



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

**CAUSE NO. 715 OF 2014 CONSOLIDATED WITH CAUSE NO.830 OF 2014 (FORMERLY CAUSE 140 OF 2014 AT NAKURU)
AND CAUSE NO.1912 OF 2014(FORMERLY CAUSE NO.326 OF 2014 AT NAKURU)**

RED LANDS ROSES LIMITED.....CLAIMANT

-VERSUS-

KENYA PLANTATIONS AND AGRICULTURAL

WORKERS UNION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th March, 2020)

JUDGMENT

The claimant is a member of the Agricultural Employers Association (AEA) which has concluded recognition and collective agreements with the respondent. By that reason the parties to the suit are at all material time bound by the recognition and collective agreements for the time being in place.

The claimant filed cause 715 of 2014 on 05.05.2014 through Kaplan & Stratton Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the industrial action by the respondent, its officials, agents or its members is premature, illegal, unprotected or prohibited.
- b. A permanent injunction restraining the respondent, its officials or agents and its members or employees and representatives from causing, effecting, inciting or otherwise calling for industrial action by the claimant's employees relating to suspension of the employees or the dismissal of the supervisor.
- c. Any other or further relief which the Honourable Court may deem fit.
- d. Costs of the claim.

The claimant then filed an amended memorandum of claim on 12.06.2014 and prayed for:

- a. A declaration that the industrial action or strike on 5th and 6th May by the respondent, its officials, agents or its members is premature, illegal, unprotected or prohibited.
- b. A permanent injunction restraining the respondent, its officials and or agents and its members or employees or its representatives from carrying out any further strike relating to dismissal of the employee Christopher Makoha.
- c. The sum of Kshs.5, 160,159.00 9 (as amended prior to start of the hearing).
- d. Interest on (c) above at court rates from 05.06.2014 until payment in full.
- e. Any other or further relief which the Honourable Court may deem fit.
- f. Costs of the claim.

The respondent filed on 01.07.2014 (in Cause 715 of 2014) the memorandum of reply dated 30.06.2014 and filed the amended memorandum of reply on 07.10.2015. The respondent prayed that the suit be dismissed with costs.

The respondent filed cause 830 of 2014 on 07.05.2014 for judgment against the claimant herein for:

- a. The Honourable Court do make a declaration that the lockout of employees is illegal.
- b. The Honourable Court do compel the respondent to end the lock out of its employees at its premises.
- c. There be no loss of benefits and victimization of the employees as a result of the respondent's lockout.
- d. That costs of the suit be borne by the respondent.

The claimant opposed the suit by filing on 20.07.2018 the memorandum of defence and prayed that the suit be dismissed with costs. The amended defence was filed on 18.08.2016 and the employer prayed that the suit be dismissed with costs.

The respondent herein also filed cause 1912 of 2014 against the same claimant herein. The claimant prayed for judgment against the respondent for:

- a. A declaration that the dismissal of the grievants herein was selective and discriminatory.
- b. An order directing the respondent (employer) to reinstate the grievants herein without loss of benefits.
- c. An order directing the respondent to pay the grievants all their entitlements to cite salaries and wages, house allowance, leave allowance, leave traveling allowance inter alia, since the date of dismissal until the date of judgment.
- d. Any other relief that the Honourable Court may deem fit and just to grant.
- e. Costs of the cause.

The trade union filed an amended memorandum of claim on 07.10.2015 alleging unfair dismissal of its 8 members (grievants). The trade union now prayed for;

- a. A declaration that the dismissal of the grievants herein was unlawful, wrongful, unfair, selective and discriminatory.
- b. An order directing the respondent to reinstate the grievants herein without loss of benefits.
- c. An order directing the respondent to pay the grievants their entitlements for the entire period they have been out of employment.
- d. An order for the respondent to pay the grievants their terminal benefits as follows:
 - i. Winston Wafula service Kshs.17,107.50; notice pay Kshs.11,450.00; leave travel allowance Kshs.2, 500.00; and 12 months' compensation Kshs.136,860.00.
 - ii. Jacqueline Munandi service pay Kshs.9,769.05; notice pay Kshs.11,493.0; leave travel allowance Kshs.2,500.00; 12 months' compensation Kshs.137, 916.00.
 - iii. Antony Ngure service pay Kshs.12,328.40; notice pay Kshs.12, 785.00; leave travel allowance Kshs.2,500.00; 12 months' compensation Kshs.153,420.00.
 - iv. Beatrice Achieng gratuity Kshs.228,399.90; notice pay Kshs.32,960.00; leave traveling allowance Kshs.2, 500.00; 12 months' compensation Kshs.191,760.00.
 - v. Janet Achieng Ojuka service Kshs.17, 107.50; notice pay Kshs.11, 405.00; leave travelling allowance Kshs.2, 500.00; 12 months' compensation Kshs.136, 860.00.
 - vi. Beatrice Naliaka gratuity Kshs.220, 524.00; pay in lieu of leave 15,980.00; leave travelling allowance Kshs.2,500.00; 12 months compensation Kshs.191, 760.00.
 - vii. Irene Nyambura gratuity Kshs.220, 524.00; pay in lieu of leave 15,980.00; leave travelling allowance Kshs.2,500.00; 12 months compensation Kshs.191, 760.00.
 - viii. Joseph Karithi gratuity Kshs.67,028.70; pay in lieu of leave Kshs.14,069.00; leave traveling allowance Kshs.2, 500.00; 12 months' compensation Kshs.168, 828.00.
- e. Certificate of service.

f. Any other relief that the Honourable Court may deem fit and just to grant.

g. Costs of this cause.

h. Interest on (d) and (g) above.

The employer filed a defence to the suit on 20.07.2016 and prayed that the suit be dismissed with costs.

The suits were consolidated. For ease of reference (in this judgment) the named claimant will be referred to as the employer and the named respondent the trade union or simply the union. The union appointed Eshiwani Ashubwe & Company Advocates to act in the suits.

The employer's case is summarised as follows:

a. The union carried out unprotected strike on 05.05.2014 and 06.05.2014 because the statutory procedure for calling a strike under the Labour Relations Act, 2007 was not followed by the union.

b. By reason of the strike on the two days (05.05.2014 and 06.05.2014) the employer failed to harvest and process flowers and therefore the employer suffered losses as claimed in the amended memorandum of claim filed for the employer.

c. On the two days in issue the employer says there was no lockout and the employees who were dismissed are the ones who led the strike on the two days. In dismissing the employees the employer complied with section 41 of the Employment Act, 2007. The employees dismissed on account of absence on the two days are not entitled to the remedies as prayed for in the suit filed by the union herein.

The trade union's case in the suits as consolidated is as follows:

a. The employees were terminated after a lockout, or after disciplinary hearing and others without a chance to show cause. The termination was predetermined and the employer undertook a disciplinary process against the employees merely as a formality to comply with statutory procedure.

b. For one of the employees (respondent witness No.1 – RW1) there was no free choice of witness and it was not considered that RW1 was not on duty on the date of the strike.

c. For the employees whose hearing was on 10.06.2014, the invitation for hearing was not served upon the employees and the union received an email at 7.30pm for the hearing scheduled for 10.06.2014. So they did not attend the hearing. The employees later received the invitation to disciplinary hearing at the post office long after 10.06.2014.

d. The lockout was unprotected and there was no unprotected strike.

The **1st issue** for determination is whether there was unprotected strike or unprotected lockout on 05.05.2014 and 06.05.2014.

The evidence by the employer's witnesses is clear. CW1, CW2 and CW3 were all union members. CW2's evidence was that some shop stewards informed her on 04.05.2014 about a strike scheduled to take place on 05.05.2014. CW1, CW2, and CW3 testified that on 05.05.2014 some workers refused to work and tried to stop those who were willing to work from reporting on duty. They testified that on 05.05.2014 the employer's gates at the farm were open and those who wanted to work reported on duty and worked. Further on 05.05.2014 some of the workers who were agitated and aggressive held a meeting with the management outside the farm's gate and the management asked them to resume duty. The workers had grievances including about transport issues. CW1 who was engaged to oversee the security at the farm noticed that the meeting was likely to degenerate into a crime scene and he called the police to intervene. The police arrived about 1500 hours.

The respondent's witness No. 1 (RW1) was a unionisable worker. His evidence was that on 06.05.2014 he did not report on duty because it was a day for his official off and so he could not have participated in the strike. In cross examination he admitted that the dismissal letter showed that he was dismissed for being absent on 05.05.2014 and not on 06.05.2014. He confirmed that on 05.05.2014 he had failed to report to work as per the day's clock-in records. He alleged he was to report on duty at 2.00pm but he gave no reason for failure to report at 2.00pm as per the respondent's attendance record at folio 107. He also admitted that at folio 127 of the respondent's documents he stated at the disciplinary hearing that he had reported at work at 12 Noon on 05.05.2014 and trade union official one Alex Wafula (Union Branch Secretary) represented him at the disciplinary hearing. RW1 also testified that on 05.05.2014 the side gate was locked with a big chain and workers could not get into the farm because there were 2 police officers guarding the farm. RW1 testified that on 02.05.2014 the management had cautioned staff about the planned strike.

RW2 was the Chief Shop Steward one Irene Nyambura Kiarie. Her evidence was that on 05.05.2014 and 06.05.2014 the employees were locked out and so they did not work. Further if any employees worked on the two days then the clock-in machine was defective. RW2 admitted that in her witness statement she did not state that there had been a lockout on the two material days. RW2 testified that on the two days she never directed the employees not to go on strike or to go to work. RW2 stated that on 06.05.2014 the employees could not work because they were locked out and the police used teargas to disperse the workers.

The Court has considered the evidence by CW2 and CW3 and returns that the fact that they worked on the two material days suggests that the employer did not lockout the employees. The Court finds that of the employees who wished and were willing to work, they proceeded to work on the two days in issue. Further of the employees who were not willing to work, they were on strike on the two days or particularly on

the morning of 05.05.2014 prior to 2pm because RW1 testified that he reported on duty around 2pm and found workers locked out at the gate and the police and guards were present. The Court further finds that the police were called to intervene but there was no evidence that the police officers who were present on the two material days prevented workers who wished to report on duty from so doing and entering their respective work stations at the farm. The evidence by RW1 was that it was between 2.00pm and 4.30pm that the respondent locked out the workers. RW2 also testified that when she reported on duty in the morning of 05.05.2014 the employer had locked out workers and had deployed the guards at the locked gates but after consultations between the union and the management the gate was opened and workers appear to have entered but trouble started when the union official one Omasire was arrested.

Under section 79 of the Labour Relations Court Act, 2007 a protected strike or lockout is defined as one that complies with the relevant provisions of the Act. Under section 76 of the Act a person may participate in a strike or lock-out if the trade dispute concerns the terms and conditions of employment or the recognition of a trade union; the trade dispute is unresolved after conciliation under the Act or provision of collective agreement on private conciliation of the dispute; and 7 days' notice of the strike or lockout has been served on the other parties and the Cabinet Secretary for labour affairs, by the representative of the trade union or the employer or employers' organisation.

The court has carefully considered the evidence. RW2 testified that after consultations between union officials and the management in the morning of 05.05.2014 it was agreed that the locked gate be open and the workers to resume duty. She further testified that later the workers did not resume duty because the gates remained closed. Yet CW1, CW2 and CW3 worked on that material day. The Court finds that in a succession of events on 05.05.2014 there was a lockout and a strike. The lockout and the strike were both without the requisite notice to the other party and the Cabinet Secretary for labour as per section 76 of the Act and to that extent the strike and lockout were unprotected in view of section 79 of the Act.

