



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 49 OF 2020

WEST KENYA SUGAR COMPANY LIMITED.....CLAIMANT

VERSUS

KENYA UNION OF SUGARCANE PLANTATION AND ALLIED WORKERS.....RESPONDENT

RULING

1. The respondent filed application dated 10/7/2020 praying for an Order in the following terms:

(i) Spent

(ii) That this Honourable Court declare the strike called by the Respondent in their notice dated 8th July, 2020 unlawful and therefore unprotected.

(iii) Spent

(iv) That this Honourable Court be pleased to issue an Order restraining the Respondent by themselves, their officials, agents and/or members from taking part in, calling instigating or inciting others to take part in unprotected strike on any form of industrial action pending the hearing and determination of the claim herein.

(v) That the Respondent be condemned to pay the costs of this application.

2. When the matter came for *ex parte* hearing on 14/7/2020, the Court granted prayers (i) and (iii) restraining the Respondent from continuing with the strike pending hearing and determination of the application.

3. The Order was inadvertently extracted granting prayer (ii). For the avoidance of doubt, it was prayer (iii) and not (ii) that was granted at *ex parte* stage since prayer (ii) is final in nature and must await determination of the Claim itself.

4. The application is based on grounds set out on the Notice of Motion numbered (1) to (17) and the nub of the application is that the Respondent had by a letter dated 8/7/2020 titled "Strike Notice" issued 7 days strike notice to the claimant effective 15/7/2020 calling upon its members who are employees of the Claimant to go on strike.

5. That the strike was called in violation of Section 76 and 78 of the Labour Relations, Act, 2007 and the terms of the Recognition Agreement in that it was in disregard of the COVID-19 situation despite that the claimant is the largest manufacturer and supplier of Sugar in the Country serving all the 47 counties.

6. That the dispute the subject of the strike is *subjudice* and before this Court in ELRC Cause No. 47 of 2020 in which the Court issued directions on the hearing of the same.

7. Indeed the respondent has filed 13 different suits against the claimant over the same subject matter and the respondent therefore lacks good faith in its dealings with the claimant in violation of the Recognition Agreement between the parties. The 13 suits are set out at paragraph 13 of the Notice of Motion.

8. The application is buttressed with reasons set out in the supporting affidavit of Martin Chisaka, the Human Resource Manager of the Claimant/Applicant who deposes that Clause 5(a) (ii) of the Recognition Agreement between the parties provide:-

“No strike, lockout or other action to stop or hinder the operations of the business of the company on a dispute which has been or should be referred to the “Committee” shall take place until

(a) Deadlock has been recorded by the “Committee;

and

(b) After such a deadlock, 21 days’ strike or lockout notice has been given and has lapsed in addition to the statutory period stipulated in the Labour Relations Act.”

9. That the Union has refused to engage the claimant on the matter yet the 21 days plus 7 extra days’ notice had not been served nor exhausted by the Claimant, nor had a deadlock been declared by the Committee.

10. That in any event a strike cannot be called in respect of a matter that the Respondent have brought to Court and is subjudice. That the application be granted as prayed.

11. The Respondent filed a response to the application in a unsworn statement dated 21/7/2020 and filed on even date. The respondent have further attached a document paragraph 24 to 31 which appear to be the tail end of an affidavit. The Respondent have in short not filed a proper replying affidavit to the application.

12. That notwithstanding the claimant filed a supplementary affidavit in response to the response filed by the respondent, which in the Court’s considered finding does not constitute a proper replying affidavit.

13. This being the situation, the deposition by the Claimant/Applicant in the Notice of Motion itself and the supporting affidavit of martin Chisaka, remain uncontroverted and the facts contained in the deposition therefore reflect the correct status of this dispute.

14. The claimant and the respondent filed written submissions which the Court has carefully considered and has come to the following finding of law and fact:-

(i) The respondent did not follow the statutory procedure provided under sections 76 and 78 of the labour Relations Act, 2007 before issuing the strike notice dated 8/7/2020.

(ii) The respondent did not adhere to the provisions of the Recognition Agreement between the parties under Clause 59(ii) (a) and (b) by issuing 21 days’ notice upon a deadlock being reached by the “Committee” of the parties seized with the dispute.

In any event the dispute had not been referred to any committee in the first place.

(iii) The dispute the subject of the intended strike is subjudice being the subject of ELRC at Kisumu Cause No. 47 of 2020 filed by the respondent union itself against the claimant employer.

15. For the above reasons, the Claimant/Applicant has established a *prima facie* case with a probability of success and has also demonstrated that it would suffer irreparable harm not remediable by damages if the Order for stay is not confirmed by the Court pending the hearing of the main suit.

See Giella –vs- Cassman Brown Ltd. [1973] E.A. 508.

16. Section 78(1) prohibits a strike if:-

(c) “the parties have agreed to refer the trade dispute to the Industrial Court.”

17. There is no doubt that the dispute the subject of the strike is pending before Court.

18. Accordingly the application is meritorious and the Court grants an injunction in the following terms in favour of the Claimant against the respondent: -

(a) An Order is issued restraining the Respondent, by themselves, their officials, agents and/or members from taking part in, calling, instigating or inciting others to take part in a strike called in terms of the notice issued by the respondent union on 8/7/2020 pending the hearing and determination of the main suit.

(b) 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

O & M Law LLP Advocates for the claimant/Applicant

General Secretary of the Union

Chrispo: Court Clerk.