



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 47 OF 2020

KENYA UNION OF SUGARCANE

PLANTATION AND ALLIED WORKERS.....CLAIMANT /APPLICANT

VERSUS

WEST KENYA SUGAR COMPANY LIMITED.....RESPONDENT

RULING

1. The applicant union filed Notice of Motion application dated 3rd July praying for and Order *interalia*:-

(a) Spent

(b) Spent

(c) The Court be pleased to issue an Order outlawing the lockout imposed to all the contracted and casual employees of the Respondent on the 1st July, 2020 by the Respondent and all the affected employees be retained in their respective work positions forthwith.

(d) **THAT** pending the hearing and determination of this application, the Respondent be barred from issuing further termination of employment contracts to any employee within its establishment.

(e) **THAT** pending the hearing and determination of this application, the respondent be restricted by way of Court Order not to fill the job positions of the affected-locked out staff either by themselves, their agents, or outsourcing companies.

(f) **THAT** pending the hearing and determination of this case the Respondent be ordered to implement the judgment in Cause 388 of 2018, 258 of 2018 and 110 of 2013.

(g) **THAT** the Respondent, his agent(s), or manager(s) or supervisor(s) and or any other persons(s) serving the interests of the Respondent be restrained/stopped from threatening, victimizing, terminating and/or dismissing any of the stated employees, union officials or any other employee on account of this suit or its proceedings.

(h) **THAT** the Respondent be ordered to release/remit union dues deducted from the employees for the month of June, 2020 to the National and Branch accounts forthwith.

(i) **THAT** the costs of this suit be provided for by the Respondent.

2. The application is founded on grounds set out in the Notice of Motion numbered 1 to 23 which may be summarized as follows:-

(a) That parties have a valid recognition agreement.

(b) That the contracted staff are members of the Union by virtue of

the Judgment of the Court in Cause No. 388 of 2018 in which the Court directed respondent to effect union deductions immediately.

(c) That the respondent has failed to honour the judgment in Cause No. 388 of 2018 which necessitated the applicant to file contempt of Court proceedings against the Respondent on 22/4/2020 which application is still pending before this Court.

(d) That the Court directed in a ruling in Cause No. 258 of 2018 delivered on 16/4/2020 that all employees of the respondent who had served over two months are entitled to the Collective Bargaining (CBA) terms and salary increment as per Clause 34 of the Collective Bargaining Agreement for the period 2017-2019 and payment of salary arrears for all employees who had been left out of the CBA implementation within 30 days.

(e) That following the judgment of the Court in Cause 388 of 2018, and the ruling in Cause 258 of 2018 and a reminder by the Secretary General to comply, the respondent planned for a periodic maintenance, followed by a verbal lockdown and in an internal memo issued at about 2.00p.m. on 1/7/2020 ended all the contracts of contracted and casual staff with an intention of terminating them and outsourcing of all the casual and contracted staff.

3. On the same day the respondent issued another memo dated 1/7/2020 at about 5 p.m. directing workers to sign new contracts on 2/7/2020.
4. That on 2/7/2020 employees found gates manned by police officers and employees were divided into groups with instructions to sign new contracts which they signed and got no copies.
5. That on 2/7/2020 the respondent also issued letters of termination dated 29/6/2020 to all truck drivers who were working on both permanent and contract terms without following due process.
6. That the conduct by the respondent is unlawful, unfair and violates Articles 22, 41 and 47 of the Constitution of Kenya 2010 and International Labour Organizations (ILO) Conventions. That the conduct also violates the Memorandum of Understanding signed by the tripartite parties and government directive that workers should not lose employment during COVID-19 period.
7. That this is unfair Labour practice against contracted workers and it should be injuncted by the Court.
8. That the application be granted with costs.
9. The matter came before Nduma J. *ex parte* on 3/7/2020 and the application was certified urgent but no interim Orders were granted.
10. The respondent filed replying affidavit sworn to by Martin Chisaka, the Human Resource Manager of the Respondent who deposes *inter alia* that the question of Union deductions as well as the purported contempt of Court Orders to that effect is a matter that is currently pending determination in ELRC Cause No. 338 of 2018 and in which the Respondent has filed a preliminary objection dated 1/7/2020 and the matter is coming before the Court on 12/8/2020.
11. That the matter of payment of salary arrears and the alleged contempt of Court Orders is also pending before Court in ELRC Cause No. 258 of 2018.
12. That these matters are sub-judice and should not be entertained by the Court herein.
13. That the respondent deposes further that it employed over 4,000 employees and over 2,500 employees are on fixed term contracts whereas the rest are on permanent and pensionable terms.
14. That due to the COVID – 19 pandemic, the Respondent's business has been extremely affected and the Respondent has made heavy losses due to curtailed inability to collect cane by disruptions in the transport and delivery chain. That the Respondent had to re-organise its manufacturing activities to take into account social distance and personal safety requirement, and the global slowdown in the economy has resulted in slower payments for goods supplied to third party distributors who are also experiencing economic hardship.
15. That as a result, the respondent opted to enter into a labour outsourcing contract with Retail Management solutions limited; Handyman staffing Solutions' and Vineyard International Company Limited and those companies have entered into various agreements with the respondent dated 27/6/2020 whereby the Respondent would outsource Labour from the companies to lower operational and Labour costs and also attract the most qualified and efficient human Resource. That the agreements were only to operate with effect from 27/6/2020 and were not to effect previous contracts between contracted employees and the Respondent.
16. That each of the 770 employees named here had individually and independently negotiated terms and conditions of their contract including the duration and the remuneration payable. The respondent accordingly wrote to these employees with fixed term contracts and informed them that their contracts were expiring and informed them of the Respondent's decision not to renew the contracts. The employees were also informed that they would be placed as and when opportunities arose.
17. That only 335 out of 770 employees affected were members of the Union constituting 35%.
18. That over 500 employees were still left employed under fixed term contracts which were yet to expire.
19. That the application is misconceived, and is riddled with falsehoods and innuendo and ought to be dismissed with costs.
20. The applicant filed supplementary affidavit dated 8/8/2020 restating its case and joining issues with the respondent. The applicant prays that the application be granted as prayed.

Determination

21. The issues for determination are:-

(a) Whether the applicant has satisfied the requirements for grant of mandatory injunction to reinstate fixed term contracts that have already been terminated and or expired by effluxion of time.

(b) Whether the applicant is entitled to other reliefs sought in the application.

(c) In answer to issue (a) above, the Court notes at the outset that since prayer 1, 2, 4 and 6 were spent at the exparte stage only prayers 3 to 8 are left for consideration upon interpartes hearing of the application.

22. It is noteworthy none of prayers 3, 6, 7 and 8 seek a temporary injunction or conservatory order lifting and cancelling the action of the Respondent of terminating employment contracts of all the affected employees the subject of this suit **pending the hearing and determination of the suit (emphasis mine)**.

23. This Court cannot therefor grant an Order that has not been sought by the claimant/applicant.

24. That only prayer 5, seeks an Order for the Court to order the respondent to implement the judgment of Cause 388 of 2018, 258 of 2018 and 110 of 2013 pending the hearing and determination of this suit. It goes without saying that such an Order may only be granted in those specific cases but not in this case which is separate and different from those stated cases.

25. It is indeed common cause that Cause No. 388 of 2018 and 258 of 2018 have applications pending before this Court. This prayer is therefore misconceived and an abuse of Court process.

26. The Court has nonetheless considered the deposition in the application, replying and supplementary affidavits and the written submissions and has come to the conclusion that the claimant/applicant has not satisfied the requirements for grant of a conservatory Order and/or injunction pending the hearing of the suit as set out in the case of **Giella –vs- Cassman Brown Ltd. [1973] E.A.**

27. Most of the prayers address matters that have already happened, such as termination of the fixed term contracts by the respondent and/or by effluxion of time and validity of ongoing out sourcing which matters may only be addressed upon hearing of the suit on the merits. Issues the subject of other named suits are subjudice and ought to be addressed in those specific suits.

21. Accordingly, the application lacks merit and is dismissed with costs in the cause.

Dated and delivered at Nairobi this 11th day of February, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with ***Order 21 rule 1 of the Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by ***Article 159(2)(d)*** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under ***Article 48*** of the Constitution and the provisions of ***Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)*** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

Secretary General – Lincoln Aveza Isagi

OM Law Advocate for the Respondent

Chrispo: Court clerk