The Court has considered the reason for the lockout and the strike. The background to the strike and the lockout is clearly captured in the testimony by RW2 and who was the Chief Shop Steward at the time. Her evidence has not been rebutted. It is that sometimes in April 2014 a supervisor known as Benson Oriri harassed an employee working under him known as Christopher Makokha and the supervisor assaulted Makokha or they fought. In subsequent events, the management appears to have failed to resolve the issue objectively so that the workers felt that the management unfairly sided with the supervisor. On 05.05.2014 was the date the branch union officials were scheduled to meet the management to resolve the issue of the fighting incidence between Benson Oriri the supervisor and Christopher Makokha, the employee. The union and the management had scheduled to meet that day party to avert the peaceful demonstrations the union had arranged by notice to take place on the 05.05.2014. The Court finds that the fight between the supervisor and the employee amounted to a matter within the terms and conditions of service as agreed between the parties and the parties convened a meeting for 05.05.2014 towards amicable resolution. It is the evidence that the sporadic or spontaneous lockout and strike at the material time was actuated by suspicion between the parties manifested in the tensions flowing from the fight. It is the Court's considered view that if the parties cared to carefully consider the terms and conditions of their relationship, then it would have become apparent to them that the events as they turned out to develop were clearly unnecessary. In any event, the parties failed to act in good faith by genuinely invoking statutory or private conciliation prior to the lockout and the strike. The union styled the grievance as mistreatment of workers but the Court finds that the purported trade dispute or the alleged fight had been an extraneous dispute that could be resolved amicably between the parties or as per the criminal justice system. On 05.05.2014 the parties met towards an amicable resolution but then the union's National Organising Secretary one Omasire was arrested by the police and later released in the afternoon. The arrest appears to have derailed the grievance resolution process and even if it related to the terms and conditions of service, the Court finds that the parties failed to invoke conciliation and instead invoked the unprotected lockout and strike. It is obvious that the strike and lockout were engaged in free of the prescribed statutory notices.

Thus, the Court returns that taking the evidence into account, the strike and the lockout were not protected for failure to comply with section 76 of the Act and the definition of protected strike or lockout in section 79 of the Act.

The **2nd issue** for determination is whether the employer is entitled to recover the alleged losses flowing from the unprotected strike on 05.05.2014 and 06.05.2014. The employer claims Kshs.4,374, 875.00 being loss occasioned by the destruction of flower stems (44,033 in farm RLR1 and Kshs.44,963 in farm RLR2) and which were not harvested. It was further claimed that the employer lost 13, 222 stems of cut flowers in the cold stores in the two farms which had been cut on 04.05.2014 but not processed due to the strike on the two days and valued at Kshs.730,774.00. The employer placed the total loss at Kshs.5,105, 649.00.

The trade union's defence is that the employer caused the loss if any by reason of the unprotected lockout. The Court has already found that on the two material dates the parties engaged in sporadic or spontaneous unprotected lockout and strike. In that view, the Court returns that the loss the employer may have suffered, if any, was attributable to both the unprotected strike and lockout. The evidence has not disintegrated the loss attributable to either the strike or the lockout but is urged for the respondent that the alleged loss was wholly attributed to the unprotected strike. In the circumstances, the claim and prayer will fail as not strictly established and justified.

Further, the Court has considered that the recovery of the loss is directed at the trade union. Section 79(6) of the Labour Relations Act, 2007 provides that an employer is not obliged to remunerate an employee for services that the employee does not render during unprotected strike. Section 80 (1) provides that an employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with the Act is deemed to have breached the employee's contract and is liable to disciplinary action; and is not entitled to any payment or other benefit under the Employment Act during the period the employee participated in the strike. Further section 19(1) of the Employment Act, 2007 provides that an employer may deduct from wages of his employee, inter alia, a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by wilful default of the employee; an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work; and an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically or his being entrusted with receipt, custody and payment of money. The Court finds that the statutory provisions provide for clear remedies or course of action that was available to the employer in event of the alleged losses flowing from the unprotected strike. The Court holds that it is trite law that where a statutory remedy is clearly prescribed like in the instant case, then it was not available for the employer to hold the trade union liable but to pursue the individual employees as per the statutory provisions. The Court returns that the employer's claim and prayer in that regard will collapse and is declined.

While making that finding the Court has considered the submission made for the employer that the Court has jurisdiction under section 12 (1) (b) of the Employment and Labour Relations Court Act, 2011 to hear and determine disputes between an employer and a trade union. The Court has also considered the employer's submission that under section 13 (3) (v) of the same Act, in exercise of its jurisdiction under the Act the Court shall have power to make an award of compensation in any circumstances contemplated under the Act or any written law. As already found, in the instant case the cited provisions of the Labour Relations Act, 2007 and the Employment Act, 2007 make it clear that the proper employer's path of action is to recover the alleged loss arising from the unprotected strike from the individual employees. In any event, the Court holds that the true monetary measure of the loss an employer can suffer at maximum flowing from absence of an employee from duty is the agreed daily wage or prorated daily salary computed at the number of days the employee was absent. The Court considers that the wage or salary is the true and agreed value of the employee's labour or service to the employer and in event of the employee's absence like in the instant case of absence on account of unprotected strike, the employer could only recoup the losses to the extent of the daily wage for the two days the employees were absent. The recovery is against the individual employees by statutory provision and the Court finds accordingly. Thus the Court further finds that to that extent, the employer was misguided in so far as the claim for alleged loss on the two days was not based on the number of employees and their respective wages for the two days in issue.

The employer has cited the holding by Rika J in **Robert Kaingu and Others –Versus- Cook 'N' Lite [2019]eKLR** that where strikers are involved in wildcat strikes the employer can sue for contractual or delictual damages and further if the employee's trade union is involved in the prohibited strike, damages can be recovered from the union. It is submitted that the employer could recover from the union in excess of the daily wages of the workers involved in the strike and in the instant case the union called the strike by the letter dated 27.04.2014 instead of pursuing conciliation. The union's evidence is that in fact the path of a strike was abandoned once parties agreed to meet on 05.05.2014 to amicably resolve the dispute. First the Court finds that the employer has not shown that it invoked and failed to recover the loss from the individual employees as per the statutory provisions. Second, the employer has not established liability against the union known to the law that would entitle the employer to recover the loss from the union. The Court finds that the evidence was that the union officials did nothing beyond the unprotected strike such as would amount to a claim in tort or other civil injury. Indeed the evidence was that other than withdrawing the labour, the concerned individual workers did not do any other thing such as destroy the employer's property. The alleged loss was squarely within the withdrawal of labour and the employer has failed to establish a reason for recovery beyond the statutory remedies and actions already referred to by the Court. Further in this case the Court has found that parties engaged in unprotected lockout and strike and there is no material and submissions made on apportionment of liability in that regard. The Court considers that the statutes do not prescribe the consequences of unprotected lockout to the employer as section 80 of the Labour Relations Act, 2007 does for employees in unprotected strike. The Court holds that one consequence upon an employer in event of an unprotected lockout like in the instant case must be that the employer cannot recover the accruing losses under the contract of service in purported implementation of the cited statutory recovery from the employee or, recover as against the trade union.

The 4th issue for determination is whether the dismissal of the mentioned grievants by the employer was unfair. The grievants were suspended by the respective letters dated 07.05.2014 on account of absence from duty on 05.05.2014 and 06.05.2014, or inciting workers to participate in strike on the 2 days. The show cause letters exhibited also show the same allegations. Invitation was made for the grievants to attend disciplinary hearing. For some grievants the evidence is that the disciplinary hearing took place and for others they failed to attend citing the pending court case. Subsequently each of the grievants was dismissed on account of participating in the illegal strike. Final dues payable were communicated to include on the headings of days worked up to the date of dismissal letters pay for leave days earned but not taken and overtime due if any. Those dismissed were informed about the right to appeal to management within 5 days. Maurine Asena's case was exceptional because she was terminated on account of poor performance and was informed of terminal dues on the headings of half pay up to the date of termination, 4 earned leave days and one month pay in lieu of notice. The Court finds that at all material time the employer set out to comply with the notice and hearing of the grievants per section 41 of the Employment Act, 2007. Those of the grievants that refused or failed to attend and participate in the disciplinary process cannot fault the employer and on a balance of probabilities, the procedure invoked by the employer in terminating the grievants' employment was not unfair on the tests in sections 41 and 45 of the Employment Act, 2007. As submitted for the employer, all the concerned employees had a duty to take steps to attend the disciplinary hearings and if in doubt, take active steps to find out the next course of action.

