



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KERICHO**

**ELRC. CAUSE NO. E015 OF 2021**

**KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT**

**VERSUS**

**BOMET WATER AND SANITATION COMPANY LIMITED.....RESPONDENT**

**R U L I N G**

1. This Ruling relates to the Claimant's Notice of Motion dated 15<sup>th</sup> November, 2021 which seeks the following orders:

**a) That the application be certified urgent and service be dispensed with in the first instance.**

**b) The respondent be restrained and be prohibited from intimidating, threatening or in any way victimizing the claimant's members' pending the hearing and determination of this Application and claim.**

**c) An interlocutory order of stay of the Respondents decision as contained in the notice of termination letter from the Respondent to the claimant's members' pending the hearing and determination of this Application and claim.**

**d) The Respondent be restrained and prohibited from employing replacing labour and or employees in the same position and to perform the same/ similar work as the claimants' members' pending hearing and determination of the claim.**

**e) The costs of and occasioned by this Application be awarded to the Claimant.**

2. The application is premised on the grounds set out in the body of the motion and the supporting affidavit sworn by Roba S. Dubi, the Claimant's National General Secretary, on the 15<sup>th</sup> November, 2021 and a further affidavit sworn on the 3<sup>rd</sup> December, 2021. The application is opposed by Respondent vide the Notice of Preliminary Objection dated 29<sup>th</sup> November, 2021 and the Replying Affidavit sworn on the 9<sup>th</sup> December, 2021 by the respondent's Managing Director Mr. Patrick Langat.

**Applicant's Case**

3. The Applicant brings this Suit on behalf of 42 of its members (grievants) alleging that, the Respondent vide various letters dated 18<sup>th</sup> October, 2021 and 26<sup>th</sup> October, 2021, has unilaterally terminated the employment of the 42 grievants.

4. The reason for termination according to the claimant is that there was a dispute about unpaid salaries that accrued from August, 2021 to October, 2021, unpaid pension from August, 2018 to date, unremitted shares to SACCOs and unremitted staff welfare funds. It contends that instead of the respondent resolving the grievances by the employees it resulted to intimidation, threats and victimization of the grievants through termination.

5. It further avers that several meetings were held in an effort resolve the matter the last one being on 6<sup>th</sup> October, 2021 but Respondent became adamant claiming that the termination is justified in accordance with the Human resource manual.

6. The claimant acknowledged that there was an industrial unrest brought about as a result of the unresolved issue and instead of amicably resolving the issue the Respondent resulted to issuing show cause letters which culminated to the termination of the 42 grievants herein.

7. The said show cause letters were issued on the 9<sup>th</sup> October, 2021 with a schedule disciplinary hearing on the 12<sup>th</sup> October, 2021 giving the grievants a weekend to Respond to the show cause letter, and prepare for the disciplinary hearing. The claimant avers that the time within

which its members were required to respond and attend hearing was unreasonably short leading to the termination of their employment without them being heard.

**Respondent's case.**

8. The Respondent on the other hand, relied on the replying affidavit and the Preliminary Objection lodged in this Court on 29<sup>th</sup> November, 2021 which came out as follows;

a) THAT this Memorandum of claim together with the Notice of Motion application is premature before this Honourable court for reasons that; -

i. The Memorandum of claim and notice of motion application offends the doctrine of exhaustion which requires that a party exhausts all available dispute resolution mechanisms provided by the law before filing a dispute in court. The affected employees have channels of appeal within the county public service board and the Public Service Commission and if not satisfied proceed to file judicial review but they opted to institute this cause.

ii. All the Forty-Two (42) employees listed under paragraph Five (5) of the memorandum of claim failed to follow the dispute resolution mechanisms provided under section 77 of the County Government Act and section 85 and 86 of the Public Service Commission Act.

iii. Additionally, the Memorandum of claim and notice of motion offends the provisions of section 9(1) (2),(3) and (4) of the Fair Administrative Action Act, 2015 which Act implements Article 47 of the Constitution on the right to fair administrative action which clearly stipulate that, a party must first exhaust the available internal dispute resolution mechanisms before resorting to court although in exceptional circumstances and on application, the court may exempt such party from resorting to alternative internal dispute resolution mechanisms

b) THAT further, this court has no jurisdiction to hear and determine this cause because, it has been instituted by the wrong party contrary to the provisions of section 12 and 74 of the Industrial Court Act and Section 87 of the Employment Act. The dispute as pleaded in this Memorandum of claimant notice of Motion application relates to, or arises out of employment Between Bomet water and sanitation Limited and 42 employees listed under paragraph 5 of the Memorandum of claim and not the trade union that id the claimant herein

9. In the Replying Affidavit the affiant admitted that the Respondent entered into a recognition agreement with the Claimant on the 7<sup>th</sup> July, 2021 which agreement recognized the Respondent as an essential service provider as captured under 4<sup>th</sup> schedule of the Labour Relations Act. And clause (i) of the said recognition agreement.

10. It averred that the circumstances that led to the issuance of the termination letters was that on 6<sup>th</sup> October, 2021 a section of the claimants' members participated in an illegal strike which led to ejection of company staff from the offices and closure of the company's head office and the main gate, thereby paralyzing the respondent's operations.

11. It further averred that, in the bid to resolve the issue between it and the claimant's members, it issued show cause letters to 59 members of the claimant on the 8<sup>th</sup> October, 2021 and scheduled their disciplinary hearing between 12<sup>th</sup> October, 2021 and 25<sup>th</sup> October, 2021. A disciplinary committee was then set up to hear the defence of each of the claimant who was given sufficient time to prepare their defence. However, that out of the 59 employees, only 23 attended the disciplinary hearing. After Hearing, the found 41 grievants were found culpable and were duly issued with termination letters.

12. The respondent further contends that Kosgei Kibet Mike, the employee listed as number 15 in the list of grievants herein was dismissed on other grounds not related to the illegal strike.

13. The Respondent admits that it had financial constraints in the past and indeed failed to pay the claimant member's, however, it avers that the issue was resolved and August, 2021 salary was paid. The salary that was yet to be paid was for September, 2021 which the Respondent was in the process of settling when a strike was called.

14. The respondent contends that the Claimant failed to observe Clause 3 of its own recognition agreement which provides for negotiating procedures and instead rushed to file this suit prematurely before exhausting the internal dispute resolution.

15. It maintains that the impugned termination was arrived at after following due process and the termination has already crystallized. Therefore it is of the opinion that the Orders sought herein are incapable of being issued, otherwise granting the same would paralyze the company work with overreaching effects, it being an essential service provider.

16. In the Applicants rejoinder, it was denied that any industrial action took place. It produced the duty roster and the water production summary to affirm that indeed the grievants were at work on the fateful day and there was no interference with the Respondent mandate. On the contrary it was contended that there was consultative meeting between the claimant's members and the Respondent on the 6.10.2021 which led to them being issued with show cause letter on 9<sup>th</sup> October, 2021.

17. Finally, the claimant denied that its members received their August salary and urged the Respondent to provide evidence to that effect.

### **Applicant submission.**

18. The Applicant submitted that as much as section 77 of the County Government Act and section 85 of the Public Service Act requires that the claimant exhaust all internal mechanism, the same does not bar the applicant from seeking redress from the Court when they feel the need.

19. It further submitted that the said provision does it oust the jurisdiction of this Court from hearing and determining an issue on the sole premise that internal dispute resolution mechanisms were not exhausted. Therefore it maintained that this Court has jurisdiction under Article 162(2) of the Constitution as read with section 12 of the Employment and Labour Relations Court Act, 2011 to entertain the suit.

20. For emphasis it cited the case of **United stated International University(USISU)V The Attorney General and others [2012] eKLR** where the Court held that; -

*“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court. ...To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters its competence would undermine the status of the court.”*

21. On whether the rights of the claimant’s members were violated, it was submitted that the right to be heard under Article 50 of the Constitution was infringed when the Respondent failed to accord them an opportunity to be heard and the reasons thereof to warrant their dismissal. It was also argued that section 5 of the Employment Act provides for protection of employees and Article 41 and 47 provides for the right to fair labour practices and fair administrative action which the Applicant argued were violated when the Respondent gave the grievants short notice to respond to show cause and attend disciplinary hearing.

22. On the Preliminary objection raised by the Respondent that the claimant failed to exhaust all internal measure as provided for under section 77 of the County Government Act, it was submitted that the claimant’s members are not governed by the said provision for the reason that section 77 talk of appeal emanating from a decision of the County Public Service Board which is not the case herein. Further that section 85 and 86 of the Public Service Commission Act talks about county public officers and not the claimant’s members herein.

23. The claimant on the second limb of the Preliminary objection submitted that, a union is empowered under Article 3,22,258 and 260 of the Constitution to bring this suit on behalf of its members. Accordingly, it was submitted that the preliminary objection has failed in both limbs and therefore ought to be struck out.

24. The Applicant then cited the case of **Nguruman Limited V Jan Bonde Nielsen & 2 others [2014] eKLR** to submit that it has satisfied all the conditions pre-requisite of grant of an interlocutory injunction and urged this Court to allow its application of 15<sup>th</sup> November as prayed.

### **Respondent’s Submissions.**

25. The respondent submitted that prayer 2 of the Notice of Motion is incapable of being granted for the Reason that there is no employer-employee relationship between the parties herein to warrant the issuance of the Orders. As regards the prayer interlocutory injunction, it was argued that the applicant has not satisfied the conditions set out in the case of **Giella V Cassman Brown**.

26. On the other hand, it was submitted that the prayer 3 cannot be granted at an interlocutory stage for the reason that the orders have the effect of allowing final prayer and in effect reinstating the grievants to employment when the suit has not been heard and determined. To fortify the foregoing view, the respondent cited the case of **Jacinta Sekoh Ochineg V Kenya Pipeline Limited [2017] eKLR** and the Court of Appeal case of **Olive Mwhaki Mugendi and another V Okiya Omtata Okoiti& 4 others [2016] eKLR**.

27. With regard to prayer 4 of the Notice of Motion, it was submitted that the Respondent is an essential service provided as provided for under section 81 as read together with schedule 4 of the Labour Relations Act, 2007 and to prohibit it from filling the positions initially occupied by the Claimants’ members would paralyze the work of the Respondent which will have irreversible effects to the public and the livelihoods of third parties especially in the current era of a pandemic which requires water in its fight and management thereof.

### **Issues for determination**

15. The issues for determination are:

- a) **Whether the court has jurisdiction over the dispute in the suit herein.**
- b) **Whether the Preliminary Objection is merited.**
- c) **Whether orders sought in the motion should be granted.**

## Jurisdiction

28. Jurisdiction is the authority or mandate which a court has to decide a matter before it. It flows from the Constitution or statute or both. It is everything to a court and whenever the issue of jurisdiction is raised, the court should address it immediately. In the **Owners of the motor vessel "Lillian s" v. Caltex Oil (Kenya Ltd. [1989] KLR1** the Court of Appeal held:

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step . . . A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

29. The jurisdiction of this court is given by section 12 of the ELRC Act, pursuant to Article 162(2)(a) and 165(5) of the Constitution of Kenya 2010. The court has unlimited original and appellate jurisdiction in employment and labour relations disputes. Both parties have agreed that this court is established to determine disputes related to employment and labour relations.

30. The suit before the court emanates from termination letters issued by the Respondent to the claimant's members on the 18<sup>th</sup> October, 2021 and 26<sup>th</sup> October, 2021. The Respondent argued firstly that there is no employer-employee relationship between it and the claimant as per section 12 of the Employment and Labour Relations Court Act as read with section 87 of the Employment Act. The Applicant is in denial and submits that it is empowered under Article 258 of the Constitution to sue on behalf of its members.

31. The standing of trade unions to sue on behalf of its members is now settled. The Court of Appeal in its decision in **Modern Soap Factory v Kenya Shoe and Leather Workers Union (Civil Appeal No 37 of 2019)** appellate court rendered itself thus:

***"Article 41 of the Constitution of Kenya on labour relations protects the right of every person to fair labour practices and the right, among others, to join a trade union, which in turn has the right to determine its activities. Article 258 of the Constitution on enforcement of the Constitution provides in Article 258(2)(d) that an association acting in the interest of one or more of its members may institute proceedings where the Constitution is contravened or threatened with contravention...We can see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact. Where there is a contest as to whether an employee is a member of a union, evidence would be required to settle that question. It is not a matter that is amenable for determination on the basis of a preliminary objection...A recognition agreement is defined under Section 2 of the Labour Relations Act as an agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in court. As the learned Judge correctly stated, the two roles are distinct."***

32. It follows therefore that for a trade union can sue on behalf of its members and in fact it does not require to have a Recognition Agreement with the employer to do so. The only requirement is that the Grievant must be a member of the trade union. In this case the Respondent admitted that it entered into a recognition agreement with the claimant on the 7<sup>th</sup> July, 2021 and therefore the Claimant has locus to sue on behalf of its members who are the grievants herein and the court ultimately has jurisdiction to hear them.

33. The Respondent also questioned jurisdiction of this Court which according to them was prematurely invoked by the claimant before exhausting the internal dispute resolution in line with the doctrine of Exhaustions. The Court of Appeal provided the constitutional rationale and basis for the doctrine in **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others [2015] eKLR**. It stated that:-

***"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for a of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."***

34. The basis upon which the Respondent seeks to compel the claimant to exhaust internal dispute resolution mechanism is section 77 of the County Government Act and section 85 and 86 of the Public Service Commission Act. My reading of both Act cited by the Respondent provides for Appeals from decision of person in authority in the County Public Service Board or the board itself.

35. The grievants in this case were employed by the Respondent who is a company Limited by shares and was incorporated on 18th June 2013 under the Companies Act Cap 486, Laws of Kenya. The Respondent is an independent company and is not the County Public service board. Its employees are not recruited by the County public service board. Accordingly it is obvious that the claimant's members cannot be governed by section 77 of the County Governments Act and Public Service Commission Act. Consequently, the appeals from the grievances herein cannot be preferred to the Public Service Commission as argued by the Respondent.

36. In light of the foregoing I therefore, hold that the court has jurisdiction to determine the suit before it and the preliminary objection by the Respondent must fall on its face.

**The Order Sought in the Notice of Motion.**

37. In the prayer (b), the applicant seeks to restrain the Respondent from intimidating, victimizing and or threatening its members. The said 42 members have already been dismissed as per the Letters of termination issued on 18<sup>th</sup> and 26<sup>th</sup> October, 2021. They are no longer in employment and therefore it is not possible for the Respondent to intimidate or victimize them when they are already out of employment. Furthermore, there is no aorta of evidence table before me to show any instance of intimidation or victimization alleged by the Claimant after the separation. I will therefore disallow that prayer for lack of evidence.

38. As regards prayer (c), the applicant seeks to stay the operationalization of the termination letters and in effect reinstate the grievants. On the other hand prayer (d) seek to stop the Respondent from filling the position formerly held by the grievant pending the trial of the main suit. The said prayers constitute both mandatory and prohibitive injunctive orders.

39. The conditions for granting of such orders were well stated in the locus classicus case of **Giella v Cassman Brown & Company Limited [1973] EA** as follows:

- a) An applicant must show a *prima facie* case with a probability of success;
- b) 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;
- c) If the Court is in doubt, it will decide the application on the balance of convenience.

40. The question that follows is whether the Claimant's application satisfies the above conditions. It was submitted on behalf of the Respondent that the orders sought are final in nature and cannot be granted at the interlocutory stage.

41. I am of the opinion that this Court cannot stay the termination because to do so could amount to reinstating the claimant into employment when their dismissal crystalized upon receipt of their termination letter. I seek support from the decision of this Court in **Joab MehtaOudia v Coffee Development Board of Trustees [2014] eKLR** where Rika J held that the court cannot stay termination as that would amount to the court unduly interfering with a decision already made by the management within its discretion.

42. This Court can only stay a letter of termination or in other words reinstate an employee where a termination is effected in defiance of a subsisting court order. I seek support in the case of **Evans Mumo Mwangangi v Kitui County Public Service Board & another [2016] eKLR**.

43. Can this Court then stop the Respondent from filling the position initially occupied by the grievants until this suit is heard and determined?

44. In the case of **Tom Otieno Odongo v Cabinet Secretary Ministry of Labour Social Security & Services & National Social Security Fund Board of Trustees (Cause No 1174 of 2013)** where Nziokawa Makau J in declining to grant a similar order, stated that it would not be in the public interest to halt the recruitment process as the National Social Security Fund was expected to continue running efficiently even as the Claimant's case against it progressed.

45. I agree with the foregoing holding and quickly add that where the number of the dismissed employees in large number like in this case, it may be unreasonable for the court to bar the employer from filling the vacancies since doing so can paralyze the employer's operations. The court does not exist to kill businesses but ensure peace at workplace and stability in the economy of the country. The court is also obliged to ensure that essential service providers are not hindered by its orders.

46. The case herein involves a water company that is tasked with supplying water to Bomet County. Water companies such as the Respondent are essential service Providers as captured under Forth schedule of the Labour Relations Act. Consequently, they cannot afford to stop operations and the court will not prohibit filling of the vacancies till this suit is heard and determined. Doing that would be a grave disservice to the people of Bomet and it would also be contrary to the spirit of section 81 of the Labour Relations Act.

47. In conclusion, the Claimant's application is declined and the interim orders granted on 18<sup>th</sup> November 2021 are vacated. The claimant will pay the costs of the application.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 2022.**

**ONESMUS N MAKAU**

**JUDGE**

**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 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**