



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. E099 OF 2021

KENYA PORTS AUTHORITY.....CLAIMANT

- VERSUS -

DOCK WORKERS UNION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd December, 2021)

RULING

The claimant filed an application on 15.11.2021 by way of the notice of motion through Turasha J. Kinyanjui Advocate. The amended application was filed on 18.11.2021. The application was under sections 3 and 12 of the Employment and Labour Relations Court Act, 2011 and Rule 17 of the Employment and Labour Relations Court Rules, 2016 and Articles 50(1) and 162 of the Constitution of Kenya, 2010. The applicant prayed for orders:

- 1) ... (spent).
- 2) ...(spent).
- 3) That the Honourable Court be pleased to issue an order restraining the respondent by themselves, their officials, agents or members from taking part in, calling, instigating or inciting others to take part in an unprotected strike or any form of industrial action pursuant to the strike notice issued vide their letter dated 10th November 2021 pending the hearing and determination of the claim herein.
- 4) That the Honourable Court declares the impending strike issued vide the respondent's letter dated 10th November 2021 unlawful and unprotected.
- 5) That the costs of this application be provided for.

The application was based on the annexed supporting affidavit of Daniel Ogutu, the applicant's General Manager, Human Resource & Administration, sworn on 15.11.2021 and upon the following grounds:

- a) The claimant is a vital Government installation established by statute and an international sea port serving Kenya and other neighbouring countries.
- b) By the letter dated and served on 10.11.2021, the respondent has issued a 7 days' strike notice. The strike was to commence on Thursday 18.11.2021 after expiry of the 7 days' notice.
- c) The strike notice is unlawful and the strike shall be unprotected as it has failed to adhere to the dispute resolution mechanisms laid out in the Recognition Agreement binding the parties as well as the express provisions of the Labour Relations Act, 2007 thus:
 - i. Failing to exhaust the full negotiating machinery as provided for under section 14(1) of the Industrial Relations Machinery, 1986.
 - ii. Failing to abide by the provisions of the Labour Relations Act with regard to giving notice of intention to strike in the event of failure to reach agreement on any particular issue as stipulated in section 14(2) of the Industrial Relations Machinery, 1986.

iii. Failing to report a trade dispute to the Cabinet Secretary in charge of labour matters as required under section 62 of the Labour Relations Act.

iv. Denying the claimant an opportunity to respond to any issues touching on the trade dispute hence breaching section 63 of the Labour Relations Act and Article 50(1) of the Constitution of Kenya, 2010 by denying the claimant its right to a fair hearing.

v. Failing to allow the conciliator to attempt to resolve the dispute in line with section 65 of the Act.

vi. Issuing a notice to strike on matters that do not form the terms and conditions of employment or a recognition agreement between the claimant and the respondent.

vii. Issuing a notice to strike for a dispute that the claimant is not a party to.

d) The strike notice purports to be under section 76 of the Labour Relations Act but the respondent has not complied with subsection 76(b) providing that one cannot participate in a strike unless the trade dispute is unresolved after conciliation under the Act or as specified in a registered collective agreement that provides for the private conciliation of disputes. The respondent has not complied with Part VIII of the Act on reporting the dispute for resolution by way of conciliation. The strike notice is therefore premature. Section 11(d) of the recognition agreement provides that in the event of failure to reach a settlement at the Joint Industrial Council (JIC) there shall be no cessation of work and the dispute shall be dealt with strictly under the procedure laid down in the relevant sections of the Trade Disputes Act – now repealed by the Labour Relations Act.

e) One of the reasons for strike notice being issued is that the issue of 10 employees of the ex-Kenya Ferry Services now under the respondent's employment by reason of their absorption by the respondent have continued in an acting appointment for over 6 years and the attempt to resolve that issue before the JIC had failed at the parties' meeting of 03.11.2021. The respondent states that per section 11(d) of the recognition agreement, that failure to resolve the issue at JIC is a precondition to move to statutory conciliation and not to issue the strike notice as was done. In any event it was not true that parties had discussed the issue at JIC meeting of 03.11.2021 as alleged in the strike notice – and the agenda by parties as exhibited shows the matter had not been considered at the JIC. Further execution of the Asset and Business Transfer Agreement was on 16.06.2021 with respect to absorption of the Kenya Ferry Services by the applicant and the transition process was on-going. The strike notice, in that regard, is premature.

f) The other reason in the strike notice (prompting issuance of the notice) is that the applicant has deliberately, ignored and refused to apply the Human Resource Manual, 2017 to benefit those employees who have been in an acting capacity for more than 6 months and others have acted for a period of now more than 4 years and above. The strike notice states that the respondent has written to the applicant several letters but the applicant has failed to respond to the employees' concerns. On that issue the applicant at paragraphs 11 to 17 of the supporting affidavit states that the matter was deliberated at the JIC on 4th and 5th November, 2021 and reached a deadlock so that the legitimate action was for the respondent to invoke the statutory conciliation and not to call a strike.

g) The general ground in the notice for issuing strike notice thus, **".... failure by the Management to respect and adhere with the spirit and the letter of the instruments which regulate and govern good industrial relations in the labour and employment instruments such as Industrial Relations Charter, Collective Bargaining Agreement and the Recognition Agreement as relates to the terms and conditions of service."** Such general ground are ambiguous and broad allegations lacking specifics as cannot constitute a proper ground to call a strike.

h) The strike is therefore in bad faith and ill-intended and should not be allowed.

The respondent opposed the application by filing on 23.11.2021 the replying affidavit of Simon Kiprono Sang, the respondent's General Secretary. It was urged for the respondent as follows:

a) Parties are indeed in binding recognition and collective agreements duly exhibited. The applicant has also developed Schemes of Service which guide in promotion of staff. The applicant has been operating in disregard of these agreed instruments. Previously the applicant acted in accordance with those instruments and the prevailing Human Resource Manual. Since 2011 the applicant has been amending the Manual to the disadvantage of the respondent's members and the 2008 version of the Manual is far superior to the Manuals as amended and reissued on 01.11.2011 and 2017. One example is in 2008 Manual an employee acting for 6 months would be appointed substantively thereafter but in 2017 Manual, the position is to be advertised after 6 months of acting. The issues subject of the strike notice was deliberated by the JIC and a deadlock reached.

b) Kenya Ferry Services was dissolved in to the applicant and the applicant is the new employer and the absorbed staff ought to enjoy all rights and benefits and privileges the applicant confers its employees generally.

c) The respondent has written several letters to the applicant about the matters leading to strike notice starting way back in 2018 and the communications have not been answered at all.

d) Some employees have been appointed to act but without compliance with provisions of the Human Resource Manual, 2017.

e) The strike notice followed the parties' deadlock at the JIC meetings and they relate to terms and conditions of service per section 76 of the Labour Relations Act.

Oral submissions were made for the parties through learned Counsel Ikegu Advocate for the applicant and Mr. Ochieng' for the respondent.

The Court has considered the application, affidavits and the submissions and makes findings as follows.

First, the main grievance in the strike notice appears to be substantive appointment of acting employees into the positions they have been acting in for over 6 months. The other general grievance is that the applicant has failed or ignored to comply with the instruments governing the parties' relationship but the notice did not set out the specific details in the notice. The Court returns that the grievances or disputes amount to terms and conditions of employment as envisaged in section 76(a) of the Labour Relations Act, 2007.

Second, it is clear that the parties deliberated the issue of confirmation or substantive appointment at the JIC meeting on 4th and 5th November 2021 and a deadlock was reached. As at that time of the JIC meeting, there is no dispute that the affected 10 Kenya Ferry Services employees had since been absorbed into the service of the applicant. Thus, while the agenda and deliberations did not set apart the 10 employees, it appears that parties deliberated advertising of positions within six months with respect to all affected acting employees in the applicant's service. After the absorption, the 10 former Kenya Ferry Services employees, as it appears to the Court, must have been part of the all acting employees deliberated at the JIC. Thus even if the strike notice separately addressed the 10 employees, the notice was clear that the same had been discussed at the JIC. In absence of any further material, the Court returns that the matters in the strike notice had been subject of that JIC meeting.

Fourth, the Court finds that the parties having reached a deadlock at the JIC, the legitimate action was to report a dispute for statutory conciliation and not to call a strike and as had been agreed per section 11(d) of the recognition agreement. In that view and as urged for the applicant, the strike notice was premature as it was trapped by section 76 (b) (i) of the Labour Relations Act, 2007 requiring that there be no lock-out or strike unless the trade dispute is unresolved after conciliation under the Act – and in this case, parties having reached a deadlock at the JIC, they ought to have reported a dispute to the Cabinet Secretary.

Fifth, both parties submitted that they were aware that the strike notice had been copied to the Cabinet Secretary for Labour and who had initiated the process for statutory conciliation. It was submitted for both parties that they should submit to the statutory conciliation.

In view of the findings the application as amended is hereby determined with orders:

- 1) Pending the hearing and determination of the suit, the respondent by itself, its officials, members, or agents are hereby restrained from participating, calling, inciting others to participate, continuing with or going on strike pursuant to the strike notice by the respondent being Ref. No. GS/1/MD/KPA/172/2021 dated 10.11.2021 and which was premature for want of exhaustion of the statutory conciliation procedure.
- 2) Pending the hearing and determination of the suit or further orders by the Court, the parties by themselves, their officials, their agents, their officers, or directors to submit themselves to the relevant statutory conciliation proceedings with respect to all the grievances or disputes mentioned in the strike notice by the respondent being Ref. No. GS/1/MD/KPA/172/2021 dated 10.11.2021 and to report to Court as may be appropriate for further orders in the suit.
- 3) Costs of the application in the cause.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 3rd December, 2021.

BYRAM ONGAYA

JUDGE