IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A

CIVIL APPEAL NO. 72 OF 2015

BETWEEN

KENYA ENGINEERING WORKERS UNION....……APPELLANT

AND

NARCOL ALUMINIUM ROLLING MILLS LTD....….RESPONDENT

(Appeal from the judgment and decree of the Employment and Labour Relations Court at Mombasa (Rika, J.) dated 24th July 2015 In ELRC No. 7 of 2013)

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JUDGMENT OF THE COURT

This appeal, lodged pursuant to ***section 17*** of the ***Employment & Labour Relations Court Act,*** arises from the dismissal by ***Rika, J***. on 24th July 2015, of a claim filed by the ***appellant, the Kenya Engineering Workers Union*** on behalf of 90 employees of the ***respondent, Narcol Aluminum Rolling Mills Ltd***. For convenience we shall refer to the 90 employees as the ***claimants*** and the Trade Union as the ***appellant.*** The appellant filed the claim in the ***Employment and Labour Relations Court***, Mombasa, by way of a Memorandum dated 4th February 2013 and a Supplementary Memorandum dated 14th June 2013 seeking two reliefs, namely an order compelling the respondent to open its doors to the claimants, who it had allegedly locked out, to resume their duties unconditionally, and an order for payment to each claimant Kshs 50,000/- for violation of their freedom of association under the ***Labour Relations Act*** and their right to a hearing before summary dismissal under the ***Employment Act***. The appellant averred that the respondent illegally locked out the claimants because they had joined a trade union, which the respondent was opposed to.

The respondent filed its response to the Memorandum of Claim on 16th September 2013 and denied locking out the claimants. Instead, it averred that the claimants had gone on an illegal strike on 15th January 2013 and subsequently most of them deserted duty.

On 4th March 2013 the claimants took out a Notice of Motion seeking the same reliefs as set out in the Memorandum, pending the hearing and determination of their claim. The trial court certified the motion urgent and on 7th February 2013 directed the County Labour Officer, Mombasa, to proceed to the respondent's premises and establish the factual situation regarding the alleged lockout, and to report back to the Court on 11th February 2013.

The findings of the County Labour Officer as detailed in his report dated 9th February 2013 were that on 15th January 2013 the claimants took illegal strike action but were advised by the labour officer to resume duty the next day and to raise their grievances in accordance with the prescribed procedures. The majority of the claimants duly complied, save for 5 who deserted work. On 24th January 2013, 60 of the claimants attempted to sabotage the respondent's operations by leaving melted aluminum in the furnace so that it could solidify and cause blockage, and by inciting other workers to stop work. In response, the respondent terminated the employment of 65 of the claimants for gross misconduct and desertion of duty. When the labour officer visited the respondent's premises pursuant to the order of the court, he found only one of the claimants on the duty, while 16 of them could not be accounted for.

Rika, J., ultimately heard the claim with 3 of the claimants testifying on their own behalf and that of the others, while 4 witnesses testified on behalf of the respondent. By the award dated 24th July 2015, the learned judge expunged some of the claimants'' documents from the record, dismissed the claim and reprimanded the appellant for trying to recruit members in an unorthodox manner. The learned judge held that that there was no lockout; that the claimants were not victimized for joining a trade union; that the claimants had engaged in an illegal strike and deserted work; and that their conduct amounted to gross misconduct.

Aggrieved by the award, the claimants filed a Notice of Appeal on 31st July 2015 and eventually this appeal. Although the claimants' memorandum of appeal contains 13 grounds of appeal, we are satisfied that the appeal turns on only three issues, namely whether the trial court erred by expunging from the record the claimants' documentary evidence; whether the claimants proved on a balance of probabilities that they were locked out by the respondent; and whether the trial court erred by failing to order the respondent to allow the claimants to resume duty. By consent, the parties opted to canvass the appeal through written submissions, which only the respondent elected to highlight briefly.

For the claimants, ***Mr. Birir*** learned counsel, submitted as regards the first issue, that the trial court erred by expunging from the record documents that the claimants had annexed to their written submissions, which they claimed were not in dispute and were relevant and critical in the determination of the issues in dispute. In counsel's view those documents merely confirmed the oral evidence adduced on behalf of the claimants and ought not to have been expunged from the record.

On the issue of lockout, the claimants submitted that the trial court erred by finding that they were involved in an illegal strike rather than being the victims of a lockout. It was contended that the trial court ignored cogent evidence that showed that the claimants were indeed locked out by the respondent and the reason therefor was their decision to join the appellant trade union. It was further argued that the dispute between the parties erupted when the check-off list was presented to the respondent, which in turn victimized the claimants for exercising their freedom of association.

In addition the trial judge was faulted for holding that because the claimants did not sign the check-off list, they could not have been victimized for joining the trade union. According to the claimants, the only reason why they denied having signed the check-off list was merely because they did not wish to suffer deductions, otherwise the list was genuine. Counsel added that the trial judge ought to have called for more evidence before finding that the signatures were forged and that only a handwriting expert could have conclusively determined the question. The trial court was also faulted for relying on the report of the labour officer, whom the claimants claimed was biased.

The claimants argued the last question of whether the trial judge had erred by failing to order the respondent to allow the claimants to resume duty as if it was an issue of failure by the court to order reinstatement of the claimants. It was submitted that the trial judge erred by declining to order reinstatement of the claimants on the grounds that they were casual employees. It was urged that there was cogent evidence before the court, which was not taken into account, that the claimants had worked for the respondent for a long time and were therefore not casual employees.

Mr. Khagram, learned counsel for the respondent, opposed the appeal submitting, as regards the first

issue, that the trial judge properly expunged the claimants' documentary evidence from the record because the same were not produced during the hearing. Instead, it was contended, the claimants sneaked the evidence irregularly as annexures to their final submissions. The respondent complained that even in the appeal before us, the claimants had sneaked in the record of appeal many documents which were never produced as exhibits before the trial court and which were never considered by that court.

As regards, the issue whether the respondent had locked out the claimants, counsel urged that after hearing evidence from both sides, the learned judge had properly concluded that there was no lockout. It was also urged that the report of the County Labour Officer, who was an independent and disinterested party, supported the respondent's averments that it had not locked out the claimants and that instead, they had initiated an illegal strike action. The respondent further urged that there was no substance in the claim that the claimants were locked out after joining a trade union, because all their witnesses denied having signed the check-off list authorizing deduction of dues as members of a trade union.

Lastly, the respondent submitted that the question of reinstatement of the claimants did not arise because their claim was founded only on the assertion that they were locked out upon joining a trade union and the remedy sought was not for reinstatement, but for resumption of duty following alleged lockout.

We have duly considered the record of appeal, the memorandum of appeal, the judgment of the trial court and the submissions by learned counsel. Ever since enactment of the ***Statute Law (Miscellaneous) Amendments (Act No. 18 of 2014)*** which repealed ***section 17(2)*** of the ***Industrial Court Act*** (renamed the Employment and Labour Relations Court by the same Act), appeals to this Court from the Employment and Labour Relations Court are no longer confined to issues of law only. (See ***Lamathe Hygiene Food v. Wesley Patrick Simasi Wafula & 8 Others, CA No. 42 of 2015).*** Accordingly, in a first appeal from the Labour and Employment Court, we are obliged to evaluate and reconsider the evidence, assess the same and come to our own independent conclusion, but always bearing in mind that we do not have the singular advantage that the trial court had of seeing and hearing witnesses as they testified. ***(See Selle & another v Associated Motor Boat Company Ltd & Others [1968] EA 123).***

On the first issue in this appeal, we have no hesitation in affirming that it has no basis in law or fact. The appellant readily concedes that the documents that were expunged from the record by the learned judge were never formally or at all produced as exhibits during the hearing of the claim. Instead, when the trial court invited the parties to file final written submissions, the appellant surreptitiously sneaked in the contentious documents as annextures to its written submissions.

With respect we agree with the respondent that, even with the relaxed procedure of the Employment and Labour Relations Court, there is no known procedure in our justice system that allows production of evidence by stealth or clandestinely**.** ***Rule 14(4)*** of the rules of procedure of the Employment and Labour Relations Court allows pleadings to contain evidence and empowers the court to require that evidence to be verified by affidavit or sworn oral evidence. ***Rule 17*** regarding pre-trial procedure requires a party who wishes to rely on a document that has not been identified in a verifying affidavit filed as part of the pleadings or where no verifying affidavit is filed, to make sufficient copies of each document for the court "***and to serve the other party with a copy before the case is set down for hearing".*** Documents submitted to the court must be originals, or where the original is not available, a certified copy thereof. It is plainly clear that under the rules, the opposite party must be afforded an opportunity to test the evidence, including by cross-examination. Short of that, the evidence may only be admitted with the consent of the parties.

In the instant case, the method adopted by the appellant to bring on record the contested evidence was in blatant violation of all known rules of evidence. The original documents or certified copies thereof were not produced before the commencement of the trial. They were not produced at the hearing itself. The respondent did not consent to their production and was not afforded an opportunity to test their authenticity or to cross-examine the claimant's witnesses on them. In those circumstances it cannot fall from the mouth of the appellant to claim the documents were not disputed or that they were merely to confirm the oral evidence adduced by the claimant's witnesses. In law documents that have not been produced cannot form part of the evidence. (See ***Raphael Kariuki Ngondi v. Barclays Bank of Kenya***

Ltd & Another, HCCC No. 3825 of 1993). Even by its own practice the Employment & Labour Relations Court has decried the practice of annexing documentary evidence to written submissions. In ***KUDHEIHA v. North Coast Beach Hotel, Cause No. 109, (Mombasa)***, the court reiterated as follows:

> ***The Court has time and again stated that Closing Submissions should not serve as a forum for adducing additional evidence; it is simply a forum for arguing one's case on the basis of the recorded evidence."***

Despite all the above, the appellant has persisted, right up to this Court, with irregular adduction of evidence, including introducing in the record of appeal other documents, which were not before the trial court. This practice has no legal basis and must cease forthwith. This ground of appeal is totally bereft of merit.

On the second issue, we do not see how, on the basis of the evidence on record, the trial judge can be faulted for holding that there was no lockout and that instead it is the claimants who had launched an unprotected or illegal strike action. Under section 2 of the Labour Relations Act and section 2 of the Employment and Labour Relations Court Act,

> ***"Lock-out" means the closing of a place of employment or the suspension of work or refusal by an employer to employ any employees—***
>
> ***(a) for the purpose of compelling the employees of the employer to accept any demand in respect of a trade dispute; and***
>
> ***(b) not for the purpose of finally terminating employment***.

A lockout therefore is a device of the employer entailing keeping out the employee from the place of work and employment for purposes of compelling the employee to accept the employer's demands in a trade dispute. As it is often said, a lockout is a reverse strike by the employer. The purpose of a lockout is not to finally terminate the employment relationship. Just like a strike, the section 76 of the Labour Relations Act sets out the procedure to be adopted by the employer before resorting to a lockout. Failure to adhere to the prescribed procedure makes the lockout an unprotected lockout under the Act ***(See Lamathe Hygiene Food v. Wesley Patrick Simasi Wafula & 8 Others, supra).***

Immediately after the claimants filed their claim, the court directed the labour officer, as an independent party, to proceed to the respondent's premises, establish the factual situation and report back to court. In his report, the labour officer explained in detail his finding, which were arrived at after visiting the factory and interviewing both the workers and the management. The court considered this report along with the evidence that was adduced by the claimants and the respondent and concluded that on a balance of probabilities, the respondent did not lockout the claimants and that it was the latter who had launched illegal strike action. Having considered the evidence on record, we are satisfied that the conclusion by the learned judge cannot be faulted.

Part of the evidence on record, which refutes the claimant's assertion that they were locked out, apart from the report of the labour officer and the evidence of the respondent's witnesses, is the evidence relating to the claimants' membership in the trade union. According to the claimants, the respondent locked them out because they had exercised their freedom of association and joined a trade union. But the evidence of their own witnesses was that they had not signed the check-off list authorizing the respondent to deduct trade union dues from their salaries and that their purported signatures on the check-off list were forgeries. The denial by the claimants that they had joined a trade union and authorised deduction of trade union dues from their salaries completely destroyed the only reason they advanced for the alleged lockout. If on the basis of their own evidence the claimants had not joined the trade union, then how could the respondent have subjected them to lockout for joining a trade union?

There is no merit in the appellant's explanation that the claimants had joined the trade union, but denied their signatures on the check-off list because they did not wish their salaries subjected to trade union

deductions. With respect, the appellant and the claimants cannot approbate and reprobate at the same time. The claimants were either members of the trade union, in which case they had to pay trade union dues, or they were not. It cannot be the case that they were members of the trade union but unwilling to pay trade union dues.

In the same vein, the appellant's submission that it required a hand writing witness to confirm that the claimants' signatures were forgeries is not only disingenuous, but also superfluous. The claimants, having denied the signatures which formed the foundation of their own case, neither the respondent nor the court was obliged to call evidence of a handwriting expert to shore up the claimants' case. As the trial judge, who had the advantage of seeing and hearing the witnesses as they testified concluded, the evidence on record is consistent with the signatures of the claimants having been forged and the claimants having been irregularly recruited into the trade union by the appellant without their consent. In the circumstances of this appeal, the reprimand of the appellant was well deserved.

The last question is whether the learned judge erred by declining to order the respondent to allow the claimants to resume duty. We agree with the respondent that was the remedy that the claimants prayed for, and not reinstatement following unlawful dismissal. However, when it framed the issues for determination, the trial court framed the issue as follows:

> ***"(c) Are they (claimants) entitled to order for reinstatement and payment of Kshs. 50,000 as disturbance allowance?"***

There is no evidence on record to show that the claimants amended their pleadings to seek reinstatement. Only one of the claimants' witnesses stated, during his evidence that he wished to be reinstated, without any foundation for that request in the pleadings. It has been stated time and again that parties are bound by their pleadings and that the court will not determine issues that have not been properly placed before it for decision through pleadings or amendments thereto. See. ***Captain Harry Gandy v. Caspar Air Charters Ltd [1956] 23 EACA.*** Neither did the parties address unpleaded issues nor did they leave them to the Court to decide (***Odd Jobs v. Mubea [1970] EA 476).***

Accordingly the issue of reinstatement of the claimants was not properly before the court. In view of the finding by the trial court, which we affirm, that there was no lockout, there was no basis established for an order directing the respondent to allow the claimants to resume duty. There was no ground of appeal challenging the refusal of the trial court to award the claimants Kshs 50,000/- each, and even if there was, the same could not possibly have succeeded in view of the finding that the appellants were never locked out. In the end, we are satisfied that this appeal lacks merit and the same is hereby dismissed with no orders on costs. It is so ordered.

Dated and delivered at Malindi this 1st day of July 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR