Appeal No. 330 of 2013. The seventh (7th) ground stated that the learned Judge erred in allowing on 23rd July 2017 an oral application by Kituo cha Sheria to be joined in Petition No. 1 of 2013 as an interested party after dismissing an application by Notice of Motion by Kituo cha Sheria dated 11th July 2013 (made on 12th July 2013) in Petition No. 1 of 2013 seeking leave to be joined as Amicus Curiae because Kituo cha Sheria had failed to show it was neutral.

5. These appeals came up for hearing before us on 26th September 2017. Learned counsel **Mr. Amos Adama** appeared for the appellant, **Kaisugu Limited**, in both appeals and learned counsel **Mr. Chigiti** appeared for respondents numbers 1 to 101 while learned counsel **Mr. Shitubi** held brief for **Mr. Emmanuel Soita** for respondents numbers 102 and 103. No counsel appeared from Kituo cha Sheria, the respondent No. 104. The Court records shows that Kituo cha Sheria was duly served with a hearing notice to attend the hearing on 26th September 2017.

6. The consolidation of the two appeals was ordered following an application by Mr. Shitubi who drew the attention of the Court to the fact that the parties in the two appeals are the same as are their advocates on record and the impugned decisions spring from the same cause, to wit, Petition No. 1 of 2013 in E&LR Court. Learned counsel Mr. Adama and Mr. Chigiti were in agreement with and consented to the consolidation of the two appeals.

7. Counsel for the parties filed written submissions in these appeals but did not wish to highlight the same. They requested for judgment on the basis of the material placed before the Court in the records of two appeals including the written submissions of the parties and the lists of Authorities filed. The submissions filed in the two appeals are similar.

8. The pleaded facts giving rise to the respondents' claims show that the respondents Nos. 1 to 64 were formerly employed by the appellant in its tea farms as tea pluckers. At the beginning of the year 2012, there was serious drought frost and later hailstones which caused reduced production which in turn necessitated reduction of employees. The appellant has a Recognition Agreement (RA) and a Collective Bargaining Agreement (CBA) with Kenya Plantation and Agricultural Workers Union (KPAW Union) and Kenya Tea Growers Association (KTG Association). The CBA governs the terms and conditions of employment between the appellant as employer and employees.

9. Due to the adverse weather conditions that affected production of tea, the appellant took a decision to reduce the work-force by declaring excess labour redundant. The record of appeal shows that the appellant maintains two types of workers, permanent and seasonal. Permanent workers were not affected by the change of working conditions and were therefore not involved in the redundancy. The appellant's decision to lay off workers affected the seasonal workers only. The record shows that the appellant communicated the decision to KPAW Union in which the workers were members.

10. The appellant averred that so as to avoid favouritism, it adopted a balloting method to determine who would be retained and who would be laid off. The appellant conducted the balloting and those who picked **YES** chits were retained while those picked **NO** chits were laid off.

11. Most of the workers who were laid off lived in the houses provided by the appellant for workers. Those who were laid off were promised

that they would be called back when yields increased. The record shows that in April 2012, rains came and yields improved. The appellant put up notices informing the laid off workers to report back to work. Some returned to work and others refused to do so. The appellant put out public notices to enhance work-force. Workers came from the vicinity. Those who did not return to work for the appellant who included the respondents 1 to 64 continued to retain their houses. As a result, the appellant gave them notices of one month to vacate. The appellant avers that those who failed to return to work filed the litigation that gave rise to this appeal.

12. There is no controversy that the respondents 1 to 64 were tea pickers and members of the Kenya Plantation and Agricultural Workers Union. There is no evidence to contradict the appellant's pleading and evidence that the workers laid off through the redundancy were housed by the appellant prior to the redundancy and were required to vacate following the notices issued. Nor is there any traverse or evidence that the employees laid off who were requested through general notices to return to work did not do so.

13. In the Memorandum of Appeal and written submissions of the appellant, the latter contends that the learned Judge erred in upholding the claims by the respondents 1 to 104 as regards alleged violation of right to be heard, breach of Articles 41 (relating to the right of fair Labour Practices) and Article 47 (relating to fair administrative action) and Article 23(2)(e) (relating to the power of the court to grant compensation in any proceedings brought under Article 22 (on enforcement of the Bill of Rights)) and finally alleged breach of Article 35 (right to access to information) and Article 49(1)(c), (relating to rights of arrested persons to communicate with an advocate, etc).

14. It is the submission of the appellant that it was hindered by the lower court in presenting its case when the learned Judge excluded the appellant's testimonies and denied sufficient time for the appellant to adduce evidence. The appellant contends that this was a misdirection on the part of the Judge and that it contravened the appellant's right to fair administrative action and violated the appellant's right to protection from discrimination guaranteed under Article 27(4) of the Constitution.

15. We have carefully perused the record of appeal and the written submissions and authorities cited. We observe that the appellant did not have its witnesses on the hearing date and that the appellant's application for adjournment was declined. Consequently, the suit proceeded without evidence being offered by the appellant. We bear in mind that the parties are entitled in this first appeal to a full re-evaluation and reconsideration of their case.

16. The record of appeal shows that the respondents made a presentation of their case before the learned Judge and after closing it, thus paving way for the appellant as respondent to make its case. The appellant's witnesses were not in court, and the appellant applied for adjournment. The application was declined. The learned Judge directed parties to file written submissions. It is for this reason that the appellant appealed against the judgment rendered on 4th October 2012 in Appeal No. 330/2013 and the ruling dated 29th July 2013 declining to allow the appellant time to call evidence (in Appeal No. 356/2013).

17. In declining to allow adjournment, the learned Judge stated:

“The court has considered the application for adjournment and find (sic) that the same is not merited. The respondent has not given any reason for absence of its witnesses in court at the appointed time (12.15 pm) for taking the respondent's (i.e. appellant's) evidence. The court finds such mischievous conduct as calculated to delay the determination of this case. In the circumstances, the court makes the following orders:-

(1) The respondent's case is closed.

(2) The petitioner's, the 2nd and 3rd respondent (sic), and the interested party to file and serve their final submissions by close of 9.08.2013 and the 1st respondent to file and serve by 25.08.2013 with liberty for the petitioner to apply by filing and serving by 1.09.2013.

(3) The petitioner at liberty to annex the expert report on its submissions as earlier applied.

(4) Parties are invited to agree on a mention date for directions on the judgment.

18. It is the application by the appellant for review made on 29th July 2013 which gave rise to the impugned ruling in Civil Appeal 356/2013 in which (Ruling) the court stated:

“I have considered the application, the submissions made and the proceedings of 23rd July 2013. In particular the application for review is predicated on alleged error which is not true as per the court record. In the circumstances, parties are directed to comply with the orders of the court made at close of the hearing on 23rd July 2013 to file submissions. This application is dismissed with no order as to costs as it is an abuse of the due process of the court.”

19. There are two issues in these two consolidated appeals. In appeal No. 356 of 2013, the appellant impugns the decision of the learned Judge refusing to grant adjournment. The issue for determination is whether the learned Judge exercised his discretion wrongly.

20. In Appeal No. 330 of 2013, the appellant complains that the trial Judge was not impartial and that he awarded the respondents reliefs in the impugned judgment delivered on 4th October 2013, without giving the appellant an opportunity to call evidence. In effect, the first issue is interrelated with the second issue.

21. On the first issue, the record shows that the appellant had notice of the hearing date and was represented by counsel at the hearing. It was not until the respondents called their witnesses who were cross-examined and finalized presentation of their case that the appellant's counsel indicated that the appellant's witnesses were not in court. Mr. Koech, learned counsel for the appellant, told the court that the appellant's

witnesses could not make it to court on the hearing date on 23rd July 2013. He asked the court to allocate another hearing date the following week. He did not inform the court what efforts or arrangements had been made to secure their attendance in court during the hearing; when objection was taken by Mr. Chigiti, learned counsel for the respondents, Mr. Koech left the matter to court. The court in its ruling noted that the hearing on 23rd July 2013 was fixed by consent of parties and that the case was called out for hearing at 9.30 am on that day when Mr. Morintat advocate appeared for the appellant. After preliminary applications, the hearing commenced at 12.55 pm with Mr. Koech present for the appellant. The hearing proceeded and the respondents closed their case at 3.30 pm on that day. At no time from 9.00 am to 3.30 pm did Mr. Koech or Mr. Morintat indicate that they did not have witnesses much less that they would seek adjournment. The court noted that no reason was given for the absence of the appellant's witnesses. The court made a finding that the conduct of the appellant was "mischievous and calculated to delay the determination of the case and declined to adjourn the hearing. The learned Judge had discretionary power to refuse to adjourn the hearing. The circumstances, in which the exercise of discretionary power will be interfered with on appeal was examined in **MBOGO & ANOTHER VS. SHAH [1968] EA93** where the Court (per Newbold P) stated:

“A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

22. After a careful examination of the application for adjournment and the decision of the court refusing to grant the adjournment, we are unable to find any misdirection on the part of the Judge nor can it be said that there was misjustice. It was the duty of the appellant to bring its witnesses to court and in the event of any hiccup, inform the court and the respondents. It was not until the respondents had closed their case that the appellant applied for adjournment without showing why the witnesses were absent. Nothing was said with regard to efforts, if any, made to secure their attendance in court. There would be no basis for faulting the learned Judge in the manner he exercised his discretionary power.

23. On the second issue, the appellant criticized the court for granting the reliefs sought. But the evidence adduced by the respondents was not controverted. The court found it sufficient to prove the respondent's case on the balance of probabilities. There is nothing on record to buttress any of the grounds contained in the Memorandum of Appeal. We find no merit in these two consolidated appeals which we dismiss with costs to the respondents, seeing as we do, that the reliefs granted were not illegal.

Dated and delivered at Nairobi this 29th day of December, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR