



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO. E008 OF 2020**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**WOOLMATT LIMITED.....RESPONDENT**

**RULING**

1. Before this Court is the Claimant's Application via Notice of Motion dated 18<sup>th</sup> December, 2020 brought Under certificate of urgency seeking for Orders that:

- 1) *That, the application be certified urgent, service thereof be dispensed with and the same be heard ex parte in the first instance.*
- 2) *That the Honourable Court do issue orders restraining the respondent from commencing, continuing or instituting disciplinary action against the shop stewards and union members on the basis of their trade union membership.*
- 3) *That the Honourable court do hereby grant the applicant leave to commence contempt proceedings against the respondent herein, its directors and the human resource manager for disobeying the Orders of this Court issued and dated 15<sup>th</sup> October, 2020.*
- 4) *That the costs of this application be in cause.*

2. The Application is based on the supporting affidavit of **Mike O. Oranga** and on the following grounds:

- a) That the claimant/ applicant's constitution and rules allows it to recruit, enroll and represent the respondent's unionisable employees as the parties have a valid recognition agreement.
- b) That, the respondent has been coercing and intimidating the claimant's members to withdraw from the claimant's union and further using flimsy reason to institute disciplinary proceedings against its members.
- c) That, the respondent victimization arose as a result of the conciliator issuing a report dated 29<sup>th</sup> May, 2020 on outstanding collective bargaining agreement issues and upon the claimant moving to this Court.
- d) That the respondent's action of forcing the shop steward to take his annual leave in excess of his pending leave days is suspect and unfair considering the fact that the said action followed after a medical report of 6<sup>th</sup> December, 2020 recommending lighter duties to **Mr. Manasseh Kisuya** which amounts to unfair labour practices, is unlawful and wrongful.
- e) That, the respondents action violates ILO Convention, the employment Act, 2007 and Article 41 of the constitution of Kenya 2010.

3. The Respondent has filed a Replying Affidavit sworn on 13<sup>th</sup> January, 2021, deposed upon by **Shantilal Maganlal Goshrani**, the director of the respondent, via the firm of Nancy Njoroge, Kairu & Company Advocates and states as follows:

- a) That the application herein is incompetent, misconceived and an abuse of court process as the prayers sought in the application are untenable in law and that the facts are misleading this Honourable Court.

- b) That the respondent has fully complied with the Court Order of 15<sup>th</sup> October, 2020.
- c) That the claimant has highlighted one case of an employee called Manasseh Kisuya and generalized that the respondent victimizes its employees.
- d) It is indicated that on 5<sup>th</sup> December, 2020 the said Manasseh Kisuya was allocated duties but declined to perform alleging he is unwell and the respondent requested for a medical report which the said Manasseh submitted the next day on 6<sup>th</sup> December, 2020 accompanied with a medical certificate from langa langa sub- county hospital.
- e) Dissatisfied with the generality in which the report was couched, the respondent requested the said Mr. Manasseh to undergo a further consultation as the said recommendation was affecting his work.
- f) That, the respondent being unable to meet its daily operations, resolved and advised Mr. Manasseh to proceed on annual leave for the year 2020/ 2021.
- g) That the leave application form in duplicate was duly issue to Manasseh and though he initially filled in for 7 days the respondent manager Mr. George Okello explained to him that an annual leave cannot be taken for less than 14 days, consequently, he cancelled the 7 days and filled the 14 days and duly signed the forms as per the annexure SMG-5a and b.
- h) That the forms were submitted in duplicate, to the said respondent manager to enable him complete his part, however before the said manager could finish filling the said forms they were snatched from him by Mr. Manasseh who walked away only to come with them on the date of disciplinary hearing on 16<sup>th</sup> December, 2020.
- i) That, the said actions were happening in the respondent's supermarket in front of the customer and other employees which actions were considered to be a gross misconduct and was issued with a show cause letter date 11<sup>th</sup> December, 2020 with hearing on 14<sup>th</sup> December, 2020, which elicited a response of even date seeking to reschedule the disciplinary hearing to 16<sup>th</sup> December, 2020.
- j) That disciplinary hearing was conducted on 16<sup>th</sup> December, 2020 as scheduled, where Manasseh Kisuya was present and the claimant herein was well represented.
- k) That, during hearing, the claimant pleaded with the respondent for a fair consideration and requested that the grievant be given salary advance which the respondent agreed and gave Manasseh a salary advance of Kshs. 10,000/- and promised to convey its decision within 7 days.
- l) That, before any decision was made the respondent considered Manasseh Kisuya's file and upon the perusal of the file, it was discovered that on diverse dates to wit 9<sup>th</sup> January, 2020, 14<sup>th</sup> march, 2020, 19<sup>th</sup> march, 2020 and 20<sup>th</sup> July, 2020 Manasseh Kisuya had been issued with warning letters, show cause letters and invitation for disciplinary hearing which correspondences were duly received by Manasseh Kisuya and the claimant herein.
- m) That, similarly on 29<sup>th</sup> September, 2020 Manasseh Kisuya was issued with a show cause letter based on negligent performance of duties which he responded and an invitation for disciplinary hearing on 15<sup>th</sup> October, 2020 which he attended and the respondent was well represented.
- n) That, after consideration the respondent resolved to issue a second warning letter to Manasseh Kisuya and not terminate his employment. However, since the respondent found that Manasseh Kisuya was guilty of gross misconduct it terminated the services of the grievant with effect from 16<sup>th</sup> December, 2020 under normal termination and not summary dismissal.
- o) That, the respondent computed Manasseh Kisuya's terminal dues which amounted to Kshs. 176,511/- being salary for days worked in December, 2020, housing allowance, leave allowance, service pay and two months' salary in lieu of notice. However, upon contacting the said Mr. Kisuya to collect his dues he declined to do so necessitating the respondent to bank it into his account.
- p) That, Mr. Manasseh was terminated on a valid ground and the respondent duly complied with the laid down legal procedure while terminating his employment.
- q) Further, that using the case of Manasseh Kisuya to allege that the respondent is victimizing and/ or harassing the claimant's members is totally misleading this court and against fair labour practice.
- r) That, for the claimant to allege any kind of victimization and or harassment of its members, it should be able to highlight any wrong doing on the part of the respondent affecting most and or all its member and not just to pick one isolated case whose termination is well merited as aforesated.
- s) That, the claimant has never been ready to engage the respondent in good faith and is out there to intimidate harass, bully and or vex the respondent and the respondent urged this court to intervene and protect the respondent from the frivolous and unmerited cases being filed by the claimant herein.
- t) That, the claimant lacks Locus standi in representing the said employee as it has not met the threshold of a simple majority which issue is still pending for determination before this Court.

u) That, consequently the instant application is not only an abuse of court process but also vexatious, frivolous, scandalous and ought to be dismissed.

4. The application herein was canvassed by written submissions with the applicant filing on 15<sup>th</sup> February, 2021 and the Respondent on 17<sup>th</sup> March, 2021.

#### **Claimant's Submissions.**

5. The claimant restated its pleadings and submitted that the series of actions undertaken by the respondent against one of its employees, one Manasseh Kisuya amounts to harassment and victimization most especially that the said employee is an active member and in the leadership role at the claimant's union.

6. The claimant submitted that the disciplinary meeting against the said employee was indeed carried out on the 16<sup>th</sup> December, 2020 however the minutes produced before this court are not binding for want of confirmation and signature from the claimant.

7. On whether the claimant has locus standi to institute these proceedings against its member, it was submitted that, the parties herein have a valid recognition agreement which grant the claimant *locus standi* to act on behalf of its members.

#### **Respondents submissions.**

8. In its submissions the Respondent submitted that the claimant has failed to prove that the Claimant is victimizing and harassing its employees on the basis of their trade union membership. further that the case of Manasseh Kisuya disciplinary process ought not be used as a blanket to condemn the respondent of victimizing its employees when the respondent has explained in a chronological manner the event leading to the disciplinary action and that it followed due procedure as provided for under section 41 and 43 of the Employment Act.

9. The respondent maintains that the claimant's union lacks the locus standi to act on behalf of its members further that that issue is still pending for hearing and determination in the previous application filed before this Court and urged court to disregard the said issue at this point.

10. On the issue for contempt of the court Order issued on 15<sup>th</sup> October, 2020, the respondent submitted that it has fully complied with the said court orders and therefore the claimant should prove how the respondent is allegedly disobeying the said court Order and also prove that it followed due procedure inter alia of individual service of the court orders as seen in the case of **Katsuri Limited –versus- Kapchur Chand Depar Shah[ 2016] eKlr** where the court summarized the procedure to be followed when citing contempt of court as follows;

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
- ii. An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
- iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
- iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
- v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
- vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
- vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.

11. Accordingly, the respondent submitted that the claimant has not followed due procedure in making the application for contempt, neither has it led evidence to affirm the said contempt and urged this court to disallow it.

12. The respondent argued that, the claimant ought to have personally served all the persons it seeks to cite for contempt and at the minimum file an affidavit of service to affirm such service as was held in the case of **In The Matter Of: High Court Civil Misc. Application No. 320 Of 2000 V The Commissioner For Lands & Others [2009] Eklr**.

13. The respondent therefore urged this Court to dismiss the claimant's application with costs as it lacks merit.

14. I have examined the averments of the parties herein as per the pleadings herein, the grievant Manasseh has already been terminated.

15. This court cannot in the circumstances issue an order staying any disciplinary action against him.

16. As for prayer No.2 the prayer is couched in broad terms asking the court to stay any disciplinary action against the claimant's members

for being members of the union.

17. Indeed instituting disciplinary action on that account is strictly illegal and against the provision of Act 41 of the Constitution and pronouncing myself on the obvious is superfluous.

18. As to prayer No.3, the issue of leave to institute contempt proceedings is also not necessary as leave need not be granted before contempt proceedings are commenced.

19. I therefore as a whole find the application is not merited and I decline to grant the same.

20. Costs in the cause.

Ruling delivered virtually this 6<sup>TH</sup> day of **MAY, 2021**.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mr. Kairu for the respondent – present

Taco for claimant – present