



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

ELRC NO. 334 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 28th January, 2019)

KENYA ENGINEERING WORKERS UNION.....APPLICANT

VERSUS

BHACHU INDUSTRIES LIMITED.....RESPONDENT

RULING

1. One of the Applications before this Honourable Court for determination is the one dated 16th March 2018 and filed under the provisions of Section 12 of the Industrial Court Act Rule of the Employment and Labour Relations (Procedure) Rules 2016 and any other enabling provisions of law.

2. The Applicant seeks the following orders:-

a. Spent.

b. Spent.

c. Spent.

d. THAT the Applicant members (assistant chief shop steward namely Dominic Kyalo Nthiani and other four members) who were forcibly locked out unlawfully be allowed back to their duties and or continue to draw their salaries by the interim orders pending the hearing and determination of this suit.

3. The Application is supported by the Affidavit of Wycliffe A. Nyamwata sworn on 16th March 2018.

4. The issue in dispute is provided for under Section 74 of the Labour Relations Act 2007 and therefore is properly before this Honourable Court.

5. The Applicant avers that the Respondent locked out its union assistant chief shop steward and four other members. Further, the Respondent has not issued any notice to the Applicant, Ministry of Labour or the grievants themselves which is contrary to Section 40 of the Employment Act 2007. The Applicant avers that its affiliations resulted in the Respondent's unlawful actions.

6. The Applicant avers that it has reported a trade dispute to the Ministry of Labour but no Conciliator has been appointed to date thus prompting the Claimant to move the Court. The Applicant further avers that the Respondent's action is to ensure that the Applicant's members lose trust in its ability of representation.

7. On 13th April 2018, the Respondent filed an Application dated 12th April 2018 and pursuant to Sections 3, 12 (2) (3) (4) and 13 of the Employment and Labour Relations Act, Rule 17 (1) (3) (7) (8) and (10) of the Employment and Labour Relations Court (Procedure) Rules 2016, Order 40 rule 4 (3) of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The Respondent seeks the following orders:-

a. Spent.

b. Spent.

c. Spent.

d. THAT the Honourable Court be pleased to discharge, vary and/or set aside the ex parte interim orders issued on 19th March 2018.

e. THAT the costs of this Application be in the cause.

8. The Application is supported by the Affidavit of James Masinde sworn on 12th April 2018.

9. The Claimant made the Application dated 16th March 2018 and interim orders against the Respondent were obtained and extracted on 19th March 2018. On 9th April 2017 (sic), the Claimant confirmed to the Court that it was yet to serve the Respondent. The Application was scheduled for *inter partes* hearing on 3rd May 2018 but the Claimant was yet to serve the Respondent with interim orders.

10. The Respondent avers that the Claimant failed to disclose material facts in obtaining the *ex parte* orders. They aver that five individuals who are subject of the interim orders were lawfully dismissed from the Respondent's service and were paid their terminal dues. The Respondent submits that the individuals have no legal claim against the Respondent and that the Respondent is unable to comply with the said interim orders.

11. The Claimant responded to the Respondent's Application vide a Statement of Response dated 2nd May 2018 and filed on 15th May 2018. The Claimant reiterates the contents of its Notice of Motion Application and Supporting Affidavit. In addition to this, the Claimant avers that the mode of payment made to them is not in line with the laid down law and procedure of clearing an employee.

12. The Claimant also avers that the allegations made by the Respondent are incompetent, bad in law, vexatious and an abuse of Court process and should be struck out with costs. The Claimant further avers that it is in the interest of justice that the interim orders in place, remain in force.

13. The Claimant responded to the Respondent's Application vide the Replying Affidavit of Wycliffe A. Nyamwata, sworn on 2nd May 2018 and filed on 15th May 2018. The Claimant denies each and every allegation set out in the Respondent's Supporting Affidavit save for what is clearly admitted.

14. The Claimant avers that its Application dated 16th March 2018 has been served upon the Respondent and that the Application disclosed material facts and which were the basis for the issuance of the interim orders.

15. The Claimant avers that the five grievants were dismissed contrary to the mandatory provisions of law. The Claimant also avers that the endorsed payment voucher alleged to have been used to pay the grievants, have not been signed by the grievants.

16. The Claimant further responded to the Application vide a Response dated 2nd May 2018 and filed on 15th May 2018. The Claimant avers that the Respondent has no lawful rights to dismiss an employee verbally and without disclosing the reasons for termination or proving those reasons.

17. Further, the Respondent has no right to dismiss an employee without informing the union (where the employee is a member) and the labour officer in charge of the area where the workers were employed.

18. The Claimant avers that before an employer terminates the services of its employee, it must explain the cause of termination to the employee, in a language they understand. The Claimant also avers that the interim orders cannot be set aside because of the Respondent's Application, without facts such as the reason for dismissal and how the employees were cleared from their employment by the employer.

19. On 25th June 2018 the Respondent filed the Replying Affidavit of James Masinde sworn on 18th June 2018, in response to the Claimant's Application dated 16th March 2018. The Respondent reiterated some of the facts deponed in its Supporting Affidavit.

20. The Respondent also avers that the Claimant's Application is incurably defective, misconceived and an abuse of the Court process hence should be dismissed with costs. Further, it is predicated on the wrong provisions of the law.

21. The Respondent avers that the Supporting Affidavit of Wycliffe A. Nyamwata is *ex facie* incompetent, fatally defective and inadmissible for want of disclosing the authority upon which it is made and should be struck off. The Respondent also avers that the Claimant lacks *locus standi* in this matter.

22. The Respondent avers that the grievants' workmanship of the trailer they were tasked to construct was poor. This cost the Respondent its reputation and a loss of KShs. 2,500,000.00 for reworking the trailer. The Respondent also avers that their employment termination was not as a result of a redundancy and that they were not engaged in provision of essential services.

23. The Respondent avers that it does not have a dispute regarding recognition of the Claimant and that it has always acted according to the CBA dated 31st March 2017. It is the Respondent's averment that the grievants' dismissal was solely based on their unsatisfactory performance and not their involvement in union activities. The Respondent denies having knowledge of any trade dispute with the Claimant as it has not been served with a copy of the trade dispute or at all.

24. It is the Respondent's case that it stands to suffer prejudice if the grievants are allowed back to work.

25. On 18th July 2018, the Claimant filed an even dated Response to the Respondent's Replying Affidavit. It is the Claimant's case that the Respondent should and ought to have complied with Clause 34 of the CBA before locking out the grievants without any written document or justifiable reason.

26. The Claimant avers that the Respondent should adduce evidence of its employees' poor performance and its employees' clearance documents.

27. It is the Claimant's case that a trade dispute was reported to the Minister.

Submissions by the Parties

28. On 26th September 2018, the Claimant filed its written submissions as regards the Application dated 16th March 2018. It is the Claimant's submissions that the Respondent has no lawful right to lockout, dismiss or terminate the service of the grievants; in total disregard of the provisions of Sections 35 (1) and 41 (1) of the Labour Employment Act 2007 (sic), Section 55 (1) of the Labour Relations Act 2007 and the CBA. In addition, the Respondent violated article 47 of the Constitution and the CBA by keeping employees as casuals for three years and as such the employment of the casuals should be converted to permanent.

29. It is the Claimant's submissions that the Respondent failed to follow the laid down procedure.

30. On 3rd October 2018 the Respondent filed its written submissions dated 2nd October 2018, regarding its Application of 12th April 2018. The Respondent restated the orders granted together with the facts of this Application.

31. On the issue of the Claimant's failure to serve the Respondent within the required time, it is the Respondent's submissions that the proviso to ***Order 40 rule 4 (3) of the Civil Procedure Rules*** is meant to prevent abuse of the Court process by parties who obtain orders but fail to notify the opposing party of the Orders. The Respondent relies on the cases of ***Immaculate Wambia Mungai vs. Fredrick Mwai Mwhia [2017] eKLR***, ***Nyayo Embakassi Residents Association & Another vs. National Social Security Fund & Another [2015] eKLR*** and ***Kazungu Moli Chogo & Others vs. Perihan Torun & Others [2015] eKLR***. The Respondent also relied on the case of ***Kazungu Ngari Yaa vs. Mistry V Naran Mulji & Company [2014] eKLR*** where the Court held that the provisions of the Civil Procedure Act and Rules apply as part of its procedures especially where its own rules have a lacuna.

32. The Respondent submits that the Claimant's assertion that it declared the grievants redundant is a material misrepresentation. It however submits that in failing to disclose the grievants' termination of employment, the Claimant is guilty of material non-disclosure. The Respondent relies on the case of ***Gotv Kenya Limited vs. Royal Media Services Limited & 2 Others [2015] eKLR***.

33. On 8th October 2018 the Respondent filed its written submissions dated 5th October 2018, regarding the Claimant's Application dated 16th March 2018. The Respondent restated the orders granted.

34. It is the Respondent's submissions that the Claimant's application is fatally defective and incompetent as it is premised on non-existent law. Further, the Affidavits of Wycliffe A. Nyamata (sic) and Dominic Nthiani Kyalo are *ex facie* incompetent, fatally defective and inadmissible for want of disclosing authority upon which they are made and knowledge of the facts deponed to and should be struck out. The Respondent relies on the case of ***Cyrus Gakuru Gitari vs. Magondu Gakuru [2008] eKLR*** and ***Kenya National Union of Nurses vs. Attorney General Acting & Another [2012] eKLR***.

35. It is the Respondent's submissions that the Claimant lacks the *locus standi* in this matter as it has failed to demonstrate that the grievants are its members and/or any authority to act on their behalf in the matter. It is also the Respondent's submissions that the claim herein is premature as it has been instituted before exhausting the conciliation process and therefore offends the provisions of Sections 62, 67, 68 and 69 of the Labour Relations Act.

36. The Respondent submits that the order seeking to have the grievants allowed back to their duties ought not to be granted because: it is a permanent remedy disguised as an interim one, the Claimant has not shown that it is deserving of this order and it is not an appropriate remedy in this case.

37. The Respondent relies on the cases of ***Ufanisi Capital and Credit Limited vs. Stephen Kipkenda Kiplagat & 2 Others [2011] eKLR***, ***East African Portland Cement Company Limited vs. Attorney General & Another [2013] eKLR***, ***Giella vs. Cassman Brown [1973] EA 358***, ***Galaxy Paints Company Limited vs. Falcon Guards Limited [2000] eKLR*** and ***Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR*** for emphasis. The Respondent also submits that the balance of convenience tilts in its favour.

38. I have examined all the averments of both parties. When the Applicants approached this Court *ex parte* on 19/3/2018, they were granted orders restraining the Respondents from victimizing the Claimant/Applicants on grounds of trade union activities by way of termination, dismissal, redundancy and lockout.

39. The Applicants had in their affidavit informed the Court that they had been verbally locked out by the Respondent without following the law. The Applicants contended that they had been locked out on redundancy grounds.

40. Given that the prayers sought by the Applicants in the main claim are monetary in nature, it would not be meritorious to have the Applicants continue working for the Respondents. I will therefore discharge the interim orders in place and direct that the parties proceed with the main claim.

41. Costs in the cause.

Dated and delivered in open Court this 28th day of January, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Araka for Claimant/Applicant – Present

Respondents – Absent