



**Kenya Union of Sugar Plantation and Allied Workers v West Kenya Sugar Company Limited; Retail Management Solutions Limited & 2 others (Interested Parties) (Cause E008 of 2024) [2024] KEELRC 2095 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2095 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
CAUSE E008 OF 2024**

**JW KELL, J  
JULY 31, 2024**

**BETWEEN**

**KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS ..... CLAIMANT**

**AND**

**WEST KENYA SUGAR COMPANY LIMITED ..... RESPONDENT**

**AND**

**RETAIL MANAGEMENT SOLUTIONS LIMITED ..... INTERESTED PARTY**

**HANDY STAFFING LIMITED ..... INTERESTED PARTY**

**VINEYARD INTERNATIONAL LIMITED ..... INTERESTED PARTY**

**RULING**

1. The Ruling is on application by way of a Notice of Motion application by the Claimant/Applicant (herein “Applicant”) dated 25<sup>th</sup> March 2024 and received in Court on 27<sup>th</sup> March 2024. The application was premised on the provisions of Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules* (2016), Sections 5 and 87(1) of the *Employment Act*, 2007, Section 1A, 2A & 3A of the *Civil Procedure Act*; Section 12 of the *Employment and Labour Relations Court Act*, and Articles 27,28 and 159 of *the Constitution*, seeking the orders: -
  - a. Spent.
  - b. The Honourable Court be pleased to issue an injunction barring and restricting the respondent from effecting the intended terminations of employment and/or layoff of the employees herein listed in Schedule A.



- c. That pending hearing and determination of this application, the Honourable Court be pleased to issue an injunction restricting /barring the respondent from filling their job positions until this matter is heard and determined.
  - d. The Honourable Court be pleased to issue an order directing the respondent, respondent's managers and interested parties to immediately recall all the listed employees back to their normal duties in their substantive positions as before the closure without, loss of benefits.
  - e. That pending hearing and determination of this application the respondent and interested parties be ordered to make monthly payments of all financial loans/obligations for the listed employees to the financing institutions involved and full house allowances.
  - f. That pending hearing of this application this Honourable court be pleased to issue an injunction against the respondent, respondent's management or agents barring them from victimizing /terminating/coercing or otherwise disadvantaging any(all) of the employees herein list(sic) Schedule A on account of this litigation/suit.
  - g. The respondent to bear the cost of this application.
2. The Notice of Motion was premised on the grounds on the face of the application and the grounds in the supporting affidavit sworn by Bro. Francis Bushuru Wangara (General Secretary) sworn on 25<sup>th</sup> March 2024 as follows: -
- a. That the claimant has a Recognition agreement with the respondent signed in 1997(FBW 01). That in July 2023, the Respondent closed down operations due to sugar cane shortages, the raw material for sugar production, as per its notice of suspension of operations (FBW 02).
  - b. The shortage of sugarcane not being the fault of any of the employees, the respondent promised to be fair in the whole process and not allow discrimination or mistreatment (as per its Memo dated 25<sup>th</sup> July 2023(FBW 03).
  - c. That the claimant negotiated separate agreements for the employees of the affected sugar factories during the 4-month closure period and after several negotiations between the claimant and the respondent, minutes were recorded (FBW04), and the discussions culminated in a memorandum agreement signed by both parties on 29<sup>th</sup> July 2023(FBW 05).
    - a. That owing to the said memorandum, the respondent issued letters to all employees releasing them for Out-of -crop leave from 1<sup>st</sup> August 2021 ending 30<sup>th</sup> November 2023 except those who were engaged in maintenance work and essential services (FBW 06(a)).
    - b. That the issues agreed prior to the signing of the memorandum were that there would be no discrimination whatsoever, resumption of duties, employee sustainability, staff loans and staff salaries during the closure period.
    - c. That as relates resumption of duties, the parties agreed that the closure was temporary and no staff would be left out on resumption, that consultations would continue during the closure, before the resumption and after the resumption.
    - d. That the operations resumed as per the notice of 25<sup>th</sup> November 2023(FBW 06(b) and the respondent has unilaterally taken decisions that have subjected the listed employees to discrimination, undue suffering and economic frustrations.



- e. That most employees had loans with various institutions as per their pay slips (FBW 07) and the respondent had ignored that factor subjecting them to mental torture and injuring their feelings.
  - f. That on staff loan the respondent agreed to a negotiated 4-month loan repayment holiday for all employees servicing loans with the various financial institutions which period has lapsed.
  - g. That by failing to recall the listed employees back on duty and to reinstate their full salary, the respondent has left them in a precarious dilemma as the loaning institutions are now threatening to act against them and list them on CRB (FBW 08-Bank Letters).
  - h. That the loans are accruing interest and penalties on account of non-payment as of December 2023 when the loan holiday lapsed.
  - i. That the respondent had agreed that since operations had stopped and there were no sales, employees would be paid stipends up to November 2023 which was the closure period
  - j. That contrary to a legitimate expectation that employees would be recalled to resume their normal duties and be paid their full salaries when operation resumed in December 2023, the Respondent has continued to pay stipends to the listed employees without any communication to the union which amounts to unfair administrative action against employees in violation of Article 27 of *the Constitution*.
  - k. The claimant has made effort to resolve the dispute mutually with the respondent but the respondent has employed delay tactics demonstrating an unwillingness to resolve the matter (FBW 09 - letters by Union).
  - l. The claimant reported the matter for conciliation, whereupon a conciliation agreement (FBW 10) was reached but the respondent is unwilling to implement the recall/return to work, as the HR has backtracked on the agreement signed at the labour office Kakamega.
  - m. As informed by the branch officials of the claimant, the Respondent is scheming on how to terminate the employment services without any reasonable cause, as he is aware that before the closure of operations, there were no existing disciplinary cases against the listed employees to warrant them not to be recalled or suffer termination or dismissal.
  - n. That the court has the constitutional, legislative and inherent mandate to issue the prayers sought.
3. The Application was opposed by the respondent who on 11<sup>th</sup> April 2024 filed a Notice of Preliminary Objection dated 10<sup>th</sup> April 2024 seeking the dismissal of the application on the following grounds: -
- i. There is no employer-employee relationship between the Respondent and the persons subject to the Notice of Motion dated 25<sup>th</sup> March 2024 in the nature of a contract of service so as to lawfully invoke the jurisdiction of the Honourable Court.
  - ii. The Claimant has no locus standi to institute this suit as it has no Recognition Agreement with the Respondent in respect of outsourced workers which is a mandatory pre-requisite to enable the Claimant pursue redress under Section 56 of the *Labour Relations Act*, 2007.



- iii. The Notice of Motion Application dated 25<sup>th</sup> March 2024 is incurably defective as the claimant does not have any privity of contract or locus standi to institute this suit against the respondent in respect of the outsourced workers.
  - iv. The Notice of Motion Application dated 25<sup>th</sup> March 2024 and the entire claim against the Respondent are an abuse of the process of the Court.
4. The Respondent further on 30<sup>th</sup> July 2024, filed a Replying affidavit sworn by Duncan Abwawo (Human Resource Manager) on 29<sup>th</sup> July 2024 stating that: -
- a. He was aware that the application relates to employees: David Wambasa; Andrew Ligare, Daniel Bulali, Jafred Werakoko, Luka Ismael, Protus A. Lucheli, Eliud Maiyo, Enock Shamala, Josephine Bushuru Nicholas Lusisa And Shibanga Micah.
  - b. That an employer-employee relationship only exists for David Wambasa; Andrew Ligare, Daniel Bulali, Jafred Werakoko, Luka Ismael, Protus A. Lucheli, and Eliud Maiyo who have already been recalled (DA 1-Recall letters).
  - c. That the said employees were deployed to work at Naitiri and Olepito which are the Respondent's stations where man-power was needed and any transfer is in line with the Respondent's transfer policy and not malicious.
  - d. That the recalled employees were called to their substantive positions and they were informed their terms and conditions of service will remain the same.
  - e. That Eliud Maiyo resigned and the Respondent accepted his resignation (DA2).
  - f. That the respondent expressed its willingness to facilitate the transfer of the recalled employees by availing salary advance which the said employees declined and declined to report to the said stations.
  - g. That the respondent having recalled the employees, did comply with the partial judgment of the court and that the rest of the persons in the list "A" i.e. Enock Shamala, Josephine Bushuru, Nicholas Lusisa And Shibanga Micah are employees of the interested parties and the respondent has no mandate to recall them.
  - h. that the respondent is aware that Josephine Bushuru was recalled by her employer.
  - i. That thus prayer (d) of the application cannot issue against the respondent.
  - j. That the respondent does not intend to victimize, or disadvantage its employees on account of the present suit, but the employees on their part are obligated to report to their new work stations and then the respondent shall honour its contractual obligations toward them on reporting to work.
  - k. That the Respondent's contracts with the interested parties lapsed on 31<sup>st</sup> March 2024, and the Respondent entered into different contracts with other outsourcing firms i.e. Peoplelink Consultants Limited and Manpower Company Limited (DA 3) which contracts commenced on 1<sup>st</sup> April 2024. That outsourced workers were offered contracts by the new firms for a seamless transition and prays that the application be dismissed.



## **Written Submissions**

5. The Court directed that the application be canvassed by way of written submissions. The parties complied. The Claimant/Applicant's written submissions dated 25<sup>th</sup> July 2024 were filed by Jeremiah Ingalia Akhonya, on an even date. The Respondent's written submissions dated 29<sup>th</sup> July 2024 were filed by O&M Law LLP Advocates on 30<sup>th</sup> July 2024.

## **Determination**

### **Issues for determination.**

6. The Applicant submitted globally on the Respondent's conduct in failing to recall employees and in issuing transfer letters to the employees who were recalled.
7. The Respondent submitted globally asserting that the respondent has already recalled the persons listed in its employ and those deployed having not reported, cannot earn if they do not work.
8. The Court having perused the pleadings by the parties and their submissions was of the considered opinion that the issue placed before the court by the parties for determination of the application is: -
  1. Whether the application was merited.

### **Whether the application was merited.**

9. The claimant brought the case that its members were recalled back to work and transferred arbitrarily and without notice causing them hardship. The full details are outlined above. Some had not been recalled as agreed at the time of the closure of the factory (FBW-04a)
10. On the other hand, the employer relying on the affidavit of Duncan Obwawo of 29<sup>th</sup> July 2023 stated that only 7 of the members were under the respondent and the rest were under the interested parties. The interested parties were served and they did not respond.
11. The copies of the letters of the 7 employees recalled by the Respondent were annexed.(DA-1)
12. The court noted the contents of the minutes of consultation of the union and the respondent on the said workers(FBW-04a), it was agreed there was to be 100% recall without victimization and with full benefits. The employer stated only 7 of the members of the Claimant were its employees the rest being under the interested parties of whom the claimant had no recognition agreement with. The Respondent annexed copies of the contracts between it and the outsourcing companies both dated 1<sup>st</sup> April 2024 ( DA3).
13. The Respondent produced evidence of letters of the employees recalled to work in Naitiri and Olepito stations which it says are stations within the company. This was not disputed by the Claimant union.
14. The court returns that the parties had agreed on the return of all employees previously engaged on a priority basis before engaging others when the time comes in the meeting held on 18<sup>th</sup> July 2023 (FBW-04a- clause C on resumption of duties ). The Court then returns that the agreement was binding between the parties and the subsequent change in management by outsourcing labour vide contracts of April 2024 was bound by the agreement on 18<sup>th</sup> July 2023 signed by parties on 22<sup>nd</sup> July 2023. It is that understanding that led to the letters of temporary variation of employment terms which indicated that upon the end of the out-of-crop period, they would be recalled to work. The Court found that the content of the letters, whether under the letterhead of the Respondent or the outsourcing companies, were similar.



