REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. E028 OF 2020

KENYA EXPORT FLORICULTURE AND HORTICULTURE

AND ALLIED WORKERS UNION .....CLAIMANT

VERSUS

VEGPRO (K) LIMITED.....RESPONDENT

RULING

1. This ruling is in respect of the Claimant/applicant's application dated 16th December,2020 filed under certificate of urgency on 23th December, 2020 by the union seeking the following orders;

1) That this application be and is hereby certified as urgent and be heard exparte and service be dispensed with in the first instance.

2) That this Court be pleased to and hereby issues an interim order directing the respondent to file in court all employment records in respect of the 970 employees who are listed as the grievants in this matter.

3) That pending hearing and determination of this application and claim this court be pleased and hereby issues an interim order restraining the respondent by itself, its officers, agents, assigns and or anybody acting on their behalf from inviting or allowing any other union other than the applicant access to its workers in Gorge Farm and delamere pivots for the purpose of recruiting members and entering into negotiations aimed at signing recognition agreement and or collective bargaining agreement.

4) That upon hearing of this application, the Honourable court be pleased to issue an order restraining the respondent by itself, its officers, agents, assigns and or anybody acting in their name from inviting and/or allowing any other union other than the applicant to recruit members from Gorge Farm and delamere farm with a view of signing a recognition agreement and or collective bargaining agreement pending the hearing and determination of the claim.

5) That this Honourable court be pleased to issue any other order it may deem fit and just to meet the ends of justice.

6) That costs of this application be provided for.

2. The application is supported by the grounds on the face of the application and the affidavit sworn by, the secretary general of the claimant, one **Mr. David Omulama** on 16th December, 2020 on the following grounds: -

(a) That the applicant is a registered trade union of employees in the floriculture and horticulture industries in Kenya and representative of 970 employees who are dismissed employees in this matter.

(b) That, the respondent is a floriculture and horticulture growing and exporting company and the employer of the grievants in this matter through its farms namely, gorge farm and delamere pivots.

(c) That, the applicant and the respondent signed two recognition agreement on 28th February, 2018 covering separately the respondents' companies namely gorge farm and delamere pivots as named in paragraph (b) above.

(d) That the applicant and the respondent had started negotiating collective bargaining agreements for the two companies mentioned above before the respondent refused to participate in negotiation for no justifiable reasons through a letter dated 27th August, 2018.

(e) That the applicant reported a dispute, and upon attending meetings convened by the conciliator, the parties were advised by the conciliator to proceed and conclude negotiations for collective bargaining agreement.

(f) That the respondent refused to participate in negotiation in good faith for a collective agreement in complete disregard to the advice of the conciliator and without any valid reason.

(g) That it is the averment of the applicant that the refusal of the respondent to continue to negotiate collective bargaining agreement was in contravention of section 57(1) of the labour relations Act 2007.

(h) That, the applicant filed a suit in Nairobi being ELRC No. 378 of 2019 seeking order to restrain the respondent from taking disciplinary actions against employees who were on strike.

(i) That, before the application and the main suit in cause no 378 of 2019 could be settled, the applicant offered to suspended the strike and engage in negotiations with the respondent.

(j) That, the Honourable court taking a cue from the offer by the applicant issued an order on 4th July, 2019 calling off the strike and directing parties to engage in further reconciliation/ dialogue to reach an amicable solution which dialogue did not yield any fruits.

(k) That, the applicant in obedience to the court order immediately advised all workers who were on strike to resume duty awaiting the conclusion of parties' discussions.

(l) That, without any justification, the respondent refused to allow workers who were on strike to resume duty when the Honourable court had called off the strike stating that the workers had be dismissed.

(m) That the applicant filed an application for contempt of court dated 9th October 2019, which application was disallowed for failure to site the correct party to whom the orders applied.

(n) That, at all material time from the time the strike was called off, the respondent had maintained that the workers could not be allowed back to work as they had been dismissed allegedly for participating in an illegal strike.

(o) That, at all the material times the applicant has maintained that since the strike was called off the workers are supposed to have been allowed to resume duty.

(p) That it is therefore the admission of the respondent that they had already dismissed the workers before the strike was called off that now has prompted the applicant to file this application together with the claim for wrongful dismissal.

(q) That the insistence of the respondent that the grievants had been dismissed therefore forms the basis for the applicants dispute for unfair and wrongful dismissal of the aggrieved employees from their employment by the respondent.

(r) That it is the applicant's averments that the respondent contravened the provisions of the employment Act by not taking the dismissed employees through a disciplinary process prior to dismissing them.

(s) That, the applicant avers that all the aggrieved employees were permanently in the employment of the respondent and that they have served for periods ranging between 2 years and 15 years continuously.

(t) The applicant avers that any such dismissal was unprocedural, unfair, wrongful and unlawful, and contrary to the provisions of section 41, 44 and 45 of employment Act, 2007, Articles 41 & 47 of the Constitution of Kenya in the manner in which it dismissed the 970 employees. Further that the respondent acted in complete contravention of rules of natural justice in taking an action and not informing those affected by the action in the individual capacities as employees.

(u) That as such the applicant has a prima facie case well within the threshold as settled in the case of **Giella and Cassman Brown** hence deserving the conservatory orders as prayed for.

3. On 12th January, 2021 the respondent in protest of the applicant application of 16th December, 2020 raised a preliminary objection on the following grounds;

a) THAT the prayers sought in the Application are incapable of being granted as such, it would serve no purpose to allow the application for injunctive orders.

b) THAT the Application and the Statement of Claim were filed contrary to the provisions of Section 6 of the Civil Procedure Act (Cap) 21 Laws of Kenya that provides that;

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

c) THAT the Claim suffers from misjoinder of parties contrary to the provisions of Order 1 Rule 9 of the Civil Procedure Rules, 2010 and in further contraventions to the provisions of article 50(1) of the Constitution, 2010 as the orders sought by the Applicant are against unions who are not parties to this suit.

d) THAT the Notice of Motion Application dated 16th December, 2020, as drawn and filed is mala fide, is misconceived, incompetent, vexatious, frivolous and an abuse of the process of the Honorable Court, brought in bad faith and bad in law merely intended to frustrate the Respondent therefore are of no legal consequence or at all as the Applicant is aware that the Application filed before this Honourable Court canvasses issues raised in a similar matter in Nairobi ELRC Cause No.378 of 2019 where a Ruling had been delivered.

e) Therefore, for the aforementioned reasons the Application and the Claim of the Applicant in respect to the dispute should be struck out with costs to the Respondent.

4. About a week later, the Respondent, through its regional human resource manager, **Mr. Joseph Otin**, swore a replying affidavit dated 22nd January, 2021 and filed in this Court on 26th January, 2021, on the following grounds;

a) The Respondent deponed that, the applicant's application and suit is mala fide, misconceived, incompetent, vexatious and an abuse of this Court process because it is *sub judice* since there is a pending suit being **Nairobi ELRC Cause No. 378 of 2019** between the same parties and the matter is directly and substantially similar to the current issues.

b) It was stated that the applicant has not disclosed a prima facie case with probability of success, neither does the balance of convenience tilt in its favour. The respondent in addition avers that the applicant is not likely to suffer any injury that cannot be compensated by an award of damages if the said orders are declined.

c) The respondent took issue with this Court handing the matter since the court previously handled the Nairobi ELRC Cause no. 378 of 2019 and alleged that the court is likely to be biased.

d) The respondent confirmed that the claimant recruited employees from the Delamere pivot farm and Gorge farm and union dues were deducted from employees pursuant to signing of recognition agreement of 28th February, 2019 and guided by gazette notice number 157 which created the Kenya Export floriculture, horticulture and allied workers union deduction of Union dues Order of 2018.

e) That, on 24th October, 2018, the claimant issued a strike notice that was to take effect in 7 days if the CBA is not signed by the parties. To counter this, the respondent filed a suit on 31st October, 2018, being Nakuru ELRC PET No.14 of 2018 seeking to stop the strike which order the court granted on 31st October, 2018.

f) The respondent avers that, the court consolidated Petition 14 of 2018 and Petition 222 of 2018 which suspended the Gazette Notice number 157 dated 13th June, 2018 and later in a judgement delivered on 16th May, 2019 dismissed the said claim and lifted the order suspending the Gazette Notice and the gazette Notice No. 157 took effect from 16th May, 2019. Consequently, the respondent herein ceased any further engagements with the claimant in respect of the issue of Union dues.

g) That, as much as there is a valid recognition agreement between parties signed on 28th February, 2019 and the proposals made on the Collective Bargaining Agreement none had been reached and or registered.

h) That, the Claimant wrote a letter to the respondent on 16th May, 2019 seeking for a meeting to sign the collective Bargaining Agreement on 23rd and 24th and demanding for deduction of Kshs. 500 as union dues from each employee when the law provides for 2% of the employee's basic pay.

i) That the parties had a formal meeting on 20th May, 2019 and agreed to adjourn to June 2019 to exhaustively discuss the collective bargaining agreement and interpretation of the backdated deductions determined in the judgement.

j) That on 20th may 2019, the employees at Delamere pivot farm were engage in an illegal strike which culminated to disciplinary action leading to their summary dismissal.

k) That on 21st May, 2019 a meeting was convened by the National leadership of the claimant and a return to work formula was arrived at which was adopted by the claimant and the respondent.

l) That on 6th June, 2019, the claimant issued another strike notice vide letters pinned on the respondent's notice board and others thrown all over the compound threatening that a Collective Bargaining Agreement be signed within 24 hours failure to which the said employees were to strike. Subsequently, the claimant served the respondent with a formal strike notice on the same day at around 8.35 am when all employees had reported to work therefore agitating the actions.

m) The respondent avers that, the said strike was illegal and unprotected thus sought the intervention of Naivasha sub-county Labour officer and the next day the claimant's member went on a full strike barricading roads, physically assaulting other employees and removing other employees from buses forcing the respondent to report the situation at Kongoni police station who provided security.

n) The respondent took action against all the employees who had participated in the illegal strike and issued them with Notice to show Cause letters which were responded by some and reported back to work and others opted not to participate in the disciplinary process and never reported to work to date.

o) That due process was followed in that the Labour office was informed by a notice about the action taken by the respondent with regard to employees who failed to return back to work as provided for under section 41 as read together with section 44(3) of the Employment Act.

p) The respondent avers that the strike was illegal in that there was not valid and registered CBA between the parties, further that the claimant failed to give the mandatory Seven (7) days' notice therefore the employees who participated in the said illegal strike are liable to disciplinary action and not entitled to any pay during such a strike as provided for under Section 80(1) of the Labour relations Act, 2007.

q) The respondent avers that they currently do not have any members of the claimant's union and are in the process of revoking the recognition agreement as directed under section 54(5) of the employment Act as the claimant's members joined the Kenya Plantation and Agriculture workers Union on various dated in 2020.

r) That, the pursuit by the claimant to deny the respondents employees from associating with a union of their choice would amount to infringement of the freedom of association protected by the constitution under Article 36 and section 4 and 5 of the Labour relations Act.

s) It was stated that, the claimant's Orders are against other unions who are not party to this suit thus the respondent is a wrong party occasioned by the misjoinder and urged court to discharge it from these proceedings and dismiss the claimants claim.

5. The parties herein agreed to canvass this application by way of written submission with the Respondent filing on 15th April, 2021 and the Applicant /claimant filing on 29th April, 2021.

Claimant/ Applicants submissions.

6. The claimant submitted with regards to the preliminary objection filed by the respondent that, the respondent has failed to meet the threshold in **Mukhis Biscuit case**, in that the issues raised in the Preliminary Objection are not pure point of law rather that the court will be forced to delve into facts and evidence to make a determination on the issue raised contrary to the holding in **John Mugo Gachuki –versus- Ne Nyamakima co ld [2011] eklr**.

7. On whether the said case is Sub-judice, the claimant submits that, the issues raise in Nairobi ELRC No. 378 of 2019 was with regard to legality of the strike called by the claimant after negotiation as to signing of the CBA between the parties herein failed while this current suit seeks to address two issues on whether the respondent unfairly dismissed the 970 employees at its employ and the issue of the respondent refusal to negotiate collective bargaining agreement.

8. Accordingly, the claimants submits that, for this Court to find out whether the issue raised herein are similar to the issue raised in Nairobi ELRC 378 of 2019, it must inquire into the pleadings and the prayers of both suits, and once such a need arise, the sub-judice ground ceased to be a point of law fit to be canvassed in a preliminary objection.

9. That, the issue of unfair termination raise in ELRC No. 378 of 2019 was not determined for it was only raised in a contempt application when the court had ordered the respondent to allow the employees on strike back to employment and in contempt of the said order, the respondent dismissed the said employees from employment, therefore the issue cannot be said to have been dealt with in ELRC No. 378 of 2019.

10. Therefore, the claimant argues that the issues in the two cases are fundamentally different and urged the court to disregard the respondent objection on claims of *sub- judice*.

11. On whether the claim suffer from misjoinder as raise in the preliminary objection, the claimant submits that, that grounds has already been addressed by the application of joinder that has brought on board the interested party herein in any event, the failure to include a party in a suit does not necessarily result in striking out of the entire suit.

12. It was therefore submitted that the preliminary objection raised by the respondent does not meet the threshold of a preliminary objection and urged this court to disallow it with costs to them.

13. On whether the court should recuse itself, the claimant submitted that the respondent in their submissions has failed to disclose that which was said or done by the court, that any reasonable person, having knowledge of the same would apprehend bias on the part of the court. To reinforce their argument, they cited the case of **Hon. Lady Justice Kalpana H. Rawal Versu- judicial service commission and others [2016] eklr** where the court relied in the decision of the Supreme Court of Canada in ***R. v. S. (R.D.) [1977] 3 SCR 484*** *that*

"The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the

fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."

14. It is the claimant's submissions that, the accusations of bias leveled against the court without clear demonstration of the specific offence is an attempt by the respondent to delay the determination of this suit and urged court to resist the attempt for the respondent to secure its recusal.

15. The claimants with regard to its application of 16th December, 2020, submits that it has met the threshold required in law for the grant of interlocutory orders sought it seeks to compel the respondent to sign a collective bargaining agreement in accordance with section 57 Labour relations Act having already signed a recognition agreement on 28th February, 2019 as admitted at paragraph 20 of the respondent replying affidavit which is not yet revoked as admitted in paragraph 50 of the said replying affidavit.

16. On whether the claimant is likely to suffer injury if the orders are not granted, the claimant submits that, the respondent has in its replying affidavit suggested that it intends to revoke the recognition agreement and sign another one with the interested party, which in essence means if the orders sought are not granted and the respondent proceeds as its contemplating then the main suit herein will be rendered nugatory and proceedings shall remain an academic exercise. Further that the claimant's rights enshrined under Article 41 of the Constitution of Kenya and provided for under section 4 and 57 of the labour relations Act shall be infringement, which infringement cannot be compensated by way of damages.

17. In conclusion, the claimant submits that the balance of probability tilt in its favour and the 970 employees who have been dismissed from the respondent employ because they are seeking for the CBA to be signed and the said employees reinstated.

Respondent submissions

18. The respondent began by submitting of the validity of its preliminary objection and argues that a preliminary objection is valid when it raises points of law that can be determined by court without the court making an inquiry into facts and evidence and cited the locus classicus case of **Mukhisa biscuit manufacturing company limited –versus west end distributors ltd{1969] EA 696** as cited by the supreme court in **Aviation and allied workers union versus Kenya airwyas limited & 3 others [2015] eklr.**

Accordingly, it argues that it has a valid Preliminary objection that need to be considered by this Court in the first instance**.**

19. On recusal of this Honourable Court from proceeding with this matter, the Respondent argues that this court ought to recuse itself since it had made some adverse findings in contempt application filed in ELRC No. 378 of 2019, which is subject of Appeal, and went beyond the known principles established in deciding matters dealing with contempt of court. The respondent argued that this court having dealt in this matter and allegedly made comments in it is likely to be bias and therefore prays for the court to recuse itself.

20. The respondent went ahead to submit that it is not likely to get fair hearing as envisioned under Article 50 of the constitution of Kenya and provided for under Article 10 of the Universal declaration of Human Rights(UDHR) and reinforced in the Court of Appeal case of **Standard charted financial service limited & 2 others –versus- Manchester outfitters (suiting division) limited) now known as king woolen mills limited & 2 others [2016] eklr. Which court interalia held that;**

> **"…**In the end, the Lords found that the appearance of bias, and not actual bias, on the part of Lord Hoffmann was so strong, that the public confidence in the administration of justice could be shaken, so that the decision made against Pinochet could not be allowed to stand. The findings of the House of Lords in the Pinochet case (supra) have been echoed closer home in Kaplan & Stratton V L.Z. Engineering Construction Limited & 2 Others [2000] eKLR (Civil Application 115 of 2000), where this Court pronounced itself on the issue of apparent bias in the following terms**:**
>
> **"Apart from that, if an allegation of apparent bias is made, it is for the court to determine whether there is a real danger of bias in the sense that the judge might have unfairly regarded with favour or disfavour the case of a party under consideration by him or, in other words, might be predisposed … prejudiced against one party's case for reasons unconnected with the merits of the issue."**

21. The respondent submitted that the current matter is *sub-judice* in that all the issues raise in this case are similar to the issue raised in Nairobi **ELRC No. 378 of 2019** thus urged this court to strike out the same for being frivolous and a wastage of precious judicious time and allow ELRC 378 of 2019 to be heard and determined having been filed first in time. In addition, the respondent submits that if the suits are allowed to run concurrently and the former is determined first then the second suit will be rendered *res judicata*.

22. The respondents further submits that, the mere addition of a party or a prayer in the subsequent suit does not change the pith and substance of the suit and cited the case of **Republic -versus- Paul Kihara Kariuki, attorney general & 2 others ex parte law society of Kenya [2020] eklr** .

23. It was submitted by the respondent that, the purpose of the rule of *sub-judice* is to prevent the court of concurrent jurisdiction from simultaneously entertaining and adjudicating upon parallel litigation in respect of the same cause of action, same subject matter and the same relief. In essence to pin down parties to one litigation so as to avoid contradictory verdicts by the courts and to prevent multiplicity of suit.

24. The respondent therefore submitted that the issues raised in the notice of motion of 16th December, 2020 is couched in different words but a replica of the ones sought in ELRC No. 378 of 2019 and urged this court to strike out the same for being scandalous, frivolous and vexatious as empowered under Order 2 Rule 15(1) of the civil procedure Act.

25. On whether the court can grant the injunctive Orders sought, the respondent submits that, the claimant has not fulfilled the requirements for grant of interim orders as espoused in the **Giella -versus- Cassman Brown [1973] EA 358.** Further that since the applicant seeks an interlocutory injunction which is mandatory in nature and whose purpose is to restrain the respondent from inviting or allowing the recruitment of the applicant member and entering into a recognition agreement and eventually a collective bargaining agreement, it has failed to demonstrate by evidence the actions the respondent took in inviting the trade union for recruitment of its members. In any event any alleged recruitment will be contrary to section 4 of the Labour Relations Act, 2007 and Article 36 of the Constitution.

26. The respondent further submits that the prayers number, 2, 3 and 4 of the Notice of motion cannot be granted at an interlocutory stage without the benefit of the court hearing the parties in the main suit, further that prayers 3 and 4 are couched with the element of finality therefore can only be granted after the hearing of the parties in the main suit.

27. On whether the applicant will suffer any irreparable loss, the respondent submitted that the applicant has not pleaded in its pleadings what damage, if any, it is likely to suffer if the said orders are not granted at this stage. Further that the balance of convenience does not lie in favour of the applicant on the contrary since it not demonstrated any exceptional circumstances to warrant the reinstatement of its members to the respondent's employ and the issuance of the orders sought therefore besieged this court to disallow the application of 16th December, 2020 with costs.

28. I have examined the averments of the parties herein. I will first deal with the preliminary objection raised by the respondents who submit that this matter is substantially the same as another matter Nairobi ELRC No.378/2019 which is pending before court and which is directly and substantially similar to the current issues.

29. As that may or may not be the case, there is no order stopping this court from proceeding with the instant case.

30. The pleadings in the Nairobi court have also not been submitted before this court to enable it assess the similarity or otherwise of the submissions by the respondents.

31. I will therefore find the preliminary objection not merited and I dismiss it accordingly.

32. As to the application before court by the applicants, I find that prayer 1 and 2 are tenable as they will give court a clearer picture of what the issues at hand are.

33. I will therefore allow prayer 1 and 2 pending the hearing and determination of this claim as follows;-

1. That this application be and is hereby certified as urgent and be heard exparte and service be dispensed with in the first instance.

2. That this Court be pleased to and hereby issues an interim order directing the respondent to file in court all employment records in respect of the 970 employees who are listed as the grievants in this matter.

3. Costs in the cause.

Ruling delivered virtually this **4TH** day of **MAY, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omulama for claimant – present

Saya holding brief for Khisa for Interested party – present

Achianda for respondents – present

Court Assistant - Fred