



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E011 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA PLANTATION AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

PRIMAROSA FLOWERS LIMITED.....RESPONDENT

RULING

Vide an application dated 8th July 2020 filed under Article 41 of the Constitution, Sections 17 and 18 of the Employment Act, Sections 4 and 48 of the Labour Relations Act, Section 17(1) and (2) of the Employment and Labour Relations Rules (sic) and any other enabling laws, the applicant, the Kenya Plantation and Agricultural Workers Union, seeks the following orders against the Respondent: –

1. *That the Court in the first instance do certify this Application as urgent to be heard ex-parte in the first instance.*
2. *That a temporary injunction do issue against the Respondent, its servants and/or agents restraining them from outsourcing services that are provided by the Claimant's members who have been put on unpaid leave due to COVID-19 pandemic pending the hearing and determination of this application and the main suit.*
3. *That this court be pleased to issue an order of injunction restraining the Respondent herein from effecting termination of any employee/union members by way of redundancy pending the hearing and determination of this suit and application.*
4. *That the Respondent deposits Ksh.2,297,808/= to the Claimant's gazetted account, being union dues amounts owed as of the date of filing this matter.*
5. *That the Respondent be compelled to pay the Claimant's members all outstanding salary arrears amounting to Ksh.6,138,632.72.*
6. *That the Respondent be directed to pay terminal dues of Ksh.1,937,167/= to the 22 employees who resigned from employment as per the provisions of the Collective Bargaining Agreement between the Parties.*
7. *That this court be pleased to issue an order of injunction restraining the respondent or their agents herein from victimizing, harassing, suspending and terminating the Claimant's members' pending the hearing and determination of this application and the main suit.*

The application is supported by the grounds that –

1. *The Applicant and the Respondent have in place a recognition*

agreement in force which guides industrial relations between the parties.

2. *The Applicant and the Respondent have equally negotiated and registered successive collective agreements which have been registered with this court and which set out the terms and conditions of employment of unionisable workers at the Respondent's enterprise.*

3. *Due to the COVID-19 pandemic, the Claimant and the Respondent signed a Memorandum of Understanding on 19th March, 2020. The Memorandum of understanding placed more than 1,000 members of the Claimant Union on unpaid leave as from the*

month of April, 2020.

4. *The Respondent is outsourcing services when it has put the Claimant's members on unpaid leave, this is despite the fact that the Respondent in the Memorandum of Understanding with the Claimant committed that it would not outsource services.*
5. *The Memorandum of Understanding entitled the Claimant's members who were put on unpaid leave to leave travelling allowance as provided in the Collective Bargaining Agreement. Until now the leave travelling allowance has not been paid to the Claimant's members whose services have been engaged during this COVID-19 pandemic period.*
6. *The Claimant's members' salaries of up to Ksh.6,138,632.72 remain unpaid.*

The application is further supported by the affidavit of THOMAS KIPKEMBOI, the Deputy Secretary General of the Applicant/Claimant Union in which he reiterates the grounds on the face of the application.

The Claimant filed a supplementary affidavit of KENNETH MUSUMBA MBAKHILA sworn on 2nd October 2020 in which he deposes that the Respondent has come to court in bad faith as it continued to effect termination of employment of the claimant's members even after the court order restraining it. That the Respondent trumped up changes against the employees as grounds for the terminations, and keeps threatening the employees with dismissal unless this suit is withdrawn. He attached a show cause letter addressed one of the employees and summary dismissal letters for two other employees, one on grounds of negligence of duty and the other for absenteeism.

The Respondent did not file any response to the application although it was represented in court by a Mr. Peter Kinyajui on 11th August, 22nd September and 7th October 2020.

The application was disposed of by way of written submissions but only the claimant filed its written submissions.

In the submissions the claimant/applicant submits that more than 1,000 of the claimant's members had been sent on unpaid leave since April 2020. That this court issued interim orders restraining the Respondent from outsourcing the services offered by the claimant's members who were on unpaid leave. That unless the Respondent is granted the orders sought, the Respondent will again start outsourcing.

It is further submitted that since August 2019, the Respondent has not paid union dues deducted from its members' salaries amounting to Kshs.2,297,808.40 as at the time of filing the instant application. That the Applicant has been accommodating and allowed the Respondent to send its members on unpaid leave since 1st April 2020. That the Respondent owes its members Kshs.6,138,632.72 against the provisions of the Employment Act.

Further that the Respondent has failed to pay terminal dues amounting to Kshs.1,937,167/= to 22 members of the Claimant who resigned from employment. That the payments are in accordance with the CBA.

It submits that the Respondent has not produced evidence to demonstrate that it is having financial difficulties. The Claimant prays that the application be granted with costs.

Determination

I have considered the application and the submissions in support thereof. Whereas the application seeks orders to restrain the Respondent from outsourcing, the claim does not make any reference to the same. There is only one paragraph in the affidavit of Thomas Kipkemboi and one letter from the Applicant addressed to the Agricultural Employers Association seeking a meeting with the Association over the issue of outsourcing by the Respondent. The further affidavit of Kenneth Musumba Mbakhila does not mention the outsourcing at all.

I find that the Applicant has not demonstrated that the Respondent has outsourced or intends to outsource services performed or jobs currently held by the claimant's members. Indeed, there is no evidence of any outsourcing by the Respondent.

I thus find that the application has not been proved. I further find that the Applicant does not meet the threshold for grant of the orders sought. The result is that the application fails and is dismissed. Costs will abide the outcome of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of**

Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE