REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1282 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

KENYA BUILDING, CONSTRUCTION,

TIMBER AND FURNITURE INDUSTRIES

EMPLOYEES UNION.....CLAIMANT

VERSUS

TIMSALES LIMITED.....RESPONDENT

RULING

The 1st Application for determination before the court is dated 3rd August 2018 wherein the Claimant Applicant seeks for Orders that:

1. That this matter be certified as urgent and service be dispensed with in the first instance.

2. That this Court be pleased to issue a declaration that the lock out by the Respondent is unfair and/or illegal.

3. That the Respondent unconditionally readmits its locked out workers into their respective work stations pending hearing and determination of this application.

4. That the Respondent be compelled to participate in negotiations with the Claimant on a fair return to work formula without victimisation of

the employees.

5. That the Respondent be restrained from threatening its locked out employees pending hearing and determination of this cause

6. That the Respondent be ordered to pay the July 2018 salaries to its locked out employees

7. That this matter be heard on priority basis

8. That costs be provided for.

The Application is premised on the grounds that the parties have a CBA but the Respondent is given to excessive delays in salary payment. That over 1000 employees of the Respondents' Elbugon branch staged a sit in on 25th July 2018 protesting non-payment of June 2018, salaries. They contend that the parties met with the hope of resolving the dispute and while the meetings were ongoing the Respondent made partial payments of the delayed salaries.

The Claimant union contends that thereafter the Respondent closed down its operations, locked out all its employees and required them to show cause before resuming duties. That the respondent refused to negotiate a return to work formula that is fair which in their view amounted to victimisation of the workers. They aver that the employees are ready and willing to return to work and urge the Court to allow the application.

The application is supported by the Affidavit of Francis K. Murage the Secretary General of the Claimant Union wherein he states that as per the CBA between the Union and the Respondent, salaries are payable by the 2nd day of the following month. That about November, 2017, the respondent started delaying salaries of all its employees which subjected them to humiliation in paying their bills.

That the Claimant union approached the respondent on behalf of its members to discuss the issue but by 23rd July 2018 the Respondent was yet to pay the June 2018 salaries of its employees. The Claimant avers that it sent the respondent a demand which was not responded to and subsequently their members downed their tools on 25th July 2018.

The Claimant contends that they went with the Labour Officer to the Respondent to discuss the issue but the Respondent indicated that it had already paid the June salaries, which was not the case as only a handful of employees had been paid their June salaries.

It is the claimant's contention that requiring the employees to show cause before returning to work amounts to punishing them for protesting against non-payment of salaries. They aver that their members who work in Elbugon have not been paid for the last 8 months and urge the Court to allow their members back to work unconditionally.

The 2nd application is also filed by the Claimant and is dated 12th September 2018 wherein the claimant seeks for orders:

1. Spent.

2. That this Court be pleased to summon the directors of the Respondent to show cause why they should not be found in contempt of the court Orders issued on the 3rd of August, 2018, restraining the respondent from locking out the members of the claimant in its employment from accessing their work stations pending interpartes hearing of the Applicant's application dated 3rd August 2018.

3. That in the alternative this Court be pleased to order the arrest and committal of the Respondent's Directors herein namely ONKAR RAI Managing Director, SPIRAM RAYAPROLU General Manager to jail or to a fine for contempt of the Court Orders issued on the 3rd August, 2018 restraining the Respondent from locking out the members of the Claimant in its employment from accessing their work stations pending interpartes hearing of the Applicant's application dated 3rd August 2018.

4. That the Respondent is hereby compelled to purge the contempt by unconditionally allowing all the members of the Claimant Union/Applicant to resume work in their respective stations and by paying the unpaid salaries and dues since the cause of action arose.

5. That this court be pleased to issue all other necessary directions herein.

6. That costs of this application be borne by the Respondent.

The Application is premised on the grounds that the court issued orders on 3rd August 2018 restraining the Respondent from locking out the claimant's members from their work stations pending interpartes hearing of the Applicant's application dated 3rd August 2018 which orders were served on the respondent.

They contend that the Respondent had deliberately failed to comply with the said orders which were on 8th August 2018 extended in the presence of counsel for the respondent. That the Respondent continues to be in contempt of the said orders by proceeding with its demand for employees to go through a disciplinary process as a pre-condition to allow them access to their work stations.

That in further disobedience of the Courts Orders the Respondent has gone ahead and hired other employees to take up positions of some of the locked out employees and if the Orders sought are not granted the Court's dignity will be undermined.

In response to the applications the Respondent admits that indeed there was a delay in the payment of June, 2018, salaries as a result on the government's ban on logging. They gave notice to the Claimant's members of the salary delay and asked them for patience. The Claimant in return gave a notice of its members downing their tools unless the June salaries are paid. On 25th July 2018 the Claimant's members downed their tools.

The Respondent states that it proceeded to pay the June salaries but the Claimant's members did not return to work and demanded July salaries and a return to work formula. That the Respondent could not sign a return to work formula as June salaries had already been paid and July salaries were not yet due.

That the Claimant failed to advise its members to return to work. Instead the employees became rowdy and gathered at the Respondent's petrol station which prompted the Respondent to call in security reinforcement to remove the employees from its premises for fear of their security and that of its premises.

The employees who refused to return to work were issued with notices to show cause which were not responded to. Instead the Respondent was served with a Court Order.

The matter came up for interpartes hearing on 8th August 2018 when the Court directed the parties to engage in negotiations with a view of resolving the dispute. That they met on 16th August 2018 where it was agreed that the Union would direct its members to comply with the lawful directions issued by the Respondent.

That it was further agreed that it was imperative for the Respondent to conclude its internal disciplinary processes that had already been set in motion with a view of vetting the employees and addressing the root cause of the strike. Still the Claimant did not advise its members accordingly and to date no disciplinary action has been taken against the striking employees despite the fact that the Respondent continues to incur great losses as a result of the employees refusal to return to work.

The Respondent claims that 600 out of 1400 workers have subjected themselves to the disciplinary hearing and gone back to work. That the Respondent has not locked out any employees and it is the Claimant's members who have refused to return to work through the agreed processes.

The Respondent avers that it has the right to exercise sound managerial prerogative while running its affairs and it is within its powers to take appropriate action to save its business in light of the illegal strike. They urge the Court to dismiss both applications filed by the claimant.

The parties made their respective submissions.

Determination

Having considered the Applications, the Affidavits in support, the Labour Officer's report and the submissions by the parties the issues for determination are:

1. Whether employees were locked out of the Respondent's premises or they participated in an unprotected strike.

2. Whether the Orders sought are merited.

Section 2 of the Labour Relations Act No. 14 of 2007 defines a strike as

> **"strike" means the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work for the purpose of compelling their employer or an employers' organization of which their employer is a member to accede to any demand in respect of a trade dispute."**

A lock out on the other hand means

> **"lock out" means the closing of a place of employment, the suspension of work, or the refusal by an employer to continue to employ any number of employees—**
>
> **a. for the purpose of compelling any employees of the employer to accept any demand in respect of a trade dispute; and**
>
> **b. not for the purpose of finally terminating employment;"**

The Claimant on the one hand claims its members were locked out whereas the Respondent maintains that the Claimant's members participated in an unlawful strike. The Labour Relations Act provides the procedure to be followed for a strike to be protected in Sections 76, 77, 78, 79 and 80. Section 76 provides for the conditions to be met for a strike to be protected as

> ***Section 76 Protected strikes and lock-outs***
>
> ***A person may participate in a strike or lock-out if –***
>
> **(a)** ***the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;***
>
> ***(b) the trade dispute is unresolved after conciliation-***
>
> ***(i) under this Act; or***
>
> ***(ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and***
>
> ***(c) seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative of –***
>
> **(i)** ***the trade union, in the case of a strike;***
>
> ***(ii) the employer, group of employers or employers' organisation, in the case of a lock-out.***

A protected strike or lock out is provided for under Section 79 as follows –

> ***79. Strike or lock-out in compliance with this Act***

(1) In this Part, a "protected strike" means a strike that complies with the provisions of this Part and "protected lock-out" means a lock-out that complies with the provisions of this Part.

(2) A person does not commit a breach of contract or a tort by taking part in?

(a) a protected strike or a protected lock-out; or

(b) any lawful conduct in contemplation or furtherance of a protected strike or a protected lock-out.

(3) An employer may not dismiss or take disciplinary action against an employee for participating in a protected strike or for any conduct in contemplation or furtherance of a protected strike.

(4) Civil proceedings may not be instituted against any person for?

(a) participating in a protected strike or a protected lock-out; or

(b) any conduct in furtherance of a protected strike or protected lock-out.

(5) Subsections (2) (3) and (4) do not apply to any action that constitutes an offence.

(6) An employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or lock-out.

The consequences of taking part in a strike or lock out that is not protected is provided for under Section 80 as follows –

80. Strike or lock-out not in compliance with this Act.

(1) An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and?

(a) is liable to disciplinary action; and

(b) is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike.

(2) A person who refuses to take part or to continue to take

part in any strike or lock-out that is not in compliance with this Act may not be?

(a) expelled from any trade union, employers organisation or other body or deprived of any right or benefit as a result of that refusal; or

(b) placed under any disability or disadvantaged, compared to other members or the trade union, employers' organisation or other body as a result of that refusal.

(3) Any issue concerning whether any strike or lock-out or threatened strike or lock-out complies with the provisions of this Act may be referred to the Industrial Court.

In the instant case the notice to strike is dated 23rd July, 2018, and the employees downed their tools on 25th July, 2018. This is admitted by the claimant at paragraphs 1.9 and at page 4 under the tile Labour Officer's report (i) as follows –

"That, on the morning of the 25th July 2018, the workers reported to work but did not go to their respective stations as intimated. The HR called the Claimant's Molo branch representative and Mr. Kirui, a Labour Officer at the Nakuru County Labour Office to try and resolve the issue. The management also informed the workers that their salaries had long been deposited into I heir respective bank accounts and should therefore call off their resistance and resume working. That the workers did not heed this call since by 1 pm on 25th July 2018 only a handful of the workers could confirm receipt of their salaries with their banks."

(i) The strike was unlawful and unprotected as per the labour Relations Act 2007 Laws of Kenya

The Claimant avers that there was no strike in the first place. The workers had given a notice on the 23/7/18 that they would be agitating for their rights on the 25/7/18 if their salaries would not have been paid by close of business on 24/7/18.The management did not make any attempts to explain to the workers on what to expect thereby prompting the workers to make good their threats. There was no strike by the Claimant's members. The respondent reacted to the same by calling the police to forcefully eject peaceful workers and locking down the premises."

This is a shorter notice period than envisaged under the law and thus the strike was unprotected and illegal. An employer is by virtue of

Section 80(1) entitled to discipline an employee who takes part in an unprotected strike.

> *The Claimant's application dated 12th September 2018 seeks to cite the Respondent for contempt. However, when the parties appeared before the Court on 16th August 2018 they were directed to engage in negotiations with a view of resolving the dispute. On that day the court did not extend the orders as the claimant was alleging that the respondent had locked out its members while the respondent's position was that the workers were engaged in an unprotected strike. In the light of the conflicting positons, the court sent the parties to the County Labour Officer, Nakuru for conciliation and preparation of a factual report should he fail to reconcile the parties. The issue of contempt was therefore overtaken by events when the parties agreed to negotiate which negotiations remain futile.*

The Labour Officer's report summary is as follows:-

> *1. That both parties in this trade dispute have a valid Collective Bargaining Agreement negotiated between Timber Industry employers Association where they are members is a fact.*
>
> *2. That the management had delayed the payment for June, 2018, salary up to 25th July, 2018, is true thus contravening the parties CBA*
>
> *3. That the strike was unlawful and unprotected as per the Labour Relations Act 2007 Laws of Kenya is obvious unless otherwise stated*
>
> *4. That July 2018 salary was not an issue in contention as it was only 25th July 2018 and the month had not ended.*
>
> *5. The company is operating below required capacity as it is only 600 out of 1400 workers who are working.*
>
> *6. The underutilization of the firms capacity has a financial bearing on the factory is a fact.*
>
> *7. That the government has put a moratorium on logging in government forests at the moments and firms operating in the same industry is declaring workers redundant.*
>
> *8. That the management deposited the workers' June 2018 salary in their respective banks is a fact and that they started receiving SMS in their cell phones with effect from 25th up to 28th July 2018 depending on ones bank is not in doubt.*
>
> *9. The union resisted social dialogue by signing the payment of July 2018, salary before the month ended and that led to the stalemate between the parties and thus the strike.*
>
> *10. It was a sit in and not a lock out as workers had assembled at the petrol station inside the company is a fact supported by both parties in the dispute.*
>
> *11. That the management had posted memos on three different occasions requesting workers to report back on duty was proven during the interview I carried out at the firms premises on the employees who had resumed work and copies produced by the management in their submission.*
>
> *12. That workers became rowdy, unruly and destructive on property is a fact proved by the arrest and prosecution of ten (10) employees.*
>
> *13. That workers who are currently working went through a disciplinary hearing is not in doubt.*
>
> *14. There seems to be lack of good faith between the branch secretary and the management when it comes to matters pertaining to industrial relations and therefore the parties should be advised to adhere with their roles as per the Industrial Relations Charter.*

The Conciliator recommended that the employees should be allowed back to work after undertaking the disciplinary processes as contained in the parties CBA and Employment Act.

> *It is clear from the aforesaid report that the employees participated in an unprotected strike by staging a sit-in at the Respondent's premises causing the Respondent to call in security to disperse the employees who had become a security risk. . The Respondent was well within its rights to insist on subjecting the striking employees to disciplinary action. The Court cannot meddle with this prerogative of the employer.*

The Court of Appeal in ***Kenya Revenue Authority Vs Menginya Salim (Civil Appeal No 108 of 2010)*** held that in taking disciplinary action against an employee a public body exercises its power under a contract of employment not its statutory power under an Act of Parliament.

Further in the case of ***Alfred Nyungu Kimungui Vs Bomas of Kenya (Industrial Court Cause No 620 of 2013)*** it was held that the courts should not take over and exercise managerial prerogatives at the work place.

The orders the Claimant seeks in essence would amount to interference with managerial prerogative of the respondent. The application dated

3rd August 2018 thus fails and is dismissed. The Respondent is at liberty to proceed with the disciplinary process in accordance with the CBA and the Employment Act in respect of the workers who have not yet presented themselves for the same.

For the foregoing reasons both the claim and application are dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE