



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.56 OF 2019

KENYA PLANTATION

AND AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

SUBATI GROUP LIMITED.....RESPONDENT

RULING

The claimant by application and Chamber Summons dated 31st August, 2019 is seeking for orders that interim injunction do issue to restrain the respondent from stopping the shop steward, David Okemwa Kebasi, the grievant herein from entering the work premises and he be allowed access to the place of work without victimisation. That there be a declaratory order that the action of the respondent in locking out the grievant who is chief shop steward is unfair, wrongful and illegal.

The application is supported by the affidavit of Henry Omasire and on the grounds that the claimant union has a recognition agreement and collective agreement with the respondent stipulating terms and conditions of employment for its members in the employment of the respondent. The respondent has however without cause locked out the grievant with express intention of dismissing him and such action is oppressive and contrary to fair labour practices.

Mr Omasire avers in his affidavit that he is the national organising secretary for the claimant and the grievant was elected as shop steward on 12th July, 2019 and the respondent was informed. The grievant was served with letter of show cause over alleged insubordination dated 26th August, 2019 based on frivolous allegations. The grievant was given unreasonable timelines to respondent and was therefore unable to reply in his defence and is now at risk of being sanctioned with summary dismissal.

Mr Omasire also avers that the grievant was able to reply to the show cause explaining the circumstances that led to the show cause notice being issued and his lock out from the work place and which arose from the respondent's refusal to provide adequate water and the poor work conditions for employees contrary to Article 41 of the Constitution. The grievant was then served with letter inviting him to a disciplinary hearing dated 27th August, 2019 scheduled for the next day on 18th September. The respondent has since locked out the grievant from accessing the workplace and the orders sought should issue in the interests of justice.

The respondent filed a reply through the Replying Affidavit of Emma Kyui the human resource officer and who avers that on 23rd August, 2019 there was a shortage of water caused by a burst pipe and thus there was no sufficient water to moisten flower beds before digging as was the norm. The grievant was among the 11 employees assigned work on the flower beds and he approached the supervisor over the matter and who referred him to the production manager and was notified of the problem and that the problem was being fixed.

Ms Kyui also avers that the grievant engaged the production manager in a confrontation and sought to have the employee reassigned work and this confrontation ended up demeaning and embarrassing the production manager. The matter was escalated to the deponent and upon investigations it was established there were reasonable grounds to commence disciplinary action against the grievant.

A show cause notice was issued to the grievant and to which he responded and was invited to a disciplinary hearing held on 28th September, 2019 and it was established the grievant uttered words to the effect that he a the union boss and could not be taken anywhere by the production manager and on 29th September, 2019 he was dismissed from his employment on account of using abusive language to a person placed in authority over him. He was allowed to appeal but he declined to accept the same. The grievant then demanded to be heard in the presence of his branch secretary but this was an internal matter and the time to lodge an appeal has since lapsed.

The orders sought should not issue in the interim and the application should be dismissed.

The claimant made oral submissions in court. The respondent opted to rely on the filed affidavit.

The court is herein moved by way of Chamber Summons contrary to Rule 17(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which requires the instant motion be filed by way of Notice of Motion;

17. (1) *An interlocutory application shall be made by notice of motion and shall be heard in open Court.*

The application is dated 31st August, 2019 and filed on 3rd September, 2019 by which date letter dated 29th August, 2019 had issued to the grievant by the respondent being for summary dismissal from his employment over alleged use of abusive language on his supervisor and production manager, a person placed in authority by the employer.

The claimant and Mr Omasire in the application and supporting affidavits do not disclose these facts.

On the orders sought seeking to restrain the respondent from *stopping the grievant from entering the premises* and also seeking to have the grievant access his work place and the respondent be barred from locking him out, such would effectively be to order a reinstatement of the grievant back to his position with the respondent on the face of the letter dated 29th August, 2019 where he was dismissed from his employment.

Reinstatement in terms of general law of employment is a final remedy. It is one of the three remedies which section 49 of the Employment Act, 2007 allow the court to grant where there is a finding of unfair termination of employment or wrongful dismissal from employment.

To issue these remedies the court is required to hear the parties on the merits before reaching a conclusion that reinstatement is the appropriate remedy to grant. As such, before the court can issue a final order in the interim, great caution and approach must be gone into as to allow reinstatement at this stage would be to restore an employment relationship which has been terminated at an interlocutory stage.

The court has not had the opportunity to interrogate the merits and practicability of restoring the employment relationship at the interlocutory phase of litigation. The court is therefore of the view that the orders sought cannot be granted at this stage.

Accordingly, the court having been moved by Chamber Summons dated 31st August, 2019 is thus dismissed with no orders as to costs.

Delivered at Nakuru this 24th day of October, 2019.

M. MBARU

JUDGE

In the presence of: