



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.429 OF 2017

**KENYA UNION OF DOMESTIC, HOTEL, EDUCATIONAL INSTITUTIONS
HOSPITAL AND ALLIED WORKERS.....CLAIMANT**

VERSUS

**BOARD OF MANAGEMENT
NAKURU WAR MEMORIAL HOSPITAL.....RESPONDENT**

RULING

The claimant filed Notice of Motion dated 17th October, 2019 under the provisions of sections 10, 13,35,41, 45 and 46 of the Employment and Labour Relations Court Act, 2014 [2011] and Articles 36, 41, 43, 47 & 50 of the Constitution, 2010 and Rule 4 and 10 and seeking for orders that;

- a) *The respondent be restrained from effecting the letters dated 1st October, 2019;*
- b) *The court do issue temporary orders restraining the respondent from terminating the services of the claimant's members pending hearing and determination of this suit.*
- c) *The court do issue orders restraining the respondent from coercing and victimising these employees pending the hearing and determination of the suit.*
- d) *The court be pleased to issue orders for specific performance restraining the respondent from intimidating, coercing and victimising the claimants' members into forced withdrawal of their union membership.*

The application is supported by the Affidavit of Fausetine Oroma Aginga the shop steward and on the grounds that the employees are about to be permanently terminated in their employment following notice by the respondent and contrary to the orders of the court issue don 31st July, 2018 and there is contempt. The affected employees are unionised having worked for the respondent for periods of over 24 and 6 years.

Other grounds are that the parties were engaged in negotiations but the respondent stopped on the basis there is Cause No.470 of 2016 in court. the parties are still under the 2014-2016 CBA and clause 30 provide for application for 2 years but remain in force until a new CBA is registered.

The letter dated 9th October, 2017 notifying the respondent's unilateral decision to pay gratuity and to denounce their union membership is done in bad faith. This has placed the claimant member's job security at stake. There is no reasons given for the payment of gratuity and this is done in mischief. This is in violation of the law and the constitution.

Mr Aginga avers in his affidavit that he has worked for the respondent for over 22 years until the respondent wrote letter dated 9th October, 2017 stating that the board had decided to pay service gratuity to the employees and placed a condition that the employees must resign from the union. The respondent has also introduced new letters of contract with unfavourable and inferior terms compared to the CBA and insisting that the employees should sign the same by 23rd October, 2017.

The respondent replied vide Replying Affidavit of Roger Joslyn the chairperson of the board of management and who avers that the claimant filed suit alleging its members are being intimidated to sign letters of resignation from the union and by its ruling, the court directed the respondent to have the subject letters withdrawn after the employees had resigned from the union.

The same employees have now issued the respondent with new letters of resignation and indicating that they are no longer interested in membership of the claimant. The union has now demanded for union dues with regard to these members who have resigned. There is no communication that these employees have re-joined the union.

Mr Joslyn also avers that all the employees receive full salary without any deduction.

There have been on-going negotiations for a new CBA but the claimant union should meet the threshold for recognition for the negotiations to proceed. Currently there are only 3 employees who are members of the claimant which vitiates the Recognition Agreement. It is therefore important for the court to address the question of recognition of the claimant by the respondent.

Mr Joslyn also avers that the employees who have received notices had their contract terms ending and apply to permanently employed staff who are not members of the union. There is no termination of employment contrary to clause 6 of the contracts but the notices relates to the expiry of contracts of 2 years and the intention to renew the same.

The respondent has opted to pay gratuity to employees whose contracts have ended. This is not dismissal or termination of employment as alleged.

The respondent has fully complied with the orders of the court and the application herein should be dismissed as it has no good basis with payment of costs to the respondent.

Both parties made oral submissions in court.

The claimant's application and Notice of Motion is premised on the provisions of sections 10, 13, 35, 41, 45 and 46 of the Employment and Labour Relations Court Act, 2011 which is a misnomer. Such provisions relates to provisions unrelated and farfetched from the orders the claimant is seeking. Where the intention was to rely on the provisions of the Employment Act, 2007 this is not stated.

The basis and foundation of the application before court is a contradiction.

The respondent has also challenged the application of the recognition agreement between the parties on the basis that there are only 3 employees who remain unionised under its employment. That this vitiates the Recognition Agreement.

The mechanism for resolving recognition dispute is provided by Section 54(5) (6) and (7) of the Labour Relations Act, 2007 as follows;

(5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.

(6) If there is a dispute as to the right of a trade union to be recognized for purposes of Collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.

(7) If the dispute referred to in section (6) is not resolved during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.

Where the respondent has good basis for the revocation and or cancellation of the existing Recognition Agreement, application is to the Board defined under section 2 of the Labour Relations Act, 2007 the National Labour Board. Before the application is thus addressed, to move the court to address the same is premature. See **Kenya Union of Entertainment and Music Industry Employees versus Bomas of Kenya Limited [2018] eKLR**.

The Court of Appeal in addressing the provisions of section 54(5) of the Labour Relations Act, 2007 in the case of **Micato Safaris versus Kenya Game Hunting & another [2017] eKLR** held that;

Under section 54 (5) the appellant was required to "apply to the Board to terminate or revoke" the Recognition Agreement. An application is different from a notice. According to BLACK'S LAW DICTIONARY, Ninth Edition "to apply" is to "make a formal request," whereas a "notice" is defined as a "legal notification required by law or agreement, or imported by operation of law as a result of some fact.

With regard to orders sought by the claimant in their substance on whether the respondent should be restrained from effecting letters dated 1st October, 2016, be restrained from terminating the services of the claimant members and be restrained from intimidating the employees to withdraw from the union, the basis of the orders sought through premised on the wrong provisions of the law as set out above, the subject letter dated 1st October, 2019 notes as follows;

RE: CONTRACT

Your two year contract ends on 30th October, 2019.

On expiry of your contract the management has decided not to renew your contract.

Effectively, the respondent notes that the issued letters and notices relates to an existing 2 years contract. This fact is not challenged by the claimant.

Fixed term contract in employment and labour relations is recognised as a lawful and legitimate mode of employment and in accordance with section 10(3)(c) of the Employment Act, 2007 (the Act);

(c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

The respondent by issuing notice with regard to an ending contract is simply being overzealous. A fixed term contract ends on its own terms. It has a start and end date. The notice issued on 1st October, 2019 and taking effect on 30th October, 2019 has a notice of 30 days as required under section 35 of the Employment Act, 2007.

The above addressed, the core of the dispute herein remains unresolved. It relates to a Memorandum of Claim file don 23rd October, 2017. The suit was filed following letters dated 9th October, 2017 issued by the respondent, the negotiations of a new CBA and that the respondent should not victimise the claimant members.

These are pending issued unresolved. The new and emerging allegations with regard to the letter and notice dated 1st October, 2019 these being new and emerging issues, the foundation of the main claim unresolved, and the foundation of the orders sought in the application herein is lost.

Accordingly, the orders sought are found without good foundation. Application dated 17th October, 2019 is hereby dismissed. Costs to the respondent.

Delivered at Nakuru this 6th day of February, 2020.

M. MBAR?

JUDGE

In the presence of: