Kenya Concrete, Structural, Ceramic Tiles, Woodplys & Interior Design Workers Union v Bomi Engineering and Construction Company (Cause E779 of 2023) [2023] KEELRC 3240 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3240 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E779 OF 2023

JK GAKERI, J

DECEMBER 7, 2023

BETWEEN

KENYA CONCRETE, STRUCTURAL, CERAMIC TILES, WOODPLYS & INTERIOR DESIGN WORKERS UNION ..... CLAIMANT

AND

BOMI ENGINEERING AND CONSTRUCTION COMPANY ..... RESPONDENT

RULING

1. Before the court for determination is the applicant's notice of motion dated September 26, 2023 seeking orders;

    1. Spent.

    2. That an order be and is hereby issued directing the respondent by itself, agents assigns, servants and representatives to immediately allow all workers who were locked out on August 4, 2023 to resume duty and the days spent while on lockout be deemed to have been on duty.

    3. That an order be and is hereby issued barring the respondent by itself, agents, assigns, servants and representative from any act of victimization including termination of existing appointments and dismissing the members of the union herein on account of this suit pending hearing and determination of this application and the main suit.

    4. That this application and the main suit be merged and proceed by way of documentation as provided for under rule 21 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.

    5. That this court be pleased to grant any other Order that it deems fit and just to meet the ends of justice.

6. That cost of this application be provided for.

2. The Notice of Motion is expressed under sections20(1) & (4) of the *Employment and Labour Relations Court Act*, rule 17 (1) (2) (3) and (21) of the *Employment and labour relations court (procedure) rules, 2016* article 41 (1) & (2) (a) of the *Constitution of Kenya*, 2010 and is based on the grounds set forth on its face and supported by the affidavit of Dishon Angoya, the General Secretary of the Applicant sworn on September 28, 2023.

3. The affiant depones that the applicant union and the respondent have a registered Collective Bargaining Agreement (CBA).

4. That the claimant wrote to the respondent *vide* a letter dated August 10, 2023 seeking reinstatement of the transport arrangements to all members of the union which the respondent declined to honour.

5. That a formal trade dispute was registered with the Ministry of Labour on August 10, 2023 and a conciliator appointed who recommended as follows;

   a. All employees terminated be reinstated with immediate effect to their employment.

   b. That all the days they have been out on strike/lock out will not be paid.

   c. That in future the management/union/workers should strive to follow the laid down procedure in resolving disputes/grievances at the shop-floor.

   d. That the tabulation of accrued arrears be all inclusive with selected members from the management and the other side of the union engaged.

   Or

   The decision of management be upheld but the same result into unfair termination because the right procedure were not put in place including the bipartite and tripartite discussions to resolve the matter thus apart from payment of all dues to employees which includes;

   i. Salary in lieu of notice

   ii. Outstanding leave

   iii. Severance pay

   iv. Certificate of service

   v. All arrears accrued

   vi. The employees be awarded four months compensation for loss of employment

6. That the applicant accepted the recommendations of the conciliator but the respondent declined as a result of which the respondent unlawfully locked out from employment 466 employees which amounts to unfair labour practice outlawed by article 41(1) and (2) of the *Constitution of Kenya*, 2010.

7. The applicant states that the respondent's failure to pay the 466 employees their entitlement has caused untold suffering to their families.

8. The applicant states that the actions of the respondent are illegal, null and void and urges the court to stop the said action by granting the orders prayed for by the applicant.

Respondent's case

9. In response to the application, the respondent filed a replying affidavit sworn by ENG Yoo, Do Huyn, a director of the respondent company on October 6, 2023.

10. The affiant states that the application does not meet the threshold for grant of the injunctive orders sought.

11. The affiant states that the respondent entered into a contract on the November 30, 2020 with the Ministry of Education for construction of KAIST Project which was expected to be completed and handed over by September 1, 2023.

12. The affiant further avers that the respondent engaged various workers to perform different roles in the project and were remunerated according to the positions they held.

13. That the respondent entered into a recognition agreement dated July 22, 2022 and the CBA was registered in court and the respondent has been engaging the Applicant and its members in relation to effective implementation of the CBA.

14. The affiant deposes that he was aware that on Friday August 4, 2023 the applicant union members downed their tools and proceeded to the Respondents office where they interrupted and stopped other employees and management from doing their work.

15. The affiant states that the employees proceeded to strike despite ongoing discussions between the applicant and the respondent on payment of various amounts contained in the CBA. That the Applicant's union members had not issued a 7 days written strike notice contrary to the CBA provisions and the *Labour Relations Act*, 2007.

16. The affiant states that the respondent pleaded with the applicant's members to resume duty but they declined to obey lawful instructions. Following the above the Respondent vide a letter dated August 7, 2023 notified the County Labour Officer, Machakos County of the ongoing unprotected strike.

17. The affiant states that the conciliator did not act on the respondent's notification and the applicants workers continued to abscond duty and persisted with the illegal and unprotected strike which was called without notice and occasioned harm and loss upon the respondent's reputation. That this left the Respondent with no option but to terminate the employment of the employees participating in the illegal and unprotected strike.

18. The affiant states that due to the urgency of KAIST Project the Respondent had since replaced the striking workers by entering into an agreement executed on September 18, 2023 with First Link Management Services Ltd for the provision and management of employees.

19. The affiant states that First Link Management services's employees were already working on the project and it is untenable to have the striking employees back as it will lead to the Respondent having 360 extra employees beyond its requirements under the project.

20. The affiant states that the respondent followed all procedures as by law required in the circumstances to resolve the dispute between itself and members of the applicant union.

21. The affiant states that the applicant has not demonstrated a prima facie case with probability of success nor has it demonstrated the irreparable loss or injury it is likely to suffer in the event the court declines to grant the orders sought.

22. The affiant states that the application is bad in law, incompetent, misconceived and merely intended to stifle construction of the KAIST Project which is meant to provide advanced studies for technological innovation to the Kenyan Nation with the financing being advanced to the Kenyan government by the Korean Export Import Bank.

Rejoinder

23. In rejoinder, the applicant filed an affidavit sworn by Dshon Angoya the General Secretary of the Applicant.

24. The affiant denies the averments made by the respondent and states that the respondent's failure to implement the CBA without any justifiable cause and refusal to hold meetings with the union triggered the disturbance at the workplace.

25. The affiant states that the conciliator endeavoured to resolve the dispute and made recommendations but the respondent declined to implement the recommendations without giving any reasons.

26. The affiant states that the application meets the test for the grant of a temporary injunction as it has established a *prima facie* case with probability of success.

Applicant's submissions

27. By the time the court retired to write this ruling, the applicant had not filed its submissions.

Respondent's submissions

28. Counsel for the respondent highlighted three issues for determination as follows;

    a. Whether the applicant has met the threshold for grant of the orders sought?

    b. Whether this honourable court should hear the application and main suit by way of documentation?

    c. Whether the applicant is entitled to the orders sought?

29. On the first issue, counsel submitted that the Applicant is seeking injunctive orders and had not established the conditions for its issue as enunciated in the celebrated decision in *Giella v Cassman Brown & Co Ltd*.

30. Reliance was also placed on the sentiments of the court in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR where the Court of Appeal observed as follows;

> " We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened or violated. Positions of the parties are not proved in such a manner as to give final decisions in discharging a *prima facie* case."

31. Counsel submitted that the applicant had not proved on a preponderance of probabilities that it has a fair and bonafide question in support of the allegations that its members had been unlawfully locked out and victimized by the respondent.

32. Counsel submitted the claimants union members downed their tools and proceeded with an unprotected strike without issuing the requisite seven days' notice contrary to the recognition

agreement, the CBA and the *Labour Relations Act, 2007*. That the respondent tried and pleaded with the claimants members to resume work which instructions they disobeyed leaving the Respondent with no option but to terminate all employees who participated in the illegal and unprotected strike.

33. Counsel submitted that the applicant has not demonstrated that the respondent breached the *Constitution of Kenya*, 2010 or any other law in terminating the employees and no material has been presented to court to prove that the applicant's case has good chances of success if the orders sought are granted.

34. Counsel further submitted that the employees who participated in unprotected strike have since been replaced and the applicant had not demonstrated the existence of a *prima facie* case with probability of success.

35. On the second issue, counsel submitted that the concept of irreparable harm seeks to protect the *prima facie* case established by the applicant from being rendered nugatory.

36. Counsel submitted that since the Application had not met the threshold for *prima facie* case, the protection sought was not justified.

37. Further, counsel submitted that the applicant had not challenged the fact that the respondent is not capable of compensating the employees should the court find in its favour.

38. Reliance was made in *Marple Brooks Projects Company Limited & another v I&M Bank Limited* (2019) eKLR where the court held that;

> " The next issue to address is whether the injury visited upon the Applicant should the conservatory orders not be granted could be compensated by way of damages. The principle generally is that where damages would suffice, the respondent would be in a position to pay them, the court ought not to grant conservatory orders at the interlocutory stage."

39. On the third issue, counsel submitted that the balance of convenience was in favour of preserving and protecting the continued construction of the KAIST Project as grant of the orders sought would interfere with the sooth running of the project.

40. The respondent submitted the court should, in determining whether or not to grant the prayers sought at this stage be guided by the lower rather than the higher risk of injustice as held in *Suleiman v Amboseli Resort Ltd* (2004) 589 where Ojwang J. (as he then was) cited with approval the English case of *Films Rover International v Cannon Films Sales Ltd* (1986) ALL ER 772, Justice Hoffman observed that:

> " a fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong."

41. On the last issue, counsel submitted that despite the provisions of rule 21 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, that provides that for a suit to procced by way of documentation, it has to either be an agreement by all the parties or the court suo motu as opposed to an application by one of the parties. The respondent submitted that it was opposed to the matter proceeding by way of documentation and proposes to have the matter proceed by way of *viva voce* evidence.

42. The respondent urged the court to find that the applicant was not deserving of the orders sought and dismiss the same with costs.

Determination

43. After careful consideration of the application, the response and the submission by the respondent, the issue for determination is whether the application meets the threshold for grant of the orders sought?

44. The applicant's primary order is to direct the respondent to allow all workers to resume duty without any victimization which includes termination.

45. The other order is to have the application and the main claim dispensed with by way of documentation.

46. The principles that govern the grant of temporary injunction were laid out in the celebrated decision in *Giella v Cassman Brown & Co Ltd* (1973) EA 358 namely *prima facie* case with probability of success, the applicant might otherwise suffer irreparable injury and if in doubt the court will decide the matter on a balance of convenience.

47. As regards *prima facie* case, the Court of Appeal stated as follows in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR;

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

48. As adverted to elsewhere in this judgement, the applicant seeks to have the employees dismissed by the Respondent reinstated without victimization. The Respondent on the other hand argues that since the employees were out of work for a period of 83 days, it engaged First Link Management Services which supplied them with employees in an endeavour to complete the project as scheduled in September 2023.

49. It hardly needs emphasis that reinstatement is a final remedy that a court ought to grant after hearing both parties on merit barring exceptional cases. In *Paul Nyandewo Onyangoh v Parliamentary Service Commission & others*, cause No. 2292 of 2016, the court expressed itself as follows;

> " Certain forms of termination grounds, the kind that result in automatically unfair termination such as pregnancy, race, gender or religious discrimination may warrant a rare exercise of the courts discretion in issue of interim reinstatement".

50. In the instant case, the applicant has not furnished the court with sufficient evidence to show that grave injustice was visited upon the employees to warrant the grant of reinstatement at this stage without establishing any special circumstances.

51. As regards irreparable loss or injury, the applicant union has not tendered evidence to demonstrate that the employees will otherwise suffer irreparable injury if the injunctive relief sought is not granted.

52. The applicant has failed to prove the loss is incapable of monetary quantification.

53. Finally based on the evidence on record, it is the finding of the court the applicant has failed to demonstrate that the balance of convenience is tilted in its favour.

54. Additionally, the applicant prays that the application and the main suit be merged and proceed by way of documentation as provided under rule 21 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.

55. Rule 21 provides;

> " The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties."

56. Under this rule, for the court to procced by way of documentation, it may do so suo motu or by agreement by all the parties involved. The Respondent in this case has expressed reservations to applicant's proposal and indicates its preference to have the suit proceed by way of *viva voce* evidence.

57. More significantly, however, this prayer has been overtaken by events as the application has already been disposed of by this ruling.

58. It is the finding of the court that the application has not met the threshold for issuance of the injunctive orders and as there is no agreement that the suit proceeds by way of documentation, the court is persuaded that the matter proceeds to hearing.

59. In the upshot, the applicant's notice of motion dated September 26, 2023 is for dismissal and it is accordingly dismissed.

60. Costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2023

DR. JACOB GAKERI

JUDGE