Kenya Plantation Agricultural Workers Union v Lauren International Flowers Ltd (Cause E306 of 2022) [2023] KEELRC 90 (KLR) (20 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 90 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E306 OF 2022

SC RUTTO, J

JANUARY 20, 2023

BETWEEN

KENYA PLANTATION AGRICULTURAL WORKERS UNION ..... CLAIMANT

AND

LAUREN INTERNATIONAL FLOWERS LTD ..... RESPONDENT

RULING

1. The Application before me has been brought at the instance of the Claimant/Applicant, which is a union representing employees, some of who work for the Respondent. The Application which is expressed to be brought under Article 41 of the Constitution and section 48 of the *Labour Relations Act*, seeks inter alia, the following orders against the Respondent:

    1. Spent.

    2. ThatFestus Walubengo Wanyama be reinstated back to employment pending the hearing and determination of this Application and main suit.

    3. Thatthe redundancy notice issued to the Applicant's representatives, Festus Walubengo Wanyama be declared void pending the hearing and determination of this application and the main suit.

    4. Thatan order be issued compelling the Respondent to comply with section 48 of the *Labour Relations Act* by deducting and remitting trade union dues of the Applicant's members to the Applicant's gazetted bank account.

    5. Thata prohibitory order be issued by this Court restraining the Respondent from coercing, threatening or victimizing the Respondent's Unionisable Employees, on account of their subscription to the Claimant Union.

6. Thatan order be issued compelling the Respondent to grant the Applicant access to the Respondent's premises for union activities.

7. Thatthe Honourable court be pleased to issue an order of injunction restraining the Respondent or their agents from intimidating, victimizing, harassing, terminating or suspending the Claimant's members on account of participating in union activities pending the hearing and determination of this Application.

8. Thatthe Honourable court be pleased to issue an order of injunction restraining the Respondent or their agents from intimidating, victimizing, harassing, terminating or suspending the Claimant's members on account of participating in union activities pending the hearing and determination of the main suit.

9. Thatthe costs of this Application be provided for.

2. The Application is premised on the grounds appearing on its face and on the Affidavits of Thomas Kipkemboi and Festus Walubengo. Briefly that: -

   a. The Applicant represents the 106 affected employees in the suit who work for the Respondent.

   b. On diverse dates of February 15, 2022 and March 8, 2022, the Applicant recruited 106 employees of the Respondent to its membership through the help of Festus Walubengo, who then was an employee of the Respondent.

   c. On or about March 9, 2022, at a meeting held between the Respondent's management and its employees, one of the Respondent's managers threatened the employees with dire consequences for associating with the Applicant union as they had heard rumours that the Applicant had recruited employees.

   d. On March 15, 2022, the Respondent was served with original check off forms which was evident that the Applicant had recruited 106 employees to its membership.

   e. On March 29, 2022, the Respondent wrote to the Applicant stating that it had embarked on a verification exercise to ascertain the authenticity of the signatures before deductions are effected.

   f. The Respondent further cancelled a scheduled sensitization meeting between the Applicant and its employees.

   g. Festus Walubengo was put on compulsory leave on account of recruiting the respondent's employees into union membership.

   h. On or about April 1, 2022, the Respondent Union issued a notice declaring Festus Walubengo's position redundant.

   i. The respondent upon being served with Form S, went ahead to orally demote its supervisors who had subscribed to the union and demanded that the employees who had signed the said Form S, retract their union membership.

3. The Respondent opposed the Application vide a Relying Affidavit sworn on May 30, 2022, by Mr Joseph Tawk, who describes himself as its Director. He avers that:

   a. The Claimant embarked on a membership recruitment exercise and the Respondent did not at any time object to the exercise as alleged.

b. The list of purported membership to the Claimant union elicited mixed reactions forcing it to conduct a verification exercise to ascertain the authenticity before deductions and remittance being effected. That the the Applicant was notified of this vide its letter dated March 29, 2022.

c. As a result of the verification exercise, the Respondent realized that out of the 106 employees purported to have joined the Claimant union, only 33 employees had infact accepted to join.

d. The Respondent proceeded to notify the Claimant union through the letter dated May 10, 2022 from its Advocates, of its findings and informed it that it would proceed with deduction and remittance of the said 33 union members.

e. The documents submitted by the Claimant/ Applicant did not suffice and/or satisfy the requirements of the *Employment Act* pertaining to statutory deductions as a majority of the persons listed were alleged to have joined the union denied ever signing up.

f. The redundancy of Mr Festus Walubengo Wanyama was lawful and procedural in accordance with the provisions of the *Employment Act*. That the same was not on account of his union membership and/or his involvement in recruiting members of the Respondent's workforce to the Claimant union. That there is no evidence to support this allegation by the Claimant union.

4. On the basis of the foregoing the Respondent urged this Honourable Court to find the instant Application without merit and to dismiss it with costs.

5. In response to the Respondent's Replying Affidavit, the Applicant filed a Further Affidavit deponed by Mr Thomas Kipkemboi on June 15, 2022, through which it is averred that: -

a. The recruitment of the Respondent's employees to the union was done within the confines of the law and the Respondent has not proved its allegations against it.

b. The alleged verification exercise is illegal and in breach of the Constitution of Kenya, the *Labour Relations Act* and the *Employment Act* and therefore lacks statutory basis.

c. Once served with duly signed Form S, the Respondent's duty was limited to effecting union dues deductions and remittance as required under law.

d. The Respondent did not engage the union while terminating the employment of Festus Walubengo from its employment despite being its member at the time of his separation.

e. It maintained that the Respondent has not come to this Court with clean hands as no union dues have been remitted to the gazetted account despite the Form S being duly served upon it.

6. The Application was canvassed by way of written submissions which I have considered.

Applicant's Submissions

7. In its submissions, the Applicant stated that it has met the threshold for the grant of the injunctive orders it seeks from this Honourable Court as outlined in the celebrated decision of *Giella v Cassman Brown Co Ltd* (1973) EA 358.

8. It further submitted that it has a *prima facie* case against the Respondent, who it maintains, is guilty of unfair labour practices as it proceeded to terminate the services of Mr Festus Walubengo on account of his union membership and further proceeded to intimidate, victimize and/or harass members of its staff on account of their union membership.

9. Further, that failure by the Respondent to notify the Applicant of the intended redundancy of Mr Festus Walubengo was clearly an act of bad faith on its part and was done in clear violation of the law. The Applicant further submits that it stands to suffer irreparable injury should this Court not allow the orders it seeks in the instant Application.

10. The Applicant further submits that the continued denial by the Respondent to access its premises for purposes of sensitization is in clear violation of the employee's right to freedom of association and the right to representation by a union of their choice.

11. In conclusion the Applicant urged this Honourable Court to find its Application to be meritorious and to allow it in terms of the reliefs sought therein. For emphasis the Applicant cited and relied on the determination in the case of ELRC Cause No. E372 of 2020, *Robert Nixon Shitamba v Sunny Processors Ltd*.

Respondent's Submissions

12. It was the Respondent's submission that the suit and the Application dated May 12, 2022 are bad in law, fatally defective and incompetent. Citing Rule 5 of the *Employment and Labour Relations Court Rules*, the Respondent submitted that pleadings ought to be signed by an authorized representative. That the instant pleadings were signed by one Thomas Kipkemboi who lacks proper authorization from the Applicant and is therefore a total stranger to these proceedings.

13. The Respondent further argued that the Applicant has not met the threshold for grant of the injunctive orders sought as set out in the case of *Giella v Cassman Brown & Company Limited* (1973) E. A 358. That the Application raises no prima facie case and has no likelihood of success in that the suit is instituted for and on behalf of one Festus Walubengo who was procedurally declared redundant and was therefore not its employee at the time of instituting this suit. Further, that there exists no relationship between the parties hereto and therefore the suit is bad in law. That in addition, there is no evidence to support the Applicant's assertion of victimization, intimidation and harassment of the Respondent's members of staff on account of involvement in union activities. That further, the Applicant has not complied with the provisions of Section 48 of the *Labour Relations Act* for it to be entitled to deduction and remission of union dues as claimed. For emphasis the Respondent cited and relied on the case of *Mrao Ltd v First American Bank of Kenya Limited & 2 Others* [2003] eKLR.

14. It was further submitted by the Respondent that the Applicant has not demonstrated the irreparable injury it is likely to suffer should the orders sought be denied. To fortify this argument the Respondent cited the case of *Paul Gitonga Wanjau v Githuthi Tea Factory Co Ltd & 2 Others*, Nyeri HCC No. 28 of 2015.

15. The Respondent further argued that the allegation of crippling the Applicant's business is unfounded as it has never been served with any order by the Minister requiring it to remit funds. It is on this basis that the Respondent urged this Honourable Court to make a finding that the alleged irreparable injury to be suffered by the Applicant devoid of merit and is unfounded. In support of this position, the case of Francis Jumba Enziano and Others v Bishop Philip Okeyo and Others Nairobi HCCC No. 1128 of 2001 (Unreported) was cited in support.

