



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 110 OF 2019

(Before Hon. Justice Mathews N. Nduma)

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....CLAIMANT/APPLICANT

VERSUS

MAMA WATOTO SUPERMARKET.....1ST RESPONDENT

RETAIL MANAGEMENT SOLUTION.....2ND RESPONDENT

RULING

1. The Claimant/Applicant in the application dated 22nd November 2019 seeks orders in the following terms:

(a) Pending the hearing and determination of this matter, the court do and hereby restrain the 1st respondent from terminating the services of employees on 26th November 2019 on grounds of alleged change in staff management pending hearing and determination of this matter.

(b) The honourable court do and hereby restrain the 2nd respondent from taking over the services of employees of 1st respondent after 26th November 2019 on alleged changes in staff management *inter alia*.

2. On 22nd November 2019, interim orders were granted by O. Makau J. at Nairobi in terms of the above said orders.

3. The respondent instead of filing a replying affidavit to the application dated 22nd November 2019, filed a new application dated 29th November 2019 seeking to have the aforesaid orders set aside on the basis the same were obtained without material disclosure to the learned judge.

4. This court gave directions on the two applications on 3rd December 2019 in which the application dated 29th November 2019 was to be treated as a substantive response to the initial application dated 22nd November 2019 and the two applications be heard and determined together.

5. The Applicant union deposes that between August and November 2019, it had recruited 76 unionisable employees of the respondent and submitted check-off forms to the respondent to commence deduction and remission of union dues to the claimant union.

6. That instead of complying with the request in terms of *section 48 of the Labour Relations Act, 2007* and recognize the union in terms of *Section 54(1)* since 76 employees comprised simple majority of the 110 unionisable employees of the respondent, the respondent embarked on subterfuge and on 18th January 2019, 1st respondent addressed the employees that it was in the process of a change of staff management the effect of which would be the takeover of all the employees of the 1st respondent by the 2nd respondent, a management agency.

7. The Applicant union deposes that the intended changes were not genuine but were only meant to defeat the freedom of Association guaranteed under *Article 36 and 41 of the constitution of Kenya 2010 and Section 5 of the Labour Relations Act, 2007*. Further the move by the 1st respondent was in contravention to the ILO conventions on freedom of Association and collective bargaining.

Response

8. Mr. Paul Kaliu Waweru, the managing director of the 1st respondent deposes in an affidavit sworn in response to the application that the applicant obtained orders on the basis of gross material non-disclosure, misrepresentation of facts and falsehoods.

9. That the 1st respondent does retail business in various parts of the country and employs over 150 staff.

10. That the 2nd respondent was brought in to improve the contracts of the 1st respondent's employees. That the business of the 1st respondent has been deteriorating in Kakamega branch hence the decision to outsource the staff to the 2nd respondent. That the transfer of staff would not affect the terms and conditions of the employees of the 1st respondent.

11. That the employees were to sign new contracts with the 2nd respondent and all dues were to be paid by the 1st respondent since all employees were to be under the employ of the 2nd respondent and not the 1st respondent. In short, the 2nd respondent was to absorb all employees of the 1st respondent. That the staff have understood the new arrangement and 80% have signed new contracts with the 2nd respondent.

12. That the 1st respondent has not refused to sign the model draft Recognition Agreement but was only engaged in saving its business first. That ex parte orders obtained based on material non-disclosure are to be set aside as per the Court of Appeal decision in **The owners of Motor Vessel "Lilians" vs Caltex Oil (Kenya) Limited Court of Appeal No. 50 of 1989 read with Bahadurali Ebrahim Shamji vs Alnoor Jamal and 2 others Civil Appeal NO. 210 of 1997.**

13. That consequences of the interim orders was that intended training of staff has been halted; business development of 1st respondent has stalled and the alleged Recognition Agreement is yet to be discussed.

14. That the interim orders be set aside and the application itself be dismissed in its entirety.

Determination

15. A careful reading of the Notice of Motion dated 22nd November 2019, and in particular the grounds in support of the application on the face of the application itself and in the supporting affidavit of Mr. Vackson Khalumi sworn on the same date, shows that all the facts deposed to by the respondent were fully disclosed to O. Makau J. before he granted interim orders at Nairobi on 25th November 2019. It is the finding of this court that the allegations of gross material non-disclosure lack merit.

16. The issue for determination is whether the applicant has satisfied the requirements of grant of interlocutory orders set out in the case of **Giella vs Cassman Brown Limited** by satisfying the court with the following:

(i) It has a *prima facie* case.

(ii) It is likely to suffer irreparable harm, not capable of remedy by way of damages if the case is finally determined in its favour and

(iii) That the balance of convenience is in favour of granting the interim relief if (ii) above is in doubt.

17. The court has considered the facts deposed by both parties and the principles of law applicable as stated above and has come to the conclusion that there is no merit at all in the court interfering in the management prerogative of the 1st respondent to have a 3rd party be involved in the management of its staff. However, it is a completely different matter for the 1st respondent to terminate the contracts of employment of the employees and have them sign new employment contracts with a 3rd party without providing a valid reason as provided under *Sections 40, 43, 44 and 45 of the Employment Act, 2007* and without following the procedure provided under *Sections 36, 40 and 45 of the same Act.*

18. The conduct embarked upon by the respondent *prima facie* denotes a termination of employment and commencement of new employment. The Applicant has made a *prima facie* case, that the conduct by 1st respondent was primarily prompted by the recruitment of the employees by the union and demand by the union that the 1st respondent commence deducting union dues and sign a Recognition Agreement with the Applicant union.

19. Accordingly, the court makes the following orders:

20. Pending the hearing and determination of the suit, a mandatory injunction is issued for the 1st respondent to commence deducting union dues from the 76 employees of the 1st respondent notwithstanding any management arrangements the 1st respondent has put in place with the 2nd respondent.

21. Further, a mandatory injunction is issued compelling the 1st respondent to follow the provisions of *Section 54(1) of the Labour Relations Act, 2007* by signing the draft Recognition Agreement between the 1st respondent and the Applicant union.

Ruling Dated, Signed and delivered this 25th day of February, 2020

Mathews N. Nduma

Judge

Appearances

Mr. Nyumba for Claimant

Mrs. Anyona for Respondent

Chrispo – Court Clerk