



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1578 OF 2017

(Before Hon. Justice Hellen S. Wasilwa 26th February, 2020)

KENYA TEA GROWERS ASSOCIATIONCLAIMANT

VERSUS

KENYA PLANTATION & AGRICULTURAL WORKS UNION....RESPONDENT

(Consolidated with Cause No. 2078, 1576, 1579 of 2017

MISC. APPL. 154 of 2017 (formerly ELRC Kericho Misc No. 6 OF 2017) and MISC. APPL. 155 of 2017 (formerly ELRC Kericho Misc No. 7 OF 2017) and MISC. APPL. 1 of 2019

RULING

1. Pending before me for determination is the Notice of Motion Application dated 23rd January, 2019 filed under Certificate of Urgency. The same is brought under Section 12 (1), (2), (3) and (4) of the Employment and Labour Relations Court Act, 2011 and Section 17 of the Employment & Labour Relations Court (Procedure) Rules and all enabling provisions of the Law seeking Orders that:-

1. This application be certified urgent, heard ex-parte in the first instance and service be dispensed with.

2. Pending the hearing and determination of this application the Honourable Court do issue a conservatory order restraining the 1st and 2nd Respondent, their officers, their staff, agents, assigns, servants and or other persons acting at their behest from evicting any of the affected employees in Nairobi ELRC No 1578 of 2017 between Kenya Tea Growers Association vs Kenya Plantation & Agricultural Workers Union pending hearing and determination of this application.

3. This application be consolidated with Nairobi ELRC No 1578 of 2017 between Kenya Tea Growers Association vs Kenya Plantation & Agricultural Workers Union and the matter be mentioned before the Principle Judge for directions to issue on the hearing of the main suit on priority basis.

4. Costs of this application be in the cause.

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

a. On the 20th December, 2018 the Court of Appeal did set aside the interim order of 17th January, 2018 in ELRC No 1578 of 2017 between Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union.

b. On the 27th December, 2018 the 2nd Respondent issued dismissal letters to all the affected employees in ELRC No 1578 of 2017 between Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union.

c. Equally on the 10th January 2019 the 1st Respondent issued a memo to all employees' affected KTGA members Estates Kipkebe limited and James Finlay Kenya Limited.

d. The 1st and 2nd Respondent has required that all employees are hereby advised to vacate company premises not later than the 28th January, 2019.

e. The dismissal of the employees is subject of a dispute in ELRC No 1578 of 2017 between Kenya Tea Growers Association v

Kenya Plantation & Agricultural Workers Union and the Collective Bargaining Agreement provides that where an employee is discharged on grounds of misconduct he/she may be allowed a maximum of six days in which to vacate the quarters allocated to him or her by his Employer and to leave the Estate after the date of dismissal. However the days may be increased or reduced for the individual depending on the severity of the case.

f. The severity of the case is such that there exists a trade dispute between the Claimant and the Respondents herein which requires that pending hearing and determination of ELRC No 1578 of 2017 between Kenya Tea Growers Association vs Kenya Plantation & Agricultural Workers Union the affected employees ought not be evicted from their staff quarters.

g. Unless the orders sought herein is granted the applicant is apprehensive that the 1st and 2nd Respondents will proceed to evict the affected employees pending the hearing and determination of ELRC No 1578 of 2017 between Kenya Tea Growers Association vs Kenya Plantation & Agricultural Workers Union .which action will heavily prejudice the claimants in case the matter is dispensed with and they are reinstated back to employment.

3. The Application is further supported by the Affidavit of **HENRY OMASIRE** sworn on 23rd January, 2019, in which he reiterates the averments made in the Notice of Motion Application.

4. In response to the Application the 1st Respondent filed a Replying Affidavit deposed by **APOLLO KIARII**, the Chief Executive Officer of the 1st Respondent on 15th February, 2019, in which he avers that the Respondent Union issued a strike notice on 31st July, 2017 on the grounds that the 2016/2017 CBA had not been renewed. As result of which it instituted ELR No. 1578, 1576 and 1579 all of 2016 in which proceedings they sought an injunction restraining the union from proceeding on strike. He further averred that the said Orders were granted on 9th August, 2017.

5. He contended that despite the above Orders the union proceeded with the said strike and issued a strike notice dated 11th October, 2017. Upon receipt of the said notice the 1st Respondent advised their employees that the intended strike would be illegal and in contravention of the Court Orders issued on 9th August, 2017.

