



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 2 OF 2018

IN THE MATTER OF VIOLATION OF ARTICLE 10, 22, 28, 41(1) & (2) 232

AND 236 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 5 OF THE EMPLOYMENT ACT CAP. 226

AND

IN THE MATTER OF AN APPLICATION BY THE KENYA COUNTY GOVERNMENT WORKERS UNION

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION.....PETITIONER

VERSUS

OTHAYA MUKURUWEINI WATER SERVICES

COMPANY LIMITED T/A OMWASCO.....RESPONDENT

RULING

1. Before me is the Petitioner/Applicant's notice of motion application dated 20th February 2018 seeking an injunction against the Respondent for the following orders:-

a. Spent

b. THAT pending the hearing and determination of this Application the Honourable Court do make an order of injunction restraining the Respondents either by themselves, employees, servants and/or agents from terminating the employment of the Petitioner's members without following the law

c. THAT pending the hearing and determination of this Application and Petition the Respondents be restrained and prohibited from intimidating, threatening or in any way victimizing the Petitioner's members.

d. THAT pending the hearing and determination of this Petition, Respondents be restrained and prohibited from employing replacement labour and/or employees in the same position and to perform the same or similar work as the Applicants/Petitioner's without following the due process of the law.

e. ...

f. ...

The parties agreed to file submissions and the Applicant submitted that there was a recognition agreement with the Respondent which led to the signing of the collective bargaining agreement between the parties. The Applicant submitted that the CBA entered into with the

Respondent was a binding agreement and the Respondent could not alter it at will. The Applicant submitted that relying on the case of **East Africa Portland Cement Co. Ltd v Kenya Chemical & Allied Workers Union [2017] eKLR** the provisions of Section 57 of the Labour Relations Act applied. It was submitted that the parties are bound and reliance placed on the case of **Said Ndege v Steel Makers Ltd [2014] eKLR** where the court held that terms of a CBA bind and are incorporated into the contract of all union members and unionisable employees of a particular employer who has entered into a recognition agreement with a union and concluded a collective bargaining agreement. The Applicant also cited other cases to bolster this point being the cases of **Kenya Union of Commercial Food and Allied Workers v Kenya National Library Services [2016] eKLR**, **Kenya Shoe & Leather Workers Union v Bata Shoe Co. (K) Limited [2017] eKLR** and the cases of **GMV v Bank of Africa Kenya Limited [2013] eKLR** and **Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers [2015] eKLR**. The Applicant submitted that the Respondent had resorted to unfair labour practices contrary to Article 41(1) of the Constitution of Kenya by threatening the members of the Applicant. The Applicant referred to the definition of the word duress in **Black's Law Dictionary, 9th Edition at page 579** and submitted that the victimization and threats against the staff with threats of termination was an act clothed in malice and bad faith. The case of **Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute [2013] eKLR** was cited for the proposition that fair labour practice is provided for under the Constitution and deviation from these rights should be resisted. The Applicant called in aid the cases of **Esther Mbinya Musau v National Bank of Kenya Limited [2015] eKLR**, **Elizabeth Washeke & 62 Others v Airtel Networks (K) Ltd & Another [2013] eKLR** and **Naftaly Rugara Muiga v Kenyatta University of Agriculture and Technology (JKUAT) [2015] eKLR**. The Applicant submitted that its members are protected under Article 232 of the Constitution and cited the case of **David Ogega Kebiro & Another v Kisii County Public Service Board & Another [2017] eKLR**.

2. The Respondent submitted that the Petitioner/Applicant had not met the threshold for the grant of the interim orders sought. The Respondent submitted that the Petitioner had sought injunctive relief to restrain it from terminating the employment of certain unknown persons who are members of the Petitioner and that neither the Petition and the notice of motion application do not indicate on whose behalf the Petitioner is in court. The Respondent submitted that the principles in **Giella v Cassman Brown** were not met and cited the case of **Mrao Ltd v First American Bank Limited & 2 Others [2003] KLR** and the case of **Fadhil Juma Kisua & Another v Kenya Ports Authority [2015] eKLR**. It submitted that the Petitioner had not sought any permanent injunction in the Petition and that the application was therefore defective as it offends Rule 16(3) of the Court Procedure Rules. The Respondent submitted that the motion and the Petition lack merit and should be dismissed with costs to the Respondent.

3. The blatant disregard of the Collective Bargaining Agreement is touted as the basis for the injunctive relief sought. It is asserted that the Petitioner's members' rights have been flouted by the Respondent. It is argued that the injunctive remedy is requisite to enforce the fair labour practices enshrined in the Constitution and in keeping with the requirements of a collective bargaining agreement. It is not contested that collective bargaining agreements once entered into and duly registered acquire the force of law. CBAs bind the union and the employer, the employees who are unionisable as well as other employees who are in the cadre of employees covered by the CBA. In other words there is no separation between the unionized and unionisable staff when it comes to benefits enjoyed. In the Petition, the allegations that the Respondent made attempts to alter the contracts of staff without adherence to the dictates of the CBA and the recognition agreement sounds like what would transpire where there is no rule of law. Parties contract and engage on the basis of the law in force. The Labour Relations Act recognizes the right to unionise and the right to enjoy a collective bargain. The Respondent seems to be mistaken in its belief that it can alter contracts of staff wily-nilly. That is frowned upon by the law as there is hereby issued an injunction in the following terms:

- a. Pending the hearing and determination of this Petition the Respondent be and is hereby restrained and prohibited from intimidating, threatening or in any way victimizing the Petitioner's members.
- b. Pending the hearing and determination of this Petition, Respondents be and are hereby restrained and prohibited from employing replacement labour and/or employees in the same position and to perform the same or similar work as the Petitioner's members without following the due process of the law.
- c. The Petitioner to have the costs of this application.

It is so ordered.

Dated and delivered at Nyeri this 17th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar