



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1563 OF 2018

KENYA ENGINEERING WORKERS UNIONCLAIMANT

VERSUS

NAPRO INDUSTRIES LIMITEDRESPONDENT

(Before Hon. Justice Hellen S. Wasilwa 27th February, 2020)

RULING

1. Pending before me for determination are two Applications. First is the one dated 9th September, 2019 by the Claimant Union filed under Rule 3 of the Vacation Rules and Section 10 of the Judicature Act and seeks the following Orders that:-

1. This Application be certified as urgent and heard ex-parte in the first instance.

2. Leave be granted to the Applicant to be heard on the Application hereto during the current Employment and Labour Relations Court vacation on grounds of urgency.

3. The Honourable Court do issue interim orders against the Respondent to allow the Applicants members Moses Semo, Matthew Njoroge, Martin Sikuku, Benard Wandari, Kennedy Lakaro, Stephen Kiru, Geoffrey Ochieng and Peter Kimani Njoroge back to their employment without loss of benefits and unconditionally or they continue earning their full benefits for the period they are locked out till the hearing and determination of this suit.

4. The Honourable Court do Order the Respondent herein to pay the Applicant members their unlawfully deducted salaries during the month of August, 2019.

5. An Order be issued to the Respondent Director (Mr. Atul Bhagwanji Shah) to appear in Court to show cause why contempt of Court proceedings cannot be preferred against him and or OCS of Ruaraka Police Station be directed to arrest and produce him in the Honourable Court for civil jail.

2. The Application is premised on the grounds that:-

a) The Applicant did file her Memorandum of Claim under Certificate of Urgency both dated 26th November, 2018 and the Respondent filed her Replying Affidavit on 5th December, 2018.

b) The Honourable Court did grant ex-parte Orders on the 28th November, 2019 and the same confirmed on 6th December, 2018 during inter-partes hearing. The said Orders were served upon the Respondent. Refer to appendix WAN 1 here attached being the aforementioned Orders.

c) The Respondent is in violation of the foresaid Court Orders as he called upon the Applicant members/grievants herein on 6th September, 2019 to collect their redundancy dues without any formal notification contrary to the parties CBA and Labour Laws. Refer to Appendix 1 in the Memorandum of Claim being the parties CBA at page 19 at clause 4.17.

d) The Applicant members declined to collect the said redundancy dues citing the orders of the Honourable Court and unfair, unlawful & procedural means in which the same was being handled.

e) They were directed not to resume work till they collected their redundancy dues and sign a new contract with the outsourcing company.

f) The outsourced employees were not touché rather than the Applicant members hence the conclusion that they are being victimized due to trade union affiliation/activities.

g) The Respondent herein has already accepted that the grounds to do away with the Applicant members so that she can outsource cheap labour. Here attached are parties minutes on the same marked appendix WAN 2.

h) The Respondent did deduct the salaries of the applicant members by 5,000/- each for the month of August 2019 without proper reasons and explanation. Here attached and marked appendix WAN 3 are pay slips of the Applicant members.

i) The grievant/Applicant members has always been in the employment of the Applicant herein on permanent basis. Here attached and marked appendix WAN 4 are Applicant members NSSF statement of Accounts.

3. The Application is further supported by the Affidavit of **WICLIFFEE A. NYAMWATA** sworn on 9th September, 2019 in which he reiterates the averments made on the face of the Application.

4. In response to the Application the Respondent filed an Affidavit deponed by **ATUL BHAGWANJI SHAH**, the Managing Director of the Respondent Company on 16th September, 2019, in which he averred that the Application dated 9/9/2019 is frivolous, vexatious, malicious and an abuse to the Court process. The Respondent further contended that the same ought to be dismissed with costs to the Respondent.

5. He further averred that the Respondent's directors are law abiding citizens and cannot therefore disobey Court Orders. He further maintained that the 6 affected employees worked at the Respondent's Company as packers and winders which positions no longer exist at the Respondent Company.

6. He further contended that it is not practicable for the Respondent to maintain the affected employees as their positions no longer exist in the Respondent's structure and that it is willing to pay them their terminal dues.

7. The Respondent urged this Honourable Court to dismiss the Claimant's Application with costs to the Respondent.

8. The Second Application is the Notice of Motion Application dated 16th September, 2019 and is filed by the Respondent herein. The Application is filed under Order 51 of the Civil Procedure Rules, Sections 1A, 3A of the Civil Procedure Act, Article 159 of the Constitution of Kenya, 2010 and all enabling provisions of the law.

9. In the Application the Respondent seeks the following Orders that:-

1. The Honourable Court be pleased to issue an Order of stay of the Orders issued on 29/11/2018 and confirmed on 6/12/2018.

2. The Honourable Court be pleased to set aside the Order issued on 29/11/2018 and confirmed on 6/12/2018.

3. The costs of the Application be provided for.

10. The Application is premised on the grounds that:-

a) The Honourable Court issued Orders inter alia restraining the Applicant from victimizing its employees and that the Applicants to maintain the status quo.

b) The Claimant's position in the Respondent Company is not tenable.

c) The Respondent has computed and is willing to pay the Claimants their rightful dues.

d) It will be uneconomical to the Respondents to retain the Claimants as employees.

11. The Application is further supported by an Affidavit deponed by **ATUL BHAGWANJI SHAH**, the Managing Director of the Respondent Company on 16th September, 2019, in which he admits that Orders in this matter were issued on 9th September, 2019 which orders inter alia restrained the Respondent from victimizing it's employees from being members or eligible to join the Claimant on account of union membership.

12. However, the Respondent contended that the Orders were issued on misrepresentation of facts by the Applicants herein who failed to indicate to the Court that they were attached to the Respondent's packing and winding department that are no longer available at the Respondent company.

13. The Respondent maintains that the Applicants were duly notified of the redundancy and that subsequently, outsourcing of staff was done on 2/1/2016. The Respondent further maintained that the two departments are no longer available.

14. It is on this basis that the Respondent avers that it would not be economically logical for it to maintain the names of the 6 Applicants on record and pay them salaries for no services rendered. It is further averred that enforcement of the Court Order will ground the Respondent's operations.

15. The Respondent further contended that it has computed the Applicants' terminal benefits and that the same are available for collection. He further averred that it is therefore necessary and in the interest of Justice that the said Court Orders be set aside.

16. In conclusion, the Respondent urged this Court to dismiss the Claimant's Application with costs and allow their instant Application.

17. Parties agreed to proceed with the Applications by way of written submissions.

Submissions by the Parties

18. It is submitted by the Claimant that there are valid court orders in place and that the action by the Respondent to declare its members redundant was done contrary to the provisions of the Employment Act, the Recognition Agreement between the Claimant and the Respondent and the said Court Orders.

19. The Claimant maintains that the Respondent's actions are in contempt of the Court Orders and therefore this Honourable Court cannot allow the Respondent's Application dated 16th September, 2019 as it amounts to aiding the Respondent's actions of disobedience to lawful court orders by setting aside the same. It is on this basis that the Claimant submitted that the Respondent's Application dated 16th September, 2019 be dismissed with costs to it.

20. The Claimant further urged this Honourable Court to allow its Application dated 9th September, 2019 and further allow parties to proceed with the hearing of the main claim on merits.

Respondent's Submissions

21. The Respondent on the other hand submitted that the prayers sought in the Claimant's Application cannot be granted as the Claimant seeks reinstatement of 6 grievants, payment of their salaries and contempt in one single application.

22. The Respondent maintains that the issue of reinstatement can only be determine at the conclusion of the main claim and not at an interlocutory stage and is therefore pre mature.

23. The Respondent further submitted that it is not in contempt of Court as the Orders were subject to reconciliation and that no reconciliation has been done as directed by this Honourable Court. It is on this basis that the Respondent averred that the Claimant's Application is pre mature and consequently urged this Honourable Court to dismiss the same with costs to the Respondent. For emphasis, the Respondent cited the provisions of Section (5) (1) of the Judicature Act and Article 162 (2) (2) of the Constitution of Kenya, 2010.

24. The Respondent further urged this Honourable Court in the interest of justice to allow its Application dated 16th September, 2019 to set aside the Orders of 29th November, 2018.

25. I have examined all the averments of both Parties. In the 1st application the Applicants want this Court to find the Respondents guilty of contempt of Court for declaring the Claimant members redundant.

26. In the 2nd application, the Respondent Applicant want orders formerly issued by Court on 28/11/2018 set aside as being not tenable. In the first application, orders granted on 28/11/2018 were as follows:-

1. "THAT the application be served by close of 29/11/2018 for inter partes hearing on 06/12/2018 at 9.00 am.

2. THAT pending the inter partes hearing or further orders by the Court the Respondent by itself, its agents or employees is hereby prohibited from victimizing its employees being Claimant's members or eligible to join the Claimant on account of union membership or proposed union membership and lawful union activities.

3. THAT pending the inter partes hearing, parties to maintain status quo on the existence and operation of the recognition agreement concluded between the parties.

4. Today's costs in the cause."

27. What the Court ordered was prohibition of victimization of Respondent's employees and maintenance of status quo on the existence of a recognition agreement concluded between the Parties.

28. The issue of redundancy was not considered in the application and there is no evidence that the redundancy was done to union members.

29. The application for contempt cannot be sustained on these grounds.

30. As to the second application, the orders granted cannot be stayed to allow for victimization of employees.

31. Concerning redundancies, the only recourse is to conclude the main claim which I direct the Claimant to pursue.

32. Costs in the cause.

Dated and delivered in open Court this 27th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Patrick Makale for Claimant – Present

Respondent – Absent