6. He further contended that as a result of the strike notice employees working for James Finlays and Kipkebe's Magura Estate failed to report to work on 18th October, 2017 a result of which disciplinary proceedings were commenced as against the said employees and subsequently they were issued with dismissal letters on 18th and 19th October, 2017.

7. The 1st Respondent avers that on 7th November, 2017 the Honourable Court made yet another Order directing that the workers return to work within 24 hours without victimization and further on 17th January, 2018 the Court reinstated the dismissed employees. Consequently, an appeal was lodged being CA 49 of 2018, KTGA & Unilever Tea Kenya Limited Vs KPAWU whose judgment was delivered on 20th December, 2018 setting aside the interlocutory orders issued on 17th January, 2018 reinstating the dismissed employees.

8. Arising from the aforementioned Judgment the 1st Respondent's members being Kipkebe Limited and James Finlay issued letters dated 11th and 12th January, 2019 advising the dismissed employees of the one (1) months' notice to vacate the Company houses as they were not entitled to housing having been terminated from their employment.

9. The 1st Respondent maintains that the effect of the conservatory orders issued in this matter is that the grievant who are no longer employees of the 1st Respondent remain in custody of company housing that they are no longer entitled to by virtue of Section 44 of the Employment Act and Clause 17 (b) of the Parties CBA which expressly excludes dismissed employees from enjoying benefits such as company housing.

10. The 1st Respondent avers that given that the substantive suit is still pending before this Honourable Court the issue of the alleged unlawful dismissal cannot be addressed at this stage and should await full hearing of the main claim.

11. It is therefore the 1st Respondent's contention that granting of the Orders sought in the instant Application would be tantamount to reinstatement of the employees which is contrary to the Court of Appeal Judgment.

12. It is further stated that grant of the conservatory orders would be interfering with the managerial prerogative of the 1st Respondent's companies which this Honourable Court should not entertain.

13. The 1st Respondent avers that the dismissed employees had already been replaced and that allowing them to continue occupying company houses is occasioning it financial losses as it is forced to provide alternative housing for the new staff as well as continued housing for dismissed staff.

14. It is further contended that the Applicant has not approached this Court in good faith as the instant Application should have been filed in Nairobi ELRC Cause No. 1578 of 2017, which is still on-going.

15. The 1st Respondent maintains that the Claimant Union is not deserving of the Orders sought in the instant Application therefore urging this Honourable Court to dismiss the same with costs to the Respondents.

16. In further response to the Application dated 23rd January, 2019 the 2nd Respondent deposed by **LYDIA MUSILI**, Legal Counsel for the 2nd Respondent on 15th February, 2019, in which she reiterates the averments made in the 1st Respondent's Replying Affidavit.

17. She further maintains that an employee who has been terminated is not entitled to housing by the previous employer as these are fringe benefits that automatically lapse with the termination of an employment contract.

18. The 2nd Respondent avers that this Court lacks the jurisdiction to deal with the issue herein as interfering with the Court of Appeal Judgment shall be contrary to the provisions of Article 165 (6) of the Constitution of Kenya, 2010.

19. The 2nd Respondent further averred that after the Court of Appeal decision it did proceed to issue letters to the dismissed employees giving them one months' notice to vacate the company houses as they were no longer entitled to the same.

20. She further maintained that the interim orders for status quo issued in this matter only serve to negate the Court of Appeal judgment that set aside the reinstatement as the union members are no longer its (the 2nd Respondent's) employees.

21. She further urged this Honourable Court to dismiss the instant Application with costs to the Respondents.

22. I have examined all the averments of both Parties herein. I note that the employees of the union who were still occupying company houses have already been dismissed. This dismissal was confirmed by the Court of Appeal vide its Order of 20/12/2018 setting aside interlocutory orders issued on 17/1/2018.

23. The effect of the Court of Appeal's decision is that the union members stand dismissed and this Court cannot reverse that finding. The members therefore not being employees of the Respondent cannot continue occupying company houses as there is no employment relationship between them and the Respondent the same having been severed after the dismissal.

24. This Court therefore finds that the orders sought are not tenable. The application is therefore dismissed accordingly.

25. This matter can therefore proceed with the hearing of the main claim, the two files having been consolidated accordingly.

26. Costs in the cause.

Dated and delivered in open Court this 26th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Oduol holding brief Achiado for Claimant – Present

Chalo holding brief Miss Opiyo for Respondents – Present