



Kenya Union of Sugar Plantation & Allied Workers v Kibos Sugar & Allied Industries Limited (Employment and Labour Relations Cause 23 of 2020) [2023] KEELRC 1215 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1215 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

EMPLOYMENT AND LABOUR RELATIONS CAUSE 23 OF 2020

S RADIDO, J

MAY 24, 2023

BETWEEN

KENYA UNION OF SUGAR PLANTATION & ALLIED WORKERS CLAIMANT

AND

KIBOS SUGAR & ALLIED INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. The expeditious determination of this Cause on the merits was hampered by the filing of intervening applications which had to be addressed first.
2. The Kenya Union of Sugar Plantation & Allied Workers (the Union) filed a Motion under a Certificate of Urgency against Kibos Sugar & Allied Industries Ltd (the Respondent) on February 27, 2020, seeking conservatory orders lifting and or canceling the suspension of some 6 named employees.
3. The Court heard the Motion on the same day and issued an ex-parte conservatory order lifting or canceling the suspension of the 6 employees with an inter-partes hearing fixed for March 8, 2020 (the Court has now noted that the Motion was not anchored on a Statement of Claim).
4. On March 12, 2020, the Union lodged a Memorandum of Claim in Court and it stated the Issue in dispute as:

Wrongful and illegal suspension of 5 (five) trade union officials and 1 (one) member namely

Benard Ochieng Abuto

Michael Abiero Agallo

Benard Otieno Owuor



Charles Guya Orondo

Aloice Otieno Owere

Elly Onyango Odero (the Grievants)

5. The Respondent filed a Response on June 17, 2020, and the Union filed a Reply to the Response on June 21, 2020.
6. The Cause was heard on February 7, 2023, February 27, 2023, March 14, 2023, and April 17, 2023.
7. 5 of the Grievants and the Human Resources Manager with the Respondent testified.
8. The Union filed its submissions on April 20, 2023, and the Respondent on April 25, 2023.
9. In its submissions, the Union isolated 8 Issues for adjudication, to wit:
 - i. Is the Claim competent before the Court?
 - ii. Were the aggrieved persons, union officials by the time of their indefinite suspension?
 - iii. Were the aggrieved persons culpable of the allegations leveled against them by the Respondent?
 - iv. Were the procedures provided for in the parties' CBA and recognition agreement used exhaustively in terminating his (sic) services?
 - v. Was the action of reinstating one of the aggrieved persons at the expense of the other 5 (five) persons a sign of discrimination?
 - vi. Was the process of fair hearing adhered to?
 - vii. Disobedience of court judgments, rulings and orders (sic).
 - viii. Is the Claimant entitled to the prayers sought in the Memorandum of Claim?
10. The Court has considered the pleadings, evidence, and submissions.

Competency of the Memorandum of Claim

11. The Memorandum of Claim was filed on March 12, 2020, while the Union had lodged a Motion with the Court on February 27, 2020 and obtained conservatory orders.
12. Since the requisite fees for the Memorandum of Claim were paid, the Court finds that the Cause was regular.
13. The same cannot be said of the interlocutory orders obtained on the basis of a Motion not anchored on the Memorandum of Claim.

Whether Grievants were union officials

14. The Union produced a copy of a Notice of Change of officials indicating that the Grievants save for Benard Otieno Owuor and Elly Onyango Odero were officials of its Kibos branch having been elected in 2016.
15. The Registrar of Trade Unions notified the Union on January 25, 2016 that she had registered the branch officials.
16. The Court finds that the Grievants save for Benard Otieno Owuor and Elly Onyango Odero were officials of the Kibos branch.



