



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 497 OF 2018

KENYA PETROLEUM WORKERS UNION.....CLAIMANT

VS

ENGEN KENYA LIMITED

(ENGEN NYALI SERVICE STATION).....1ST RESPONDENT

PEOPLELINK CONSULTANTS.....2ND RESPONDENT

RULING

1. By its Notice of Motion dated 1st November 2018, the Claimant seeks the following prayers:

- a) An order restraining the Respondents and/or their managers and/or their directors and/or their agents from terminating, suspending, intimidating, threatening and victimizing the Claimant's members;
- b) An order barring the 1st and 2nd Respondents from changing the terms and conditions of employment or handing over the employees to the prospective dealers.

2. The application, which is supported by an affidavit sworn by Edward Mugambi Mwendwa is based on the following grounds:

- a) That the decision by the Respondents to declare 10 employees redundant was unprocedural, unlawful and unfair within the meaning of Section 40 (1) of the Employment Act, 2007;
- b) That there were new employment contracts of 3 months issued to the employees by the 2nd Respondent who is currently the employer of the grievants;
- c) That after the 1st Respondent realized that the 10 grievants were union members, they advised the 2nd Respondent to issue the employees with one month contracts yet the work at the Respondent is of a regular nature;
- d) That the matter has gone through conciliation without success;
- e) That if no order is issued, the Respondents will jointly continue to discriminate, threaten, frustrate and victimize the Claimant's members.

3. The 1st Respondent's response is contained in a replying affidavit sworn by its Human Resource and Administration Manager, Kemunto Michieka. She states that the Claimant has no *locus standi* to bring the present claim as there is no valid recognition agreement with the 1st Respondent or proof of membership by the 10 grievants.

4. Michieka adds that the Claimant cannot obtain an order of injunction at the interlocutory stage in the absence of a corresponding prayer for permanent injunction in the Memorandum of Claim.

5. In a replying affidavit sworn by the 2nd Respondent's Director, Gorret Kimani on 20th November 2018, it is deponed that the 2nd Respondent is a recruiting agency whose sole role is to link up job seekers with potential employers for a fee or commission.

6. Kimani states that once a job seeker and potential employer get linked up, it is for them to agree on the contractual terms and the role of the 2nd Respondent ceases. The 2nd Respondent therefore maintains that the suit against it is untenable and ought to be struck out and/or

dismissed.

7. I have looked at the Claimant's application together with the replying affidavits sworn on behalf of the 1st and 2nd Respondents and make the following observations:

- a) That the grounds on the face of the application have no relationship with the prayers sought. While the prayers sought are in the nature of interlocutory injunctions, the grounds complain of events that have already taken place;
- b) That no proof of intimidation or victimization of the Claimant's members has been presented;
- c) That the application together with the supporting affidavit as well as the replying affidavits contain many issues of fact which are contested by the parties and which can only be determined after taking evidence in a full trial.

8. For the foregoing reasons, the Claimant's application dated 1st November 2018 is declined.

9. Each party will bear their own costs.

10. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF JANUARY 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Olala (Union Representative) for the Claimant

Miss Mburu h/b Mr. Kandere for the 1st Respondent

Mr. Kaburu h/b for Mr. Ndungu for the 2nd Respondent