15. The court found evidence of recall of the said 7 workers but transferred to other stations in the respondent's company. The court found in the consultation minutes the union was agreeable to members being deployed under clause b of the Minutes of 18<sup>th</sup> July 2023 in any vacancy at Sukari (FBW-04a).
16. The Claimant took issue with the recall letters for deploying the members to other stations. The Court holds it is a prerogative of the employer to allocate work to employees and re-organize its staff to achieve optimum results or address human resource gaps in the company. A transfer of an employee from one station to the other should thus be seen from this perspective that the employer is at liberty to organize its business. This principle should be seen within the context of sections 10(2) (h), 17 and 18 of the *Employment Act*, 2007. See *Joseph Makau Munyao & 4 others v Kenya Ports Authority & another* [2016] e KLR as cited by Justice Mbaru in *Anne Wairimu Kimani v Kenya Agricultural Livestock Research Organisation (KALRO)* [2017] eKLR.
17. The Court finds in the instant case the employees have been transferred on the same terms. There was no evidence of special hardship at the said stations being within the region. Where an employer has on good reason made a decision to transfer an employee and notice is issued to this effect, the employee should readily oblige. Such a transfer can only be challenged on good grounds such as, that the decision is made arbitrarily, there is no notice or even where notice is issued the same is not sufficient or reasonable. See *Henry Ochido v NGO Co-ordination Board* [2015] eKLR. The instant case was unique as the employees had been out of work due to closure of factories for lack of cane. It was not a normal transfer. It cannot thus be said to have been arbitrary. The notice would also not have applied as the previous work had stopped. The decision in *Henry Ochido v NGO Co-ordination Board* was emphatic that transfer of staff is prerogative of the employer.
18. In the circumstances the claimant's members who have been recalled ought to oblige and report to their new stations as per the mediation agreement dated 25<sup>th</sup> April 2024 and adopted by the Court as partial judgment on the 7<sup>th</sup> May 2024.
19. The Notice of preliminary objection was to the effect that the respondent had no employee-employer relationship with 11 of the workers under its list in the claim who it said had since been outsourced. Taking into consideration that the alleged outsourcing happened after the negotiations of 18<sup>th</sup> July 2023 and while the employees were out on closure of the factory for lack of crop, then the interested parties holding the contract of 1<sup>st</sup> April 2024 are bound by that agreement between the respondent and the claimant to recall the employees and members of the Claimant stopped for lack of crop sometimes in 2023. The Court in *Kenya Hotels & Allied Workers' Union V Travellers (Tiwi) Beach Hotel (owned by Dhanjal Investments Ltd.)* [2006] e KLR held:- 'In this case, the employees were continuously employed in the Hotel by the two companies, i.e. Dhanjal Investments Ltd. and Sucham Investment Ltd., and for this reason a change in the management or ownership of the Hotel did not break the continuity of their employment contracts and did not also change the identity of the business. The take-over of the management of the Hotel by Sucham Investment Ltd. from Dhanjal Investments Ltd. had, therefore, no effect on the employment contracts of the employees and the identity of the business.' The decision is upheld to hold that the change of management does not break the continuity of employment contracts and their terms.

## Conclusion

20. For the above reasons, the Preliminary Objection is disallowed. The application dated 25<sup>th</sup> March 2024 is allowed noting the employer had a prerogative to transfer staff in compliance with its human resource



policies. The Court holds that the recalled employees ought to report to work as stated in the recall letters within 7 days of this ruling.

21. A further order is issued directing the respondent, respondent's managers and interested parties to immediately recall all the other listed employees back to their normal duties in their substantive positions having resumed operations as before the closure without, loss of benefits. The Court reiterates the employer has a prerogative to transfer staff to similar positions without loss of benefits in compliance with its human resources policies.
22. All other prayers in the application are disallowed at this stage.
23. Each party to bear own costs in the application and the notice of preliminary objection.
24. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF JULY 2024.**

**J.W KELI**

**JUDGE**

In The Presence Of: -

Court Assistant: Macheso

Respondent /Applicants: - Wachira

Claimant/Respondent: Akhonya

Akhonya for the Union

I pray for a stay of 14 days to consult.

Court Order

The Application for a stay of the ruling is unjustified. The stay is denied.

The memorandum of claim is listed for pretrial directions on the 19<sup>th</sup> of September 2024.

31/07/2024

