REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 58 OF 2020

KENYA UNION OF SUGAR PLANTATION

AND ALLIED WORKERS.....CLAIMANT

VERSUS

CHEMELIL SUGAR COMPANY LTD.....RESPONDENT

JUDGMENT

1. The Kenya Union of Sugar Plantation & Allied Workers (the Union) sued Chemelil Sugar Co Ltd (the Respondent) on 28 July 2020, and it stated the Issue in Dispute as:

Unfair/unlawful terminations of:

(i) Enock Nyakwara.

(ii) Judith Anyango Siwa.

(iii) Thomas Osoro Arodi.

(iv) Harvey Otieno Walendwa.

(v) Robert Nabwera Nasongo.

(vi) Arthur Onyango Okoth.

(vii) Billy Awino Obel.

2. On the same day, the Union filed a Motion under a certificate of urgency seeking an order staying the termination of the Grievants' contracts.

3. The Court declined to entertain the motion and directed that the main Cause be progressed to hearing.

4. The Respondent filed a Statement of Defence on 17 August 2020, and this prompted the Union to file a Reply on 20 August 2020.

5. The Respondent filed an Amended Statement of Defence on 25 August 2020, and the Cause was heard on 9 November 2020 and 3 March 2021.

6. Judith Anyango Siwa (Grievant) and Moffat Omondi, Head of Human Resources with the Respondent, testified.

7. The Union filed its submissions on 26 March 2021, whilst the Respondent filed its submissions on 16 April 2021.

8. The Court has considered the pleadings, evidence and submissions and will address at the outset a jurisdictional question.

Exhaustion doctrine

9. The Union and the Respondent have a recognition agreement, and they have also negotiated and concluded several collective bargaining agreements.

10. In terms of Part VIII and, more specifically, sections 62, 63, 64, 65, 67, 68, 69 and 73 of the Labour Relations Act, the instant dispute should have been taken through conciliation.

11. The Union did not demonstrate that it reported a trade dispute to the Cabinet Secretary of Labour. It also did not file an appropriate affidavit attesting to the failure of conciliation (the parties did not also file a certificate of unresolved dispute).

12. Alternative dispute resolution is now recognised in this jurisdiction by the Constitution, and its role should not be ignored in the dispute resolution arena.

13. The Court would therefore find that its jurisdiction was invoked prematurely.

Unfair termination of employment

14. The Grievants were issued with show-cause notices, which also served as suspension letters dated 9 April 2020. The letters set out 5 allegations against the Grievants and called upon them to respond within 48 hours.

15. The Grievants responded, and on 8 May 2020, they attended a disciplinary hearing.

16. The minutes of the hearing shows that the Grievants were accompanied by 4 Union representatives, and the Committee found them culpable but recommended that they be reinstated to work and get issued with final warnings.

17. Despite the recommendations of the Disciplinary Committee, the Human Resources Manager who was part of the Committee issued the Grievants with letters terminating their contracts on 9 July 2020.

18. The Grievants appealed against the decision(s) to terminate their contracts on 13 July 2020, 15 July 2020 and 16 July 2020.

19. The Union contended that the failure to determine the appeal was unfair.

20. Faced with accusations of not acting on the appeals, the Respondent asserted that the Union moved the Court on 28 July 2020 before it had sufficient time to determine the appeals.

21. The Respondent also contended that clause 6.2.6 of the Human Resources Policy Manual clothed the Managing Director with the power to disregard a recommendation by the Disciplinary Committee.

22. The Grievants appealed within the 21 days prescribed in the Human Resources Policy Manual.

23. Under the Manual, the Board of Directors had 21 days to determine the appeals.

24. However, the Union moved the Court before the period for determining the appeals had lapsed. The Union jumped the gun by moving the Court prematurely.

25. Had the Union not jumped the gun, the Court would have found that the decision of the Managing Director to disregard the recommendations of the Disciplinary Committee by substituting reinstatement with termination was procedurally and substantively unfair.

26. The Managing Director should have given the Grievants an opportunity to make representations on the substituted sanction.

27. The Court finds solace in making such finding by relying on the persuasive South African authorities of *National Union of Metalworkers of South Africa obo Members and Others v ArcelorMittal South Africa Limited and Others and SARS v CCMA and Ors (Kruger and* ***Branford vs Metrorail Services (Durban)*** **2004 (3) BLLR (LAC) where the Courts held that as a general rule, an employer who intends to alter or substitute a recommendation by a disciplinary committee should extend a further opportunity to make representations.**

Conclusion and Orders

28. From the foregoing, the Court declines jurisdiction and dismisses the Cause with no order on costs considering the social partnership between the Union and the Respondent.

Delivered through Microsoft teams, dated and signed in Kisumu on this 16th day of June 2021.

Radido Stephen, MCIArb

Judge

Appearances

For the Union Lincoln Aveza Isagi, Industrial Relations Officer

For Respondent Amos O. Oyuko & Co. Advocates

Court Assistant Chrispo Aura