



**Kenya Export Floriculture, Horticulture & Allied Workers Union v Vegpro (K) Ltd
(Cause E028 of 2020) [2024] KEELRC 13593 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13593 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E028 OF 2020
DN NDERITU, J
DECEMBER 19, 2024**

BETWEEN
**KENYA EXPORT FLORICULTURE, HORTICULTURE & ALLIED WORKERS
UNION CLAIMANT**
AND
VEGPRO (K) LTD RESPONDENT

JUDGMENT

I. Introduction

1. The claimant, a trade union representing workers in the floriculture and horticulture agricultural sector commenced this cause, for and on behalf of its alleged 970 members (the grievants) who were employees of the respondent, by way of a memorandum of claim dated 13th July, 2022 filed in court on 16th December, 2020.
2. With the leave of court, the claimant filed an amended statement of claim on 13th October, 2022 seeking the following prayers –
 1. A declaration that the Respondent’s/lockout and or dismissal of the 970 employees was unprocedural, unfair and wrongful.
 2. A declaration that the Respondent’s refusal to negotiate a Collective Bargaining Agreement with the Claimant amounts to unfair Labor practices and is unlawful.
 3. That , the 970 employees dismissed by the Respondent be and are hereby reinstated to their former employment status effective from 4th June 2019 without loss of benefits.
 4. That , in the alternative, the Respondent be ordered to pay each of the 970 employees as listed in the Respondent’s letter dated 10th June, 2019 terminal dues in the following terms;



- a. One month Gross Salary in lieu of Notice
 - b. Gratuity payment of 23 days for each completed year of service for each of the dismissed employees
 - c. Pro-Rate Leave payment for leave earned but not taken for each of the dismissed employees.
 - d. In addition to prayer a, b and c above, the respondent be ordered to pay to each dismissed employee maximum compensation of 12 Months gross pay per Month for unfair dismissal.
 - e. Interest at Court rates from date of award until full payment
 - f. Issue a Certificate of service to each dismissed employee.
5. That , the Respondent and the Claimant be and are hereby directed to jointly compute the amounts of money due to each dismissed employee in respect of prayer No. 4 above and the same be filed in court for final orders of the court.
 6. That , the respondent and the Claimant be and are hereby directed to engage in Negotiations with a view to concluding and signing a Collective Bargaining Agreement.
 7. Any other order the Honourable Court may deem fit and just to grant to meet the ends of justice.
 8. That , Respondent to bear the costs of the suit and application.
3. As it is the procedure, the amended statement of claim is accompanied with a verifying affidavit sworn by David Omulama, the secretary general of the claimant, and witness statements by Boaz Sikenyi and Remi Simiyu.
 4. The claimant initially filed the cause in person but on 9th November, 2022 appointed the law-firm of Chimei & Co Advocates to act for it.
 5. The respondent, through Okweh Achiando & Co Advocates, filed a response to the amended statement of claim on 9th February, 2023 pleading that the cause be dismissed with costs for lack of merits.
 6. On 14th March, 2023 the claimant filed “replying affidavit to the respondent’s memorandum of response dated 23rd January 2023”. Upfront, the law does not envisage or contemplate the filing of such a document.
 7. Further, the claimant filed a list of documents on 6th April, 2023 with copies of the listed documents annexed thereto. A response to the amended memorandum of response was filed on 6th April, 2023.
 8. The cause came up for hearing in open court on 7th November, 2023 when CW1 testified in-chief and was partly cross-examined by counsel for the respondent. He was stood down to allow the filing and service of the claimant’s bundle of documents. The hearing continued on 27th November, 2023 with further cross-examination and re-examination of CW1. On the same date CW2 testified in-chief, was cross-examined and re-examined, and the claimant’s case was closed.
 9. The defence was heard on 21st February, 2024 when RW1 testified in-chief, was cross-examined and re-examined, and the respondent’s case was closed.



10. Counsel for both parties addressed the court by way of written submissions. Mr Chimei for the claimant filed written submissions on 12th June, 2024 while Mr Okweh for the respondent filed on 16th July, 2024. Counsel for the claimant filed supplementary submissions on 12th September, 2024.

II. The Claimant's Case

11. The claimant's case is expressed in the amended statement of claim, the oral and documentary evidence adduced through CW1 and CW2, and the written submissions by its counsel.
12. In the amended statement of claim, the claimant avers that the respondent is a limited liability company engaged in floriculture and horticulture in its two farms in Naivasha area, Nakuru County. It is pleaded that the claimant, a trade union, had at the material time to the cause many of its members working in those farms.
13. It is pleaded that at the material time to this cause the claimant had a recognition agreement with the respondent but on or about 27th August, 2018 the respondent pulled out of negotiations for a collective bargaining agreement (CBA) in regard to workers in its two farms, namely Gorge and Delamare Pivots. It is pleaded that in contravention of the law the respondent ignored and or neglected a recommendation by a conciliator that the CBA be negotiated and concluded.
14. It is pleaded that in response to the respondent's withdrawal or refusal to engage in negotiating a CBA the claimant issued a strike notice and the strike commenced on 7th June, 2018 when employees in the two farms downed tools.
15. Following the strike, the claimant filed Nairobi ELRC No. 378 of 2019 seeking for orders to shield the striking workers from any disciplinary action by the respondent. It is pleaded that subsequently the respondent denied all the striking workers access back to the farms to resume work after the court had suspended the strike to allow parties time to engage and settle the dispute. It is pleaded that it is the refusal by the respondent to allow the grievants back to work and its insistence that the said grievants had been dismissed for taking part in an alleged illegal strike that prompted the claimant to file this instant cause in court. It is pleaded that the alleged dismissal is wrongful, unfair, and unlawful.
16. Further, it is pleaded that by refusing to engage and negotiate a CBA the respondent contravened Sections 4 & 57(1) of the Labour Relations Act as well as Article 41 of the Constitution.
17. It is further pleaded that by dismissing the grievants in the manner that it did the respondent violated Sections 41, 44 & 45 of the Employment Act. It is further pleaded that the grievants were denied a hearing in contravention of Article 47 of the Constitution.
18. In his evidence in court CW1 stated that he is a former employee of the respondent and was among the 970 dismissed as pleaded in the foregoing summary of the amended statement of claim. His evidence-in-chief was based on his filed statement dated 27th September, 2022 which he adopted. He also produced the filed documents in the two lists as claimant's exhibits 1 to 12.
19. In cross-examination CW1 stated that he used to coordinate union activities among the employees of the respondent as a shop-steward. However, he conceded that he had no evidence to prove that he was a member of the claimant or even evidence of payment of union dues or a membership card. He also admitted that he had no prove of his election as a shop-steward.
20. He stated that the negotiations for a CBA collapsed because the respondent claimed that the claimant did not have a simple majority membership among its employees and the conciliator appointed could not resolve the impasse. It is as a result of this that the claimant issued a strike notice on 25th October,



2018 and another one on 4th June, 2019. The strike that was to commence on 1st November, 2018 was stopped by court in Nakuru ELRC No. 14 of 2018.

21. CW1 further stated that after the strike was declared illegal he reported back to work but was not allowed into the respondent's premises. He denied ever receiving a show-cause letter from the respondent and claimed to have only seen one in court. He stated that those who took part in the strike were summarily dismissed.
22. He conceded that the claim as filed in court and as contained in the amended statement of claim did not name and or disclose the names of the alleged 970 grievants. He further stated that he was not a grievant in this cause but a witness. He also conceded that the dues for each grievant are not computed in the claim.
23. In re-examination he insisted that he was neither served with a show-cause letter, a hearing notice, nor a letter of dismissal. He stated that the employees were prevented from going back to work by the police.
24. CW2 adopted his filed statement as evidence-in-chief and stated that he was a shop-steward.
25. In cross-examination CW2 conceded that he had no evidence of his union membership or his alleged shop-stewardship. However, like CW1, he alleged to have signed the recognition agreement between the claimant and the respondent in his capacity as a shop-steward. While he alleged that he was a witness and a grievant in this claim, he admitted that his name was not indicated in the pleadings as such grievant. He conceded that the list of the names of the grievants was not attached to and filed with the claim.
26. He stated that the strike called by the claimant and commenced on 7th June, 2019 was peaceful until the police intervened and caused chaos by allegedly throwing teargas cannisters and beating up the striking employees. He stated that he was not issued and served with a show-cause letter as he saw the same for the first time in court. He further stated that he was not issued and served with a letter of dismissal and his attempts to return to work were thwarted by the respondent as he was denied access and entry into the premises and locked out.
27. He denied having been invited for a disciplinary hearing when shown minutes of an alleged disciplinary hearing meeting. He admitted that his claim is not tabulated in the pleadings.
28. In re-examination he stated that the list of the grievants is in the claimant's bundle of the filed documents. He stated that he was dismissed on 10th June, 2019 although he was not issued and served with a letter of dismissal. He stated that he reported back to work after the strike but he was stopped at the gate and denied access into the premises. He stated that the strike began on 7th June, 2019 but the employees were dispersed by the police on 10th June, 2019.
29. It is on the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment be entered as prayed in the amended statement of claim. The submissions by its counsel shall be considered in a succeeding part of this judgment.

III. The Respondent's Case

30. The respondent's case is contained in the memorandum of defence to the claim, the oral and documentary evidence adduced through RW1 and RW2, and the written submissions by its counsel.
31. It is pleaded that this cause is an abuse of the court process as the subject matter hereof is also directly and substantially in issue between the same parties in Nairobi ELRC Cause No. 378 of 2019 which is pending before a court of competent jurisdiction. It is pleaded that this cause is thus sub judice to the cause filed earlier on as alluded to above.



