



**Kenya Chemical & Allied Workers Union v Kenapen East Africa Limited & another
(Cause 763 of 2017) [2023] KEELRC 3094 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3094 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 763 OF 2017
NZIOKI WA MAKAU, J
NOVEMBER 27, 2023**

BETWEEN

KENYA CHEMICAL & ALLIED WORKERS UNION CLAIMANT

AND

KENAPEN EAST AFRICA LIMITED 1ST RESPONDENT

**ESSENTIAL MANAGEMENT CONSULTANCY SERVICES LIMITED 2ND
RESPONDENT**

JUDGMENT

1. The Claimant Union instituted this suit against the Respondents through a Memorandum of Claim dated 20th April 2017, for the unlawful lock out of 33 employees/grievants on 16th June 2016. The Claimant is a registered trade union representing the interest of Kenyan workers engaged in the ,Chemical and Allied Industries in Kenya, including the manufacturing of plastic containers. The 1st Respondent, Kenapen East Africa Ltd, is in the business of manufacturing plastic containers while the 2nd Respondent, Essential Management Consultancy Services Ltd, is an outsourcing company contracted by the 1st Respondent to supply workforce at its factory situated at Enterprise Road-Industrial Area, Nairobi County, where they also perform their duties. The 33 Grievants were employed by the Respondents between the years 2002 and 2016 to work in various capacities and under different terms of engagement. It was the Claimant’s averment that it recruited 45 employees and forwarded their names to the employer on 23rd May 2016 for the employer to effect deduction of union dues in accordance with the law. That the said list included the 33 Grievants as shown in the copies of the checkoff forms produced as Appendix 2. That however, on 30th June 2016 the Respondents locked out of the factory all the employees and only the few who had not signed the Union check-off list were allowed entry. The Union further averred that from 1st July 2016, some workers informed it that the Respondent asked them to revoke their union membership for them to be re-admitted to their employment but majority of them refused. That only ten (10) employees withdrew their



membership and were taken back into employment and those who refused to revoke their membership were unfortunately verbally terminated later on.

2. The Claimant averred that the matter was thereafter informally reported to the Labour Officer Industrial Area and a meeting was convened on 4th July 2016 in the presence of two labour officers. That in a follow-up meeting held on 5th July 2016, it was verbally agreed for such workers to be allowed back to employment and that another meeting be held on 6th July 2016 at the Industrial Labour Office for the 2nd Respondent to report back the outcome of its consultation with its clients – Kenapen East Africa Limited on the way forward. That in the meeting of 6th July 2016, parties agreed that each employee would be allowed to pick re-application letters/forms for renewal of their contracts from 8th July 2016 but that the actual work would resume from 11th July 2016. Further, the 2nd Respondent reported that the 1st Respondent would possibly not take back every grievant on the said 11th July 2016 due to decline of workload but that those who will have been left out would be taken back from 13th July 2016. The Claimant further averred that notably, its proposal to sign an agreement pursuant to the parties' day discussions was shot down by one of the two Labour Officers present, a Mr. D.K Njagi, chairing the meeting and the 2nd Respondent, claiming that the staff had no existing contracts at that time.
3. It was the Claimant's averment that contract renewal for all employees including the 33 Grievants were routinely renewed before 25th day of the months before lapse of contract. That the contracts of the 33 Grievants were set to lapse on 30th June 2016 and they had already filled contract-renewal forms by 14th June 2016, which the Respondent did not act on unless one recanted union membership. It further averred that some of the employees were working for the 1st Respondent even before they engaged the 2nd Respondent to provide labour. The Claimant Union argued that section 37(1)(b) of the *Employment Act* provides that a casual employee becomes automatically permanent after the expiry of an aggregate of three (3) months of continuous service. That the affected employees having worked for more than three months, they automatically became permanent and are entitled to all benefits in law. However, the said employees were yet to be paid their years of service by the company who has refused to give them appointment letters confirming them to permanent basis, contrary to sections 7, 8, 9, 10 and 20 of the *Employment Act*. The Union thus prayed that:
 - a. This Honourable Court at its own discretion will order immediate reinstatement of all thirty three (33) employees/Grievants without loss of benefits and continuity of service.
 - b. This Honourable Court at its own discretion, if for any reason finds reinstatement not possible, then the thirty three (33) grievants should be paid their statutory benefits. They should also be paid maximum compensation of twelve (12) months for unlawful loss of employment among other statutory entitlements, bearing in mind that, the Respondent does not have Collective Bargaining Agreement (CBA) which can be used to calculate their entitlement apart from the Law.
 - c. This Honourable Court at its own discretion should order the Respondent to stop practicing unfair labour practice to its workers as denying them their right to join a trade Union of their choice is to deny them their fundamental rights, which is against *Labour Relation Act*, 2007, section 4 and 5, *Kenya Constitution* Article 36 and 41(1)(c).
 - d. The cost of this case be met by the Respondent.
4. The 2nd Respondent averred in its Reply to Memorandum of Claim dated 27th May 2017 that they are an employer as set out under the law and that they had employed the 33 Grievants whose contracts expired on 30th June 2016. Further, since there was no recognition agreement between the Claimant



and the Respondents, the Claimant had no locus standi to purport to represent the Grievants. That the alleged 33 members of the Claimant Union only represented 2.2% of the total workforce of 1,500 employees working at the 2nd Respondent company and the Claimant had thus not met the threshold set by law. The 2nd Respondent denied that there was any lockout at the premises of the 1st Respondent or that it had ever denied any employee the right to join a trade union as per the law. It averred that the 33 Grievants had been its employees pursuant to a six (6) months contract which upon expiry, the Grievants were seconded to the 1st Respondent and asked to re-apply for renewal of contracts but they declined. According to the 2nd Respondent, the 33 Grievants staged a sit out on the premises of the 1st Respondent and acted in a manner to provoke the 1st Respondent, co-workers, 2nd Respondent's Supervisor and client customers. It further denied that the 33 Grievants were asked to withdraw their membership from the Union for them to be considered for employment. It averred that only three (3) Grievants complied with renewal of their contracts and became employees of the 2nd Respondent stationed at the 1st Respondent's premises. That the Grievants who did not re-apply were not their employees as they were paid their dues upon expiry of their contracts and that they were thus not entitled to reinstatement as pleaded. Further, the said Grievants were not entitled to twelve (12) months compensation for unlawful loss of employment. The 2nd Respondent prayed that the Claim be dismissed with costs.

5. The matter was disposed of by way of written submissions.

Claimant's Submissions

6. The Claimant submitted that all the 33 Grievants were subjected to unfair labour practices. It cited the case of *Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute* [2013] eKLR in which the Court held that:

“What is this right to fair labour practices?”

First, it is the opinion of the court that the bundle of elements of “fair labour practices” is elaborated in Article 41(2), (3), (4) and (5) of the *Constitution*. Under Article 41(2) every worker has the right to fair remuneration; to reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike. Under Article 41(3) every employer has the right to form and join an employers' organization; and to participate in the activities and programmes of an employers' organization. Under Article 41(4), every trade union and every employers' organization has the right to determine its own administration, programmes and activities; to organize; and to form and join a federation. Under Article 41(5) every trade union, employers' organization and employer has the right to engage in collective bargaining. These constitutional provisions constitute the foundational contents of the right to fair labour practices.

Secondly, it is the opinion of the court that the right to “fair labour practices” encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work.”

7. The Claimant submitted that besides Article 41 of the *Constitution* of Kenya, section 4(1) of the *Labour Relations Act* provides that every employee has the right to participate or join or leave a trade union. That the Grievants were unfairly terminated from employment as the Respondent did not follow the mandatory procedure as required under sections 41, 43 and 45 of the *Labour Relations Act*,



2007. That the Grievants were not given an opportunity to defend themselves against any allegations and were only required to either revoke their union membership and retain their employment or retain union membership and lose their employment. That evidently, the Respondent's action of making it a mandatory condition for the Grievants to resign from the Union in order to renew their contracts was a contravention of Articles 27 and 41 of Constitution. It was the Claimant's submission that the Respondents reneged on the agreement had between parties at the Ministry of Labour on 6th July 2016. That the Grievants had legitimate expectations that their contracts would be renewed since they had worked for the Respondent from 2007 continuously and because the Respondent, in the meeting of 6th July 2016, had promised to reinstate them.
8. The Claimant also cited the case of South African Clothing and Textile Workers Union & another v CADEMA Industries (Pty) Ltd (C 277/05) [2008] ZALC 5 where a worker was similarly employed on several fixed-terms contracts on a continuous and unbroken period of 4 ½ years and the court held that the several renewals/extensions over that period without any discussions on the same, and further to the fact that the last renewal was done after the worker pleaded and was permitted to continue working for another 7 days after expiry of contract, created a reasonable expectation that the contract would be renewed. It was the Claimant's submission that similarly in the instant case, the circumstances of the employment relationship between the Grievants and the Respondents created a legitimate expectation that their contracts would be renewed. In conclusion, the Claimant submitted that the Court should issue an order directing the Respondents to pay the Grievants their statutory benefits and maximum compensation for loss of employment pursuant to section 49 of the Employment Act. That the Court could also issue any orders that it may deem fit and just to grant and that costs and interest at court rates be borne by the Respondents from the date of filing this Cause.
 9. The Respondent did not file any submissions.
 10. This case proves the conundrum that is labour disputes that are unresolved in real time. The Grievants were employed on fixed term contracts after the employer decided to outsource. The Grievants had served the 1st Respondent for various periods of time and from all accounts were subjected to the disease that was prevalent then among some employers – outsourcing. There was no indication of any adherence to the principles on outsourcing which are inter alia:
 - a) Ordinarily, employers are not expected to outsource their core functions;
 - b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;
 - c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and
 - d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.
 11. The 1st Respondent unilaterally altered the contractual provisions for employees it had confirmed into position by offering them varied fixed term contracts in place of their initial contracts. This led to unfair labour practices. The Grievants who assert the Respondents had sought revocation of union membership as a precondition to renewal of contracts. None was able to show any communication between them and the employer on the issue. No protest letters had been sent and there was no record even at the Labour Office of the grievance since the meeting held there was informal. No record of reference to the Minister for Labour for resolution of a dispute was availed. The Union seems to have



jumped the gun by initiating a civil suit without following the laid down procedures under the *Labour Relations Act*. Even when an employer locks out employees, it does no harm to initiate a process that would involve the Minister appointing a conciliator.

12. Whereas there was misconduct by the Respondents, the Court cannot ascertain with particularity the harm to each Grievant. The Claimant indicated each Grievant's position, earnings and the employment documents duly filed. However, the Claimant indicated as its prayers that the court at its own discretion do order immediate reinstatement of the 33 Grievants. This cannot be done for obvious reasons. So much time has passed since 2016 that an order of reinstatement would not be appropriate. The Claimant sought that the Court should order payment of terminal benefits for the 33 Grievants if reinstatement is not possible. There were no specifics on what these terminal benefits were. No indication of the sums due for each nor any guide since the Claimant even acknowledges that there is no collective bargaining agreement in place. The last prayer was that the court at its own discretion should order the Respondents to stop practising unfair labour practices by denying the workers the right to join a trade union of their choice.
13. The Court is therefore unable to grant the Claimant the reliefs it sought for the Grievants as the Court does not have the specific claims made for each. It is improper for any employer to engage in unfair labour practices and the Respondents are ordered not to engage in any practice that is contrary to sections 4 and 5 of the *Labour Relations Act*, 2007 as well as Article 41 of *Constitution* of Kenya. That said, are there any remedies the Claimant has been able to achieve for the Grievants? The answer to the above is in the negative and the suit herein despite having had potential for a different outcome is dismissed albeit with an order that each party bears their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