As for the reasons for termination, the Court has already found that on the two days there was an unprotected lockout and strike. The Court has considered the evidence and there is no reason to doubt that the grievants dismissed were involved in the unprotected strike.

Taking all the findings into consideration and the evidence, the Court returns that on a balance of probability, the dismissal was not unfair as it was within section 80 of the Labour Relations Act, 2007 on the consequences of employees engaging in unprotected strike. Thus the Court returns that the union is not entitled to the declaration that the termination was unfair or unlawful and no compensation will issue under section 49 of the Employment Act, 2007. There was no reason to doubt the respondent's evidence that on 05.05.2014 the grievants were actively involved in the sporadic and spontaneous strike. As already found they were equally locked out sporadically on that day. The respective reasons for termination are therefore found valid as per section 43 and 45 of the Employment Act, 2007. It could be that the employer could surcharge the grievants the two days' wages but the Court also considers that it was open for the employer to dismiss as was done. In any event, it has been submitted for the union thus, **"14. The Union submits that section 43(2) of the Employment Act provides the reasons for termination are the matters that the employer at the time of termination genuinely believed to exist and which caused the employer to terminate. In the circumstances, the Union submits that it has proven that the reasons for the Grievants' dismissal were justified and fair...."** The Court considers that the union is equally bound by that submission and even if the check-in records were misleading or not accurate so that some employees on leave had checked -in, the grievants have failed to show they were at work on the material day and the evidence by CW1, CW2 and CW3 was clear that the grievants participated in the unprotected strike. RW2 stated in her witness statement that when Omasire was arrested, the employees witnessed the arrest and they immediately started to gather around. They were repulsed by the police officers and further RW2 states, **"We peacefully camped outside the gate but the police on several occasions teargassed us and drove us towards the main road but we would soon gather and camp at the gate hoping that the claimant would open the gate for us to report to work. When it became clear that the gate would not be opened for us, we left for our respective residences."** Her further evidence was that on 06.05.2014 the employer, union officials and the shop stewards held a meeting to resolve the dispute and in the meantime workers had been locked out. There is no reason to doubt that account by RW2 and it is that on 05.05.2014 the workers engaged in unprotected strike that RW2 was a participant and that on 05.05.2014 in the morning and after Omasire was arrested as well as on 06.05.2014, the employer lockout the workers in what the Court has found to have been an illegal lockout. It is true that in view of the unprotected lockout, the employer could not enjoy its powers over the employees under the contract of service and the Employment Act, 2007 such as dismissing the employees on account of the absence flowing from the lockout. But in view of the concurrent unprotected strike, the tree will endure where it fell and to balance justice for the parties, the dismissals were not unfair in the circumstances of the case.

The 5th issue for determination is whether the trade union is entitled to the other remedies as prayed for. The Court finds that no evidence and submissions have been made to justify the award on the headings as claimed for the grievants. The prayers will fail except that the employer will issue each grievant a certificate of service as a statutory entitlement.

The Court has considered the parties' margins of success and returns that each will bear own costs of the suit.

In conclusion judgment is hereby entered for the parties for:

1. The declaration the respondent's members in the claimant's employment engaged in unprotected strike on 05.05.2014 and as found by the Court in this judgment.
2. The declaration that the claimant engaged in unprotected lockout of some of its employees being the respondent's members on 05.05.2014 and on 06.05.2014 and as found by the Court in this judgment.
3. The permanent injunction hereby issued restraining the respondent, its officials or agents and its members or employees and representatives from causing, effecting, inciting or otherwise calling for industrial action by the claimant's employees relating to suspension of the employees or the dismissal of the supervisor herein.
4. The permanent injunction hereby issued directed at the claimant by itself or by its directors, managers, or agents to end the unprotected lockout in issue and the victimization of the employees as a result of the unprotected lockout.
5. The claimant to deliver to the grievants the certificate of service for each of the grievants herein in 30 days from the date of this judgment.
6. Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 13th March, 2020.**

BYRAM ONGAYA

JUDGE