32. It is pleaded that on 31st October, 2018 the respondent filed Nakuru ELRC Constitutional Petition No. 14 of 2018 to stop a strike following a notice issued by the claimant on 23rd October, 2018. The notice had been issued that employees in the two farms were to go on strike following impasse in CBA negotiations between the claimant and the respondent. The court issued orders injuncting the impending strike. Along the way the above petition was consolidated with Nakuru ELRC Cause No. 222 of 2018 and a consent recorded stopping the strike but the parties still failed to agree on deduction and remission of union dues based on the said consent. As a result no CBA was agreed and executed.
33. On or about 21st May, 2019 the respondent started taking disciplinary action against employees who had taken part in the illegal strike in October, 2018. However, discussions between the parties yielded to a return to work formulae which gave a blanket amnesty from dismissal to all the employees affected but they were issued with warning letters.
34. However, instead of sanity and industrial peace prevailing the claimant issued a strike notice on 6th June, 2019 that a strike was to start on the same day unless a CBA was agreed and executed. It is pleaded that on 7th June, 2019 members of the claimant downed tools in the two farms. However, most of the workers in the Gorge Farm returned to work on 8th June, 2019.
35. It is at that point that the claimant filed Nairobi ELRC No. 378 of 2019 seeking various orders intended to validate the above strike and a declaratory order that the strike was protected and lawful.
36. It is pleaded that subsequent to the strike the respondent issued show-cause letters to the striking employees and some of them responded to the letters and were allowed to resume duty while others decided not to respond and stayed away from work. It is the respondent's position that the strike was illegal and unlawful for lack of notice and a CBA regulating the same. It is pleaded that the striking employees breached Sections 76 and 80 of the *Labour Relations Act* and hence the respondent had the backing of the law in taking disciplinary action against them.
37. It is pleaded that the disciplinary action by the respondent was aligned with the provisions of Sections 41 & 44(3) of the *Employment Act* and Articles 41, 47, & 50 of *the Constitution*. It is pleaded that the affected employees were lawfully and procedurally summarily dismissed for taking part in an illegal strike contrary to Section 44 of the *Employment Act* and as such the issue of notice before dismissal or payment in lieu of notice does not arise. In any event, it is further pleaded, there is no binding CBA between the parties upon which the claimed reliefs may be based.
38. It is pleaded that the claimant has not established a cause of action against the respondent for failing to establish that it has members with the employees in the two farms most of whom are members of Kenya Plantation & Agricultural Workers Union (KPAWU). It is thus pleaded that the claimant has no locus upon which to file this claim purporting to represent none-existent members. It is pleaded that the claimant does not have simple majority membership among the employees of the respondent and as such it has no business purporting to act for such imagined membership.
39. In his testimony in court RW1, the regional human resources manager of the respondent at Naivasha, based his testimony on his filed statement dated 17th February, 2022. He produced the filed documents as exhibits 1 to 23. He stated that negotiations for a CBA between the parties broke down and stalled after the claimant demanded deductions at a rate (5% of basic pay) above what is provided for in the law (2%).
40. He stated that after the negotiations stalled the claimant incited its alleged members to engage in an illegal strike that was stopped by the court on 25th October, 2018. However, the claimant incited employees to another violent strike on 7th June, 2019. The respondent called in police to restore order and thereafter issued show-cause letters to the employees who took part in the said illegal strike. Some



of the employees responded to the show-cause letters and apologized for taking part in the illegal strike and were pardoned with warning letters issued. They reported back to work while others went on strike for over two weeks.

41. He stated that on 21st June, 2019 the respondent decided to summarily dismiss all those who had failed to report back to work. He stated that the claimant failed to avail evidence that the employees dismissed are its members and in any event the list of the grievants was not filed with the claim. He stated that there are no grievants in this claim and no authority was executed and filed from any of the alleged grievants authorizing the claimant to file and prosecute this claim on their behalf. He further stated that there is no stated claim and quantified for each of the alleged grievants and hence the cause is incompetent and untenable in law.
42. In cross-examination by counsel for the claimant RW1 stated that CW1 and CW1 were employees of the respondent and shop-stewards for the claimant union. He stated that the show-cause letters to the striking employees were collected from the gates of the two farms. He stated that the CBA negotiations jammed after the parties could not agree on the issue of the rate of deductions of union dues and the continuous and persistent ultimatums and threats issued by the claimant and hence the respondent obtained injunctive orders against the strike in ELRC Cause No. 222 of 2018.
43. Nonetheless, the employees still went on strike on 7th June, 2018 but those employees who elected to go back to work were admitted back and pardoned. He stated that no employee who wished to resume work was stopped or denied the opportunity. He stated that out of 970 employees 831 failed and or refused to return to work and were thus summarily dismissed as they did not even bother to respond to the show-cause letter.
44. In re-examination RW1 stated that while he was an employee of the respondent in the material period to the cause, in 2018/19 when the strike took place, he had not come across evidence confirming that indeed CW1 and CW2 were shop-stewards of the claimant. He stated that the strike notice was issued on 4th and the strike started on 7th June, 2019 and hence the notice did not comply with the law for being shorter than seven days. He reiterated that the employees who decided to abandon the strike and go back to work did so unconditionally. He insisted that show-cause letters were served upon all the employees from the gate as the strike was violent and the employees were riotous. He stated that the respondent availed buses as usual to ferry employees to work and those who wished to work continued while those who declined were subsequently summarily dismissed.
45. It is the basis on the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs.

IV. Submissions

46. On the one hand, counsel for the claimant submitted that this is a representative suit in which the claimant and its officials, including the shop-stewards (CW1 & CW2), did not require the authority from the dismissed employees to file in court. Counsel identified two issues for determination – Refusal by the respondent to negotiate a collective bargaining agreement; and, Unfair and wrongful dismissal of 970 employees who are members of the claimant.
47. From the above two broad issues counsel derived the following sub-themes for consideration and determination by the court –
 - i. Whether the Respondent was justified to pull out of negotiations?
 - ii. Whether the Claimant and the Respondent should conclude negotiations and sign the collective bargaining agreement?



- iii. Whether the dismissal of the 970 employees was unfair and wrongful?
 - iv. Whether there was a valid reason/reasons for dismissal of the 970 employees?
 - v. Whether the strike commenced by the Claimant's members on 7th June, 2019 was illegal?
 - vi. What is the bearing of the Ruling in Cause No. 378 of 2019 in a contempt application against the respondent in this suit?
 - vii. Whether there was procedural fairness exercised by the respondent in dismissing the 970 employees?
 - viii. Whether the Respondent's witness evidence has probative value to the Honorable Court?
 - ix. Whether the prayers sort including costs of this suit should be granted?
48. On item (i) it is submitted that the parties herein had a recognition agreement and were negotiating a CBA when the respondent withdrew from the negotiations in August, 2018. It is submitted that the respondent had no lawful or probable or justifiable reason for withdrawing from the negotiations and that none has been advanced throughout the trial and as such the court is urged to find that the respondent is in breach and violation of the applicable law.
49. On item (ii) it is submitted that the respondent is under legal obligation to engage and conclude a CBA with the claimant under Section 59 of the *Labour Relations Act*. It is submitted that the respondent has failed to demonstrate existence of another CBA between the parties or between the respondent and any other union covering the concerned 970 employees. The court is urged to order the parties to engage and conclude the CBA and they may agree on the effective date.
50. On the issue of wrongful and unfair dismissal, it is submitted that the list of the 970 employees dismissed is in the bundle of the documents filed by the claimant. It is further submitted that based on the correspondences in the bundles of documents filed and produced in court by the parties it is clear that the respondent was fully aware of the names and membership of the 970 employees in the claimant union.
51. It is submitted that there is no evidence availed confirming that the said employees were served with the show-cause letters as alleged by the respondent and or that they were issued with letters of dismissal. It is further submitted that the respondent admitted that the said 970 persons were its employees and admitted to dismissing most of them except those who resumed duty. It is submitted that in its response to the claim the respondent admitted the said employees as members of the claimant. It is further submitted that RW1 admitted as much in his testimony in court. In any event, it is submitted, the respondent availed in court letters of dismissal of 938 of the said employees.
52. It is submitted that the dismissal ran afoul of Sections 41, 43, 45 of the Act and lacked in both substantive and procedural fairness. It is submitted that no show-cause letters were properly served or at all, no disciplinary hearing was conducted, and the letters of summary dismissal were not served upon the affected employees. It is submitted that the respondent did not even attempt to apply the rules of natural justice in the entire process. The court is urged to follow the reasoning in *Geffrey Gikonyo Mathu V Intex Construction Company Limited (2017) eKLR*, *Gilbert Mariera Migor V Equity Bank Limited (2016) eKLR*, and *Anthony Mkala Chitavi V Malindi Water & Sanitation Company Limited (2013) eKLR* in contemplating the ingredients of fair hearing.
53. On the legality of the strike that culminated in the dismissal of the grievants, it is submitted that a strike notice was issued on 25th October, 2018 following the failure by the respondent to negotiate



and execute a CBA with the claimant on behalf of the grievants. It is submitted that the strike was lawful based on Sections 76, 79 of the Labour Relations Act and clause 4 of the recognition agreement signed between the parties. It is further submitted that the claimant issued a 7 days' notice before commencement of the strike on 7th June, 2019.

54. In any event, it is submitted, the issue as to whether the strike was lawful and protected is the subject of Nairobi ELRC Cause No. 378 of 2019 and as such the issue is sub judice. It is submitted that the strike was called off by the court to give the parties a chance for dialogue. It is submitted that instead of allowing the grievants back to work the respondent dismissed them as alluded to above. However, it is conceded that an application filed by the claimant for contempt in that cause was disallowed by the court on a technicality as no specific officers of the respondent were named in the application to be held liable for the contempt. However, it is emphasized that the respondent was held in contempt of the court order.
55. It is submitted that the subject matter in this cause is different from the other cause as Nairobi ELRC No. 378 of 2019 is about the legality of the strike only. It is submitted that the respondent was ordered to allow the grievants back to work but it failed to comply and purported to file an appeal against that order which appeal has not been prosecuted since 2020. It is submitted that as at the time the order of the court for re-admission of the grievants back to work in the above cause the respondent had not dismissed them and, in any event, the dismissal was wrongful, unfair, and unlawful ab initio.
56. It is submitted that this court cannot make an order reversing the order of another judge of this same court, that is subject of appeal, to the effect that the employees ought to have been re-admitted back to work. Further, the court is urged to find that the alleged dismissal was wrongful, unfair, and unlawful as per the submissions above.
57. The court is urged to allow the claim and relief the grievants as pleaded and prayed. The submissions on reliefs shall be considered in a succeeding part of this judgment.
58. On the other hand, counsel for the respondent raised a fundamental issue for determination in that the list of the grievants is neither included in the body of the claim nor a list of their names attached thereto and as such the cause as filed is incompetent and devoid of merits.
59. Further, it is submitted that the respondent's dismissal of the employees who failed and or refused to return to work was fair and just in the circumstances as the strike was illegal. It is submitted that based on Section 107 of the Evidence Act and Section 43(1) of the Employment Act it is upon the claimant to demonstrate that the dismissal was unlawful and it is only then that the respondent may be called upon to justify the dismissal.
60. It is submitted that CW1 and CW2 came to court as witnesses and had no authority whatsoever to plead or act for and on behalf of the alleged grievants.
61. Counsel for the respondent listed the following issues for determination by the court –
 - a. Whether the matter is sub judice?
 - b. Whether the strike commenced by the Claimant's members on 7th June, 2019 was illegal?
 - c. Whether there existed any valid reasons to terminate the employees?
 - d. Whether there was procedural fairness in termination of the employees?
 - e. Whether the Respondent should engage in Collective Bargaining negotiations with the claimant?



- f. Whether the Claimant is entitled to their prayers?
- g. Who bears the costs of this suit?
62. On the first issue, it is submitted that Nairobi ELRC No. 378 of 2019 is still pending in court and that the same is between the same parties and the matters raised herein are similar or substantially the same as in this instant cause. It is thus submitted that this cause having been filed subsequent to the one above is an abuse of the court process and in contravention of Section 6 of the [Civil Procedure Act](#).
63. It is submitted that this cause is sub judice and counsel cited the Supreme Court in Kenya National Commission on Human Rights V Attorney General & Others as cited in Republic V Paul Kihara Kariuki & 2 Others Ex parte Law Society of Kenya (2020) eKLR to the effect that no party should file two suits over the same subject matter between the same parties or parties claiming under them. It is submitted that in the very least this cause ought to have been stayed in view of Nairobi ELRC No. 378 of 2019.
64. It is further submitted that the subject matter in both causes is about the lawfulness and legality of the strike and the dismissal of the grievants whose names have not been disclosed by the claimant in the instant cause. It is submitted that this cause is the latter in time and the court is urged to avoid making findings that may contradict or compromise the initial or earlier cause cited above which was first in time. It is submitted that when read and understood in their entirety the two causes relate to the same subject matter and obviously between the same parties.
65. Besides being sub judice, it is submitted that the filing of this cause by the claimant is vagrant abuse of court process. The court is urged to sift through the matters in issue in the two causes and find that rather than the framing of the reliefs sought the subject matter in the two causes is one and the same. It is submitted that that the ratio in Republic V Paul Kihara Kariuki (supra) is that so long as the fundamental issue is the same or similar and the parties are the same, the framing or the wording of the reliefs is of no consequence.
66. It is submitted that the issue on whether the strike was illegal or otherwise is so central in the two causes, so much so that the issue of compensation or the other reliefs sought cannot be tackled without a finding on that fundamental issue. It is further submitted that that is the exact fundamental issue in both causes.
67. It is submitted that the claimant ought to have amended its pleadings in the earlier cause to align it to any other or further reliefs that the claimant may have deemed fit to seek. The court is urged to be persuaded by the decision of Ndolo J in Stella Nkatha Kebengo V Barclays Bank of Kenya (unreported) and find this cause sub judice and an abuse of court of process and dismiss the same with costs.
68. Without prejudice to the foregoing and in regard to the second issue, it is submitted that while the [Employment Act](#) and the [Labour Relations Act](#) recognize and protect workers who engage in union activities and programmes, such activities must be conducted within the law. It is submitted that Section 46 of the [Employment Act](#) should be read in conjunction with Section 76 of the [Labour Relations Act](#) in order to fully appreciate what constitutes lawful and protected strikes and lock-outs. It is submitted that in Lamathe Hygiene Food V Wesley Simasi Wafula & 8 Others (2016) eKLR and Inter-Public Universities' Consultative Forum of Federation of Kenya Employers V Universities' Academic Staff Union & 5 Others (2018) eKLR the court delineated the ingredients of a lawful strike or lock-out.
69. It is submitted that although a constitutional and a statutory right, going on strike or lock-out should be a last resort and only executed in strict compliance with the law cited above. It is submitted that



- while the claimant issued a notice of intended strike on 25th October, 2018 the notice that gave rise to this cause is the one issued on 4th June, 2019. The strike intended in the earlier notice which was to commence on 1st November, 2018 was stopped by a consent order issued on 31st October, 2018 in Nakuru ELRC No. 222 of 2018 as consolidated with Nakuru ELRC Petition No. 14 of 2018. It is submitted that the intended strike was not postponed or suspended but was stopped and employees allowed back to work and resumed their duties.
70. It is therefore submitted that if the claimant intended to engage its members in another strike it had to issue a fresh notice in accordance with the law cited above, specifically Sections 76 & 78 of the *Labour Relations Act*. Counsel in supporting this position cited *University of Nairobi V Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers Union & 4 Others (2018) eKLR* and *Joash Alubale Jacob V Mega Pack Limited (2019) eKLR*.
 71. It is submitted that the notice issued on 4th June, 2019 did not comply with the law as enunciated above. It is submitted that for the strike that commenced on 7th June, 2019 the claimant ought to have issued a fresh notice in accordance with the law and failure to do so rendered the strike unprotected and unlawful.
 72. On the third issue, and related to the above, it is submitted that the respondent had a right to taking disciplinary action against the striking employees based on the circumstances that prevailed based on Section 43 of the *Employment Act*. It is emphasized that the strike was unprotected and unlawful. Further, counsel cited *Mary Chemweno Kiptui V Kenya Pipeline Company Limited (2014) eKLR* in underpinning the interpretation of the above law.
 73. It is submitted that the employees were summarily dismissed after they turned down an invitation to resume work and failed to respond to show-cause letters. It is submitted that the letters of dismissal are very clear that the ground for summary dismissal was absenteeism, failing to follow lawful instructions, and taking part and participating in unlawful strike. The court is urged to align itself with the Court of Appeal holding in *Mohammed Yakubu Athman & 18 Others V Kenya Ports Authority (2017) eKLR* and find that the respondent had valid and lawful reasons for summarily dismissing the grievants based on Sections 44 & 45 of the *Employment Act*.
 74. It is further submitted that the employees engaged in unlawful and riotous strike in fundamental breach of their contract of service. Citing *David Serenge Kiganane V Mega Pack (Kenya) Limited (2019) eKLR* it is submitted that the dismissed employees engaged in actionable gross misconduct resulting in their summary dismissal under Section 44 of the *Employment Act* and Section 80 of the *Labour Relations Act*.
 75. On procedural fairness, counsel cited *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*, *Kenfreight (E.A) Limited V Benson K. Nguti (2016) eKLR*, and *Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Limited (2013) eKLR* in analysing the procedural steps that an employer should undertake before dismissing or terminating an employee. It is submitted that no employee, under whatever circumstances, should be dismissed or terminated without due process, both in substance and procedure.
 76. It is submitted that the striking employees were issued with show-cause letters on 8th June, 2019, including CW1 and CW2. It is submitted that some of the employees responded to the show-cause letter and were pardoned and allowed back to work with a warning. However, 831 employees did not respond to the show-cause letters and in a disciplinary hearing held on 17th June, 2019, in their absentia, the respondent resolved to summarily dismiss all of them. It is submitted that the 831 refused to participate in the disciplinary hearing. It is further submitted that by refusing or opting not to respond to the show-cause letters and not to participate in the disciplinary hearing the said employees



squandered their chance to argue their defence and as such the respondent had no alternative other than to proceed as it did.

77. It is further submitted that the claimant has failed to prove that the alleged 970 employees were dismissed. It is submitted that the evidence on record confirms that only 831 employees were summarily dismissed. Further, it is submitted the claimant is not forthright in that while the claimant is in court alleging unlawful dismissal it is in the same breath claiming that no dismissal letters were issued. How then, it is posed, did the claimant make the conclusion that the grievants had been summarily dismissed as pleaded? It is submitted that all the affected employees received their letters of dismissal dated 21st June, 2019.
78. On the issue of further engagement in collective bargaining agreement negotiations, it is submitted that the claimant no longer has simple majority membership with the respondent's employees and as such no further negotiations may be tenable. It is submitted that most of the respondent's employees are now members of Kenya Plantation Agricultural Workers Union which has the requisite simple majority to engage the respondent for negotiating a CBA.
79. It is therefore submitted that the cause is without merits and the court is urged to dismiss the same with costs.
80. Counsel for the claimant filed supplementary submissions in response to the submissions by the respondent's counsel. On the issue of whether this cause is sub judice in view of the pending Nairobi ELRC No. 378 of 2019 it is submitted that the court (Wasilwa J) in a ruling dated 4th May, 2021 determined that this cause is not sub-judice to the above cited cause. It is submitted that while the cause pending in Nairobi is about legality or otherwise of the strike, which issue was in any event overtaken by a consent order that ended the strike and allowed the employees back to work, the instant cause is about unlawful dismissal of the employees and refusal by the respondent to engage in negotiations for a CBA.
81. On the issue of the names and the list of the grievants, it is reiterated that the correspondences by the respondent to the labour office admitted that there existed employees as per the bundle of documents filed by the claimant in court. In any event, it is further submitted, their names are contained in the show-cause and dismissal letters. Further, it is submitted that the respondent admitted that out of 970 employees who took part in the strike 831 were summarily dismissed and that 139 were allowed back to work. It is thus submitted that the existence and identity of the 970 employees is a non-issue.
82. On the legality of the strike that commenced on 7th June, 2019 it is submitted that the same was founded and commenced on the notice of 25th October, 2018. It is submitted that the strike that was to commence on 1st November, 2018 was suspended by the Ministry of Labour pending the conciliation which failed after the respondent withdrew from the same. It is submitted that the strike notice issued on 25th October, 2018 was never withdrawn but the strike that was to commence on 1st November, 2018 was only suspended. It is thus submitted that the claimant needed not issue another notice to commence the strike on 7th June, 2019.
83. In regard to the dismissals it is reiterated that the same was wrongful, unfair, and unlawful for lack of both substantive and procedural fairness. It is further submitted that by the time the court called off the strike on 3rd July, 2019 there was no information that the grievants had been dismissed and the respondent gave no indication or evidence of the dismissals to court as at that point in time. No dismissal letters were availed by the respondent then.
84. It is thus submitted that the show-cause and dismissal letters filed in court by the respondent more than three years after the alleged summary dismissal are a fabrication and an afterthought intended to



mislead the court in validating the wrongful dismissals. It is submitted that the continued locking out of the affected employees led to contempt proceedings against the respondent and the court found and held the respondent in contempt as stated elsewhere in this judgment.

85. It is submitted that if this court found and held that the dismissals were fair and lawful it would amount to this court reviewing or setting aside the order by Wasilwa J alluded to above which found the respondent in contempt for locking out the affected employees.
86. It is submitted that the dismissal of the affected grievants lacked both in substance and procedure as provided for under Sections 41 & 43 of the *Employment Act*. It is further reiterated that the affected employees were not served with show-cause letters, they were not invited for disciplinary hearing, and they were not issued with letters of dismissal. It is submitted that if the above important letters and notices were pinned on the notice boards within the farms the dismissed employees had no access to the said notices as they had been locked out.
87. On the issue of whether the respondent should be ordered to engage the claimant in negotiations for a CBA, it is submitted that since the parties have a valid recognition agreement and under Section 54 of the *Labour Relations Act* the court should order the respondent to engage the claimant in negotiations towards a CBA. It is submitted that no evidence was availed to confirm that Kenya Plantation and Agricultural Workers Union has acquired a simple majority within the respondent's workforce. It is submitted that the said union was joined as an interested party in this cause but opted not to participate.

V. Issues For Determination

88. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for the parties. The following issues commend themselves to the court for determination –
 - a. Whether this cause as filed is properly before the court;
 - b. Whether the dismissal of the grievants was wrongful, unfair, and unlawful;
 - c. Whether the claimant is entitled to the reliefs sought; and,
 - d. Who should bear the costs of the cause?

VI. legitimacy of the cause

89. There are at least two facets upon which this issue has been raised by the respondent in the response to the claim and the submissions by its counsel. The first aspect is that the alleged grievants are not named in the amended statement of claim; the second aspect is that this cause is sub judice in view of another earlier cause pending in court being Nairobi ELRC No. 378 of 2019; and, the third aspect, and this is from the court, is whether there is evidence that the alleged grievants have been demonstrated to be duly registered members of the claimant.
90. That above three issues are so fundamental that the entire cause stands or falls depending on their determination. Upfront, it is important to clearly state that this court shall, as it should, determine the issues in this cause based only on the evidence availed and presented by the parties and the law applicable. Unless evidence has been availed and presented the court cannot go out of its way to investigate the contents of other causes or materials not availed in court as per the law.
91. There is no debate that a duly registered trade union has locus not only in bringing an action in court on its own behalf as a legal entity but also on behalf of its duly registered members. In the earlier context



the union has a “personal” interest in the subject matter as the action is taken in its own name and interest. In the latter context, the union is a representative of the members filing the action for and on behalf of those members and for the members’ benefit and interest – see Section 22 of the *Employment and Labour Relations Court Act*.

92. In this cause the claimant has filed for and on behalf of its purported members who were employees of the respondent. Legally, and logically, the claimant ought to have named its alleged members and presented to court evidence that the said employees were its duly registered members so as to qualify as grievants in this cause. It is the finding and holding of this court that no list of the alleged grievants was filed by the claimant either with the original or the amended statement of claim as for the court to identify them as the persons behind the claim.
93. Further, even if one assumed that the names in the correspondences by the respondent to the labour office are the names of the grievants, which names also appear in the bundle of documents filed by the claimant, one fundamental question would still remain unanswered – Where is the evidence that the so named persons were members of the claimant union? Where is the evidence of their membership and payment of union dues and subscriptions?
94. It cannot be legally or logically assumed that since the alleged grievants worked in the horticulture and floriculture sector that they were automatically members of the claimant. It is the finding and holding of this court that to this extent the cause herein is incompetent as the claimant failed to demonstrate and prove its capacity to sue for and on behalf of its alleged members. On this ground this cause fails in le mine.
95. The other preliminary issue as raised by the respondent is that this cause is sub-judice in view of the earlier and admittedly pending Nairobi ELRC No. 378 of 2019. It is submitted by counsel for the respondent that although the court (Wasilwa J) made a ruling dismissing a preliminary objection to this cause based on the same issue (sub judice), the said ruling was based on the observation by the learned Judge that the parties did not avail the pleadings in the Nairobi cause so as to enable the court make conclusive findings on the issue. The respondent has now requested this court to relook the matter now that the materials that were missing then are now available to this court.
96. In my understanding, the court (Wasilwa J) was clear that she could not allow the preliminary objection as the parties did not avail to the court the pleadings in Nairobi ELRC Cause No. 378 of 2019. In fact, the judge did not make a finding as to whether this cause is sub judice. In my considered view, it would not, in the circumstances, amount to an order of review or appeal if this court was to revisit the issue and make independent finding on this issue now based on all the materials placed before this court which were not on record when the learned Judge made her observations as stated above.
97. For clarity and avoidance of doubts, the Judge stated as follows in the relevant part of the ruling –
 - “ 16. I have examined the averments of the parties herein. I will first deal with the preliminary objection raised by the respondents who submit that this matter is substantially the same as another matter Nairobi ELRC No. 378 of 2019 which is pending before court and which is directly and substantially similar to the current issues.
 17. As that may or may not be the case, there is no order stopping this court from proceeding with the instant case.



18. The pleadings in the Nairobi Court have also not been submitted before this court to enable it assess the similarity or otherwise of the submissions by the respondent.
 19. I will therefore find the preliminary objection not merited and dismiss it accordingly.”
98. Nairobi ELRC No. 378 of 2019 was filed by the claimant seeking the following reliefs –
1. That , a declaratory order be issued declaring the strike effected 7th June 2019 protected.
 2. That , a declaratory order be issued declaring that the employees who took part in the strike effected on 7th June 2019 had a right to do so and cannot be disciplined for participating in the strike.
 3. That , any disciplinary action which may have been taken against any employee for taking part in the strike be quashed.
 4. That , the court be pleased to issue any other order it may deem fit and just to meet the end of justice.
 5. That , costs of the application and suit be to the claimant.
99. Clearly and evidently, the central issue for determination in the above cause is whether the strike by the affected employees on 7th June, 2019 was protected and hence lawful. In my considered view, it is only upon a finding on this central issue that it may be determined what reliefs, if any, based on that finding, may be awarded to the grievants.
100. As a matter of fact, the court (Wasilwa J) directed on 5th July, 2019 that the then striking employees be allowed to report back to work following a consent order that called off the strike that had commenced on 7th June, 2019. As at that point the issue of the dismissal of the grievants did not come to the fore. It is thereafter that the claimant filed contempt proceedings against some officers of the respondent but the application failed although the Judge held that the respondent was in contempt of the order directing that the affected employees be allowed to report back to work.
101. It is conceded and agreed by both parties that the above cause is still pending in court. The question then becomes – Are the issues raised in this instant cause capable of being resolved in the above cause? or better still - Should the issues raised in the instant cause be fairly and competently be heard and determined in the Nairobi cause? This is the exact same question as - Whether this cause is sub judice.
102. It is not debatable that the above cause pending in Nairobi was first in time and filed ahead of the instant cause. Lawfully, and logically, the cause in Nairobi should take precedent. In my considered view, the central issue in both causes is whether the strike organized and called by the claimant that ultimately led to the summary dismissal of the grievants was protected and hence lawful or otherwise. It is only after that issue is tackled and decided that the court may determine whether the reliefs sought by the claimant in this instant cause may be granted. This court should not engage in determining that same issue which is clearly and evidently pending before a court of competent jurisdiction in Nairobi.
103. This court takes the considered view, and I so find and hold, that instead of filing this cause the claimant ought to have pursued the claim and litigated the same under the earlier cause filed at Nairobi. It was, and still is, open for the claimant to apply for amendment and alignment of the pleadings in the cause in Nairobi to include the reliefs now sought in this cause.



104. In view of the foregoing, the court agrees with counsel for the respondent that this cause is sub judice and filed in abuse of court process in view of the earlier cause filed being Nairobi ELRC No. 378 of 2019. This is because the two causes relate to and concern the central theme of whether the strike that ultimately led to the dismissal of the grievants was protected and hence lawful or otherwise. As held above, the reliefs sought herein may only be properly determined and ventilated properly once the issue of the lawfulness of the strike is determined. As noted above, the earlier cause is still pending and the claimant is at liberty to apply and amend the pleadings accordingly to accommodate the reliefs sought in this cause.
105. On the basis of the findings in the three fundamental and preliminary issues and grounds raised and discussed above, this cause shall fail. The claimant is advised to pursue this claim under the cause filed earlier on in Nairobi ELRC No. 378 of 2019.
106. It makes no logical or legal sense for this court to proceed in considering and determining the next issues of whether the dismissal of the grievants was unlawful and or whether the claimant is entitled to the reliefs sought. Such an adventure shall amount to this court aiding in abuse of court process. There need not be an order for stay of proceedings in this matter as the issues raised here should be fairly and squarely addressed in the earlier cause.
107. It is unfortunate that the earlier ruling mentioned above did not address the sub judice issue exhaustively on merit due to failure by the parties to avail all the materials that have now been availed. Had the parties done the needful then it should have saved precious judicial time.
108. The court has said enough in demonstrating that this cause shall fail on the three preliminary points/ issues discussed above. This cause is hereby dismissed with no order as to costs

X.Orders

- a. This cause is hereby dismissed with no order as to costs for –
 - i. Being sub judice in view of the pending Nairobi ELRC No. 378 of 2019 that raises the same and or similar issues and or should accommodate the issues raised in this cause and takes precedent;
 - ii. Being incompetent for lack of list of the names of the grievants in the statement of claim; and,
 - iii. Lack of evidence of membership of the alleged grievants with the claimant.
- b. There is no order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 19TH DAY OF DECEMBER, 2024.

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DAVID NDERITU

JUDGE

