



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO E006 OF 2020

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

VS

KENYA GENERAL INDUSTRIES.....RESPONDENT

RULING

1. On 9th October 2020, the Claimant filed a Memorandum of Claim citing the following as issues in dispute:

‘Confirmation of all long serving fixed term contract employees to permanent and pensionable terms, victimisation of Claimant’s members on account of trade union activities/affiliation and/or unprocedural outsourcing to replace the Claimant’s members’

2. Alongside the Memorandum of Claim, the Claimant filed a Notice of Motion seeking the following prayers:

- a) An interim order restraining the Respondent and/or its agents from victimising the Claimant’s members by way of termination, dismissal and/or redundancy pending the hearing and determination of the suit;
- b) An order restraining the Respondent and/or its agents from unprocedural and/or unfair outsourcing and replacement of the Claimant’s members pending the hearing and determination of the suit.

3. The application is supported by an affidavit sworn by the Claimant’s General Secretary, Wycliffe A. Nyamwata and is based on the following grounds:

- a) That the Respondent’s action is in violation of the parties’ Collective Bargaining Agreement at preamble (b) clauses 3, 20 and 23 as fixed term contracts are not provided for;
- b) That the Respondent is in breach of Article 41 of the Constitution on fair labour practices;
- c) That the Respondent is also in breach of Section 37 of the Employment Act, 2007;
- d) That after the conciliation process, the Respondent embarked on redundancy/termination of the Claimant’s members and their replacement by unprocedural and/or unfair outsourcing;
- e) That the action by the Respondent offends the rule of law and the position taken by the Court in ***Cause No 245 of 2014: Kenya Shoe & Leather Workers Union v Bata Shoe Company (K) Limited***;
- f) That the action by the Respondent violates Article 47 of the Constitution on fair administrative action;
- g) That if the orders sought are not granted, the Claimant and its members will suffer irreparable damage.

4. The Respondent’s response to the Claimant’s application is by way of a replying affidavit sworn by its Human Resource & Administration Manager, Mohamed Koraya.

5. Koraya depones that the Respondent has acted within the precincts of the law and the applicable Collective Bargaining Agreement. He points out that the parties in the employment relationship had entered into fixed term contracts.

6. Koraya states that the Claimant’s members were engaged on defined contracts and could not be engaged on permanent basis as the

Respondent was going through economic hardship.

7. Regarding outsourcing of some of its functions, Koraya states that this was a cheaper option for the Respondent. He adds that it is the Respondent's managerial prerogative to make decisions regarding its business strategy in order to stay afloat.

8. Koraya states that no employees had been declared redundant and adds that termination of employment had occurred by effluxion of time, upon expiry of specific fixed term contracts.

9. Koraya maintains that it was not tenable for the Respondent to convert all long service fixed term contract employees to permanent and pensionable terms, because the business environment had deteriorated considerably and had become unpredictable.

10. Koraya points out that the Claimant had not adduced evidence of any of its members having been terminated, dismissed or declared redundant.

11. Looking at the Claimant's application and the Respondent's response, it is evident that the issues which the Court is called upon to determine are convoluted matters of fact requiring *viva voce* evidence.

12. Further, it is clear to me that the prayers sought in the application are intertwined with those sought in the main claim.

13. For these reasons I decline to grant any orders at the interlocutory stage and direct the parties to take steps towards listing the main claim for hearing on priority basis.

14. The costs of this application will be in the cause.

15. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF FEBRUARY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Makale (Union Representative) for the Claimant

Mr. Onyony for the Respondent