Whether the suspensions were lawful

17. Issues 3 and 4 spoke to the question of whether the suspension of the 6 Grievants was lawful.
18. On or around February 20, 2020, the Respondent issued to the Grievants suspension notices. The notices indicated that the suspensions were to facilitate investigations into allegations of misconduct and would be for periods not longer than 21 days.
19. The notices further called on the Grievants to show cause why disciplinary action should not be taken.
20. The Grievants acknowledged receipt of the notices on February 22, 2020 and they responded on February 24, 2020.
21. On February 24, 2020, the Union wrote to the Respondent seeking the withdrawal of the suspensions.
22. On February 27, 2020, the Union moved to Court and secured conservatory orders lifting or canceling the suspensions, and the orders were served on the Respondent on February 28, 2020.
23. As a result, the Respondent wrote to the Grievants on February 29, 2020 with copies to the Union branch, notifying them of the revocation of the suspensions and instructing them to resume work.
24. The Grievants denied receiving the letters but the letter made reference to discussions with the General Secretary of the Union. Copies of the letters produced by the Union had the Union's stamp acknowledging receipt. It is also not disputed that one of the Grievants, Benard Otieno Owuor resumed work after the date of the letters.
25. The Respondent allegedly did not lift the suspensions and the Union wrote to it on March 4, 2020, warning of contempt proceedings if there was no compliance.
26. Apparently, the Grievants did not resume work, and on March 10, 2020, the Respondent issued show-cause notices with warnings of contemplated disciplinary action. The Union acknowledged receipt of the show causes on March 13, 2020.
27. 3 Grievants, Charles Guya Orondo, Alloys Otieno Owere, and Elly Onyango Odera responded to the show cause(s) on March 16, 2020.
28. These Grievants, however, denied receiving the letters revoking the suspension(s).
29. On the same day, the Union acknowledged receipt of the Respondent's letters dated February 25, 2020, February 29, 2020 and March 10, 2020.
30. In Court, the Union challenged the lawfulness of the suspensions on the grounds that the allegations forming the basis thereof had not been proved or justified and the same remained hearsay; the suspension letters were served upon the Union instead of the Grievants directly and that the grievance/ dispute resolution avenues outlined in the recognition agreement and collective bargaining agreement had not been exhausted before the suspensions.
31. In answer to the assertions by the Union, the Respondent's witness testified that he reached out to the Grievants during the suspension, but they failed to collect the letters hence the decision to serve them through the Union, and as a result 1 of the Grievants resumed work.
32. It is not in dispute that the Grievants were suspended. It is also not in dispute that 1 Grievant resumed work after the revocation of the suspension.



33. The Respondent did not place any evidence before the Court that it served the Grievants personally with the letters revoking their suspensions.
34. However, there is evidence that copies of the revocation letters were served and acknowledged by the Union's branch office (the Union itself exhibited copies of the letters with its stamp).
35. The revocation letters (dated February 25, 2020) alluded to a conversation between the Union's General Secretary and the Respondent's Human Resources Manager.
36. The General Secretary did not file any affidavit or testify that he did not have a conversation with the Respondent's Human Resources Manager before the date of the letter.
37. The Court can, therefore, infer that the Union had information by February 25, 2020 that the Respondent had lifted the suspensions. This was even before the Union moved to Court to seek conservatory orders.
38. The Court has also looked at the recognition agreement and collective bargaining agreement. The Union did not disclose which clauses of the agreements were breached by the Respondent in suspending the Grievants.
39. Nevertheless, the recognition agreement does not have a clause that required the Respondent to conduct its investigations in a certain manner before suspending the Grievants as part of investigations into alleged misconduct.
40. On its part, clause 10 of the collective bargaining agreement gave the Respondent the discretion to suspend an employee for not more than 21 days on half-pay to enable the carrying of investigations.
41. The Union did not demonstrate that the Respondent breached the clause on suspension save for the payment of half-pay.

The conservatory orders of February 27, 2020

42. In the course of preparing this judgment and perusal of the pleadings and submissions, the Court noted that the conservatory orders issued on February 27, 2020 were not anchored on a Statement of Claim and, therefore, the Motion and orders issuing therefrom were issued in vacuo.
43. The Motion was incurably defective and hence the orders were void.
44. The Court is therefore, of the view, that the determination of this Cause on the merit should not turn on the violation of those interim orders.

Discrimination

45. The Union did not plead a case for discrimination and the Court declines to address its mind to the issue which was only introduced through the submissions.

Unfair termination of employment

46. The Union did not amend its pleadings to introduce a head of claim for unfair termination of employment and the Court's hands are tied.
47. It cannot adjudicate the unpleaded claim.



Conclusion and Orders

48. Save for breach of contract on payment of half-salary during the suspension, the Court finds no merit in the Cause.
49. The Court orders the Respondent to compute and pay the Grievants the half-salary they were entitled to during suspension.
50. No order on costs as the parties were social partners.

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 24TH DAY OF MAY 2023.

Radido Stephen

Judge

Appearances

For Union Mr. Gombe and Mr Avedza, National Treasurer and Industrial Relations Officer

For Respondent Mr. Onsongo instructed by Onsongo & Co. Advocates

Court Assistant Chrispo Aura