16. That further, contrary to the Applicant's submissions, the likely resulting inconvenience is greater to the Respondent. The case of *Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another* (2019) eKLR was cited in support of this argument.

17. The Respondent further argued that it does not have a recognition agreement with the Applicant as to allow it access to its premises under Section 56 of the *Labour Relations Act*. That in addition, the

Respondent's premises are private property and access can only be granted with authorization of the owner.

18. The Respondent further submits that prayers 2, 3,9 and 10 sought in the instant Application are final in nature and as such, cannot be granted at this stage. To buttress this argument the Respondent placed reliance on the cases of *Olive Mwihaki Mugenda & Another v Okiya Omtata Okoiti & 4 Others and East African Portland Cement Company Limited v Attorney General & Another* (2013) eKLR.

19. It is the Respondent's further argument that grant of the orders sought will render the substantive suit nugatory without trial hence urged the Court to dismiss the Application in its entirety with costs.

Analysis and determination

20. Flowing from the Application, the Response thereto and the submissions by both parties, it is evident that at this stage the Court is being called to determine whether the Applicant has met the threshold for the grant of the orders sought.

21. Issuance of injunctive orders at an interlocutory stage is guided by the principles set out in the celebrated case of *Giella v Cassman Brown* [1973] EA 358 at page 360 where Spry VP held that:

> " .... First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)"

22. In summary, the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the orders, he or she is likely to suffer irreparable injury. Further, if the Court is in doubt, it should decide the matter on a balance of convenience.

Prima facie case

23. The Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd& 2 others* [2003] eKLR defined a prima facie case in the following terms;

> " A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

24. It is instructive to note that the main consideration ought to be whether the Applicant has pointed out a right that has apparently been infringed. It is worthy to note that a primafacie case is not a case which must succeed at the hearing of the main case.

25. In addition, the court must also remind itself that this is not mini trial hence will not examine the evidence presented microscopically.

26. The Application mainly seeks orders to enforce the provisions of Article 41 of the Constitution. The orders sought are composite in that they are at three levels to wit; individual level, union level and membership level.

27. At the individual level, the Applicant seeks orders in favour of one Mr Festus Walubengo, while at the union level, it seeks to enforce its constitutional right as a union and at the membership level, it seeks

orders against victimization by the Respondent of its members, on the basis of the membership and participation in trade union activities.

28. The Applicant has raised several issues regarding the manner in which the redundancy of Mr Walubengo was effected by the Respondent. For instance, it avers that it was not given notice to declare Mr Walubengo redundant despite him being its member.

29. The Applicant has further raised an issue regarding the deduction and remittance of union dues and whether the Respondent has a right to undertake a verification exercise upon submission of Form S. In support of its case, the Applicant exhibited copies of Form S which contained names of employees who had already signed check off forms thus expressing their desire to join the union.

30. The right to form, join or participate in the activities and programmes of a trade union is guaranteed under Article 41(2) (c) of the *Constitution* hence cannot be taken away. Section 48 (3) of the *Labour Relations Act* is one of the ways through which the above Constitutional provision has been given effect. The question thus, is whether an employer has right to undertake a verification exercise once served with Form S?

31. Another issue that has been raised by the Applicant is with regards to victimization and harassment of its members on account of their union membership. The Respondent has been categorical that this assertion by the Applicant is not true.

32. No doubt, the foregoing issues are pertinent and having considered the Application, the grounds set out in the Supporting Affidavit annexed thereto, as well as the Respondent's response, together with the evidence presented by both parties, and having applied the same against the principle set out in the Mrao case (supra), I am satisfied that the Applicant has proved that it has an arguable prima facie case.

33. Establishing a prima facie case is not an end in itself and cannot form sufficient basis to grant an interlocutory injunction, hence the Court must further be satisfied that the injury to be suffered by an Applicant in the event the injunction is not granted, will be irreparable.

Irreparable injury

34. The principle of irreparable injury was espoused by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, as follows; "An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

35. In line with the above holding, the question then should be, will the Applicant suffer irreparable injury in the event the Court does not grant the injunctive orders sought at this stage?

36. With regards to the order seeking reinstatement of Mr Walubengo, it is evident from the record, that he proceeded on compulsory leave with effect from March 5, 2022 and was to resume work on April 4, 2022. Thereafter, he was issued with a redundancy notice dated April 1, 2022, on grounds that his position at the Respondent company was being abolished as a cost cutting measure. The notice period of the redundancy was for one month hence it took effect from May 1, 2022.

37. The instant Application was filed on May 13, 2022 and by then Mr Walubengo was already out of the Respondent's employment on account of redundancy.

38. Essentially, what the Applicant now seeks is to undo the redundancy at this point in time which is an interim stage. The Applicant had all the time in the month of April, when the notice was subsisting but instead it waited till the redundancy had taken effect, for it to move the Court.

39. This is too late in the day and the order being sought at this juncture is final in nature and one that can only be granted upon the issues being ventilated in a full trial and at the time of determination of the main claim.

40. Besides, pursuant to the provisions of section 12(3) of the *Employment and Labour Relations Court Act*, this court is clothed with powers to grant a wide range of orders ranging from award of damages; reinstatement; prohibitory orders; orders for specific performance and declaratory orders.

41. Indeed, the Applicant will stand to be granted either of the remedies set out above, in the event his main claim succeeds. Therefore, Mr Walubengo does not stand to suffer irreparable injury in the event the order of reinstatement is not granted at this stage.

42. I am further fortified by the determination by the Court of Appeal in the case of *Nguruman v Jan Bonde Nielsen & 2 others* (supra), the Court of Appeal further held that;

> "if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage."

43. In respect of deduction and remittance of union dues, the Applicant seeks orders to compel the Respondent to deduct and remit union dues of its members to its gazetted bank account.

44. The Respondent states in its response that after it was served with Form S, it embarked on an exercise to verify the signatures, which exercise revealed that only 33 employees out of the 106 presented by the Applicant, had consented to join its membership. It contended that the other members did not consent to their inclusion in the union. The Respondent maintained that it can avail this evidence at the hearing of the main claim.

45. As I have stated, the Court is not called at this stage to examine evidence at this stage microscopically hence it cannot scrutinize the forms submitted by the Applicant alongside the evidence submitted by the Respondent following its membership verification exercise. Therefore, it cannot make a conclusive finding on the issues at this stage.

46. Subsequently, in the event the Court is to order deduction and remittance of union dues of all the 106 employees and it turns out after the full hearing that indeed, some did not consent to join the Applicant union, then the orders will be injurious to them. In fact, this will be tantamount to imposing union membership on them.

47. On the other hand, if after hearing it turns out that the said employees consented to join the Applicant union, their union dues can still be deducted and remitted as appropriate. In short, there is no irreparable injury at this stage either on the part of the Union or the said employees.

48. Therefore, an order of deduction and remittance of union dues can only be issued at this stage in respect of 33 employees, who the Respondent concedes, acknowledged membership to the Applicant Union.

49. The Applicant has further sought to be granted right to access the Respondent's premises for purposes of undertaking union activities.

50. Section 56 (1) of *Labour Relations Act*, enjoins employers to grant reasonable access of union officials, to its premises. Pursuant to Section 56(2), an employer to impose reasonable conditions as to "the time and place of any rights granted"to avoid undue disruption of operations or in the interest of safety. The employer may also require officials or trade union representatives requesting access to provide proof of their identity and credentials.

51. In the instant case, there is no direct evidence that the Applicant has been denied access to the Respondent's premises. The only evidence presented is the letter dated March 29, 2022, through which the Applicant was notified of the postponement of a scheduled meeting. That does not amount to denial of access.

52. Indeed, from its own admission, the Applicant union stated that it recruited 106 members from the Respondent's employment. This is evidenced by the check-off forms exhibited by the Applicant. Essentially, this means that it had some access to the Respondent's premises as to achieve the recruitment. Therefore, the issue of irreparable injury does not arise in this regard.

53. The Applicant has further prayed for a prohibitory order restraining the Respondent from coercing, threatening to victimizing its employees who are unionisable, on account of their subscription to the union.

54. As stated herein, Article 41 of the Constitution, guarantees the right to join a union and participate in the activities of such union. Consequently, victimization of an employee on account of their union membership is a direct violation and goes to the root of article 41 and the constitutional right to associate. This is an inviolable right that cannot be taken away.

55. I must emphasize that victimization and harassment of employees on account of their membership to a union, is a grave matter and is to be frowned upon and should not be left to stand as it would result in an irreparable injury.

56. It is against this background that the Court partially allows the Application dated May 12, 2022 in the following terms;

    a. The Respondent do forthwith commence deductions and remittance to the Applicant's gazetted bank account, dues from the 33 employees who have duly signed Form S and acknowledged union membership into the Applicant union.

    b. Pending the hearing of the main suit, the Court confirms its orders of July 27, 2022 and the Respondent or its agents are hereby restrained and/or prohibited from intimidating, victimizing, harassing, terminating or suspending the Applicant's members on account of their union membership or participation in union activities.

57. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

.....

STELLA RUTTO

JUDGE

Appearance:

Ms. Ateko for the Claimant/Applicant

Mr Murage for the Respondent

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions

of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE