



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NUMBER 26 OF 2017

BETWEEN

DOCK WORKERS UNION [K].....APPLICANT

VERSUS

1. KENYA PORTS AUTHORITY

2. ABDIRASHID SALAT [Sued on behalf of the

Joint Industrial Council [JIC] of the 1<sup>st</sup> Respondent].....RESPONDENTS

*Rika J*

*Court Assistant: Benjamin Kombe*

*Leonard Rufus Ochieng, Executive Officer, for the Applicant*

*Miller & Company, Advocates for the 1<sup>st</sup> Respondent*

*2<sup>nd</sup> Respondent in Person*

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**RULING**

1. The Applicant filed this Miscellaneous Application on 20<sup>th</sup> September 2017. The Orders sought are:-

- a) A mandatory injunction directing the 1<sup>st</sup> Respondent to tender to the JIC Appeals' Committee [represented by the 2<sup>nd</sup> Respondent herein] files of all former Employees who have appealed against their dismissal / termination to the JIC Appeals' Committee and all/any documents in the 1<sup>st</sup> Respondent's custody which it relied upon during inquiry, hearing, determination and termination of services of its former Employees.
- b) A mandatory injunction directing the 2<sup>nd</sup> Respondent to convene the Joint Industrial Council immediately and/or urgently to hear and dispense with all pending Appeals.
- c) A mandatory injunction directing the 1<sup>st</sup> Respondent to comply with all the decisions arrived at the Joint Industrial Council.
- d) Costs to be borne by the 1<sup>st</sup> Respondent.

2. The Application is based on the Affidavit of Applicant's General Secretary, Simon Kiprono Sang, sworn on 19<sup>th</sup> September 2017.

3. General Secretary Sang explains that the JIC is composed of Representatives of the Applicant and the 1<sup>st</sup> Respondent. It is created under Memorandum of Agreement, signed between the Applicant and the 1<sup>st</sup> Respondent. It is governed by its Constitution, which is annexure 'A' of the Memorandum of Agreement. The Agreement came into force on 9<sup>th</sup> January 1986.

4. Within this machinery, the Applicant made various Appeals on behalf of its Members, Employees of the 1<sup>st</sup> Respondent, whose contracts were terminated on various grounds by the 1<sup>st</sup> Respondent, at different times. The Application is based on the Respondents' failure to finalize some of the Appeals.

5. The 1<sup>st</sup> Respondent filed a Replying Affidavit, sworn by Daniel O. Ogotu, General Manager Human Resources and Administration, on 28<sup>th</sup> June 2019. The 1<sup>st</sup> Respondent also filed a Notice of Preliminary Objection on 3<sup>rd</sup> July 2019, on the following Grounds:-

- a) The Application is incompetent as it is brought by the Union, which is a member of the JIC, as opposed to individual Employees.
- b) The Application is fatally defective and incompetent as the prayers and reliefs sought under the Miscellaneous Application fall under Judicial Review Proceedings.
- c) The 2<sup>nd</sup> Respondent is wrongly joined in his own capacity, yet he acts as the Chairman of the JIC.
- d) The Application seeks final orders, yet it is made under Rule 17 of the E&LRC [Procedure] Rules 2016 that govern Interlocutory Applications and Temporary Injunctions.
- e) The Application wrongly invokes Sections 58 of the Labour Relations Act 2007 and Rule 28 of the E&LRC [Procedure] Rules 2016, as there is no award made in arbitration in the dispute herein.
- f) The orders sought are not enforceable as the JIC has no jurisdiction to deal with issues of dismissal from employment.

6. Ogotu explains in his Affidavit that the 1<sup>st</sup> Respondent is run through a Board of Directors and a Managing Director, who are guided by the State Corporations Act, the Kenya Ports Authority Act and the Employment Act, in dealing with Staff. The 1<sup>st</sup> Respondent has developed a Disciplinary Handbook, applicable to all Staff.

7. It is agreed that at a meeting of the JIC held on 28<sup>th</sup> and 30<sup>th</sup> October 2009, the Applicant and the 1<sup>st</sup> Respondent agreed to constitute an Appeals' Committee to look into Appeals made by the Applicant in respect of Employees/ Applicant's Members, whose contracts were terminated for various reasons. The recommendations of the JIC are subject to review by the Managing Director. The JIC Committee was to give a report on its findings and recommendations to Management for further consideration.

8. Parties agreed that the Preliminary Objection and the Application, are joined, heard and determined together. They confirmed filing of their Submissions on 12<sup>th</sup> July 2019.

#### **The Court Finds:-**

9. The activities and report of JIC, relating to the Appeals filed by the Applicant on behalf of its Members, were the subject of this **Court's Cause Number 402 of 2015, Salome Lilian Etenyi v The Kenya Ports Authority**. This Court had agreed with the recommendation of the JIC, and ordered reinstatement of one of the Employees, Salome Lilian Etenyi.

10. The matter went on appeal in the Court of Appeal, **Kenya Ports Authority v Salome Lilian Etenyi [2018] e-KLR**, where the remedy of reinstatement was reduced to 6 months' salary in compensation for unfair termination.

11. The Court of Appeal held that *'the best person to determine which employee qualified for reinstatement and who did not was the employer who was seized of the peculiar case of each of the employee who was reinstated.'* The Court of Appeal's view agrees with the submission made by the Respondents herein: the recommendations of the JIC did not bind Management. The final decision was the Managing Director's to take. The Memorandum of Agreement between the Union and the Employer, states at clause 11 [b], that agreements reached at the JIC shall be binding. This does not seem to be consistent with the requirement elsewhere, to subject the findings and recommendations of the JIC to Management. After all the JIC comprises Representatives from the Union and Management. Contrary to the submission made by the 1<sup>st</sup> Respondent, the JIC has jurisdiction to deal in matters directly concerning terms and conditions of employment. It has a duty to maintain satisfactory Union/Management relationship. It has a wide role in settlement of grievances and workplace disputes, which must include termination of Employees' contracts.

12. Prayer 4 of the Miscellaneous Application cannot be granted by this Court, in light of the decision from the Court of Appeal.

13. In any event the Court does not think it is proper to give a blanket order, requiring the 1<sup>st</sup> Respondent to comply with all decisions of the JIC. Parties can only be assisted in enforcement of specific decisions.

14. The JIC Constitution, clause 3[a] states, the JIC shall meet at least once every 2 months. The Applicant complains that this has not been happening. The Court does not see reason not to remind the JIC to convene at least once every 2 months, in accordance with its Constitution.

15. Prayer Number 2 of the Notice of Motion again lacks in specifics. The Court is not in a position to grant an order regarding all/ any document. Documents need to be identified in any proceedings, whether in Court or Court-assisted dispute resolution mechanisms. How is an order relating to all/ any document to be enforced?

16. There is merit in Respondent's submission on the form of the Application. The Applicant does not say why it approached the Court through a Miscellaneous Application. The Rules, and Substantive Laws invoked by the Applicant, have not been shown to support filing of

Miscellaneous Application. The remedies sought are substantive in nature. Rule 17 deals with interlocutory applications. Annexure 'D' of the Memorandum of Agreement regulates recourse to the E&LRC. The requirements match those prescribed under the E&LRC [Procedure] Rules 2016. Annexure 'D' does not mention Miscellaneous Applications. The Applicant should have filed a Statement of Claim and documents to be relied upon, in pursuit of substantive remedies of mandatory injunction. The Applicant ought to have filed a Claim, a Petition or an Application for Judicial Review as suggested by the Respondents. It is noted also that the Applicant filed 2 Miscellaneous Applications, No. 26 and 27 of 2017, against the same Respondents, over the same issues. This is in complete abuse of the process of the Court.

IT IS ORDERED: -

*a) The Miscellaneous Application is rejected. Parties' attention however, is drawn to clause 3 [a] of the JIC Constitution.*

*b) They are encouraged to resolve their dispute within the machinery availed by their Memorandum of Agreement, guided by existing Court of Appeal Decision [s] on the specific JIC dispute.*

*c) No order on the costs.*

**Dated and delivered at Mombasa this 30<sup>th</sup> day of September 2019.**

**James Rika**

**Judge**