



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 149 OF 2018

BAKERY CONFECTIONARY FOOD

MANUFACTURING & ALLIED WORKERS UNION (K).....CLAIMANT

-VERSUS-

SAMEER AGRICULTURE AND LIVESTOCK (K) LTD.....1ST RESPONDENT

HAGGAI MULTI CARGO HANDLING SERVICES LTD.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd November, 2019)

RULING

The claimant is a trade union and has concluded a recognition agreement with the 1st respondent. The present suit is filed by the claimant with respect to its member Joseph Mureithi on account of alleged unlawful lock out and redundancy of the said Joseph Mureithi (the grievant).

The claimant pleaded that upon conclusion of the recognition agreement, the 1st respondent contracted the 2nd respondent for provision of human resources services restricted to recruitment and payment of the employees. The grievant is one such employee recruited and paid by the 2nd respondent but deployed to work in the 1st respondent's establishment. The claimant's case is that the grievant joined the union and the 1st respondent was notified by the claimant. The 1st respondent is said to have acted by locking out the grievant and alleging loss of employment on account of redundancy. The claimant's case is that the alleged lock out and redundancy were unlawful and were based upon the grievant's lawful trade union membership and participation in trade union activities.

The respondents have not filed a defence or response to the memorandum of claim filed herein on 12.02.2017. On 26.06.2019 the court directed the 1st respondent to file and serve a response, documents and witness statement by 12.07.2019 and a reply to response by mention 24.07.2019 at 9.00am for directions. The 1st respondent did not comply with the directions and instead filed a notice of motion under Rule 17(1) and 28(1) (b) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and any other enabling laws. The application was filed through Cheloti Karanja Advocates. The 1st respondent prayed for orders:

- a. That the 1st respondent be struck out from the proceedings.
- b. That costs be in the cause.

The application is based on the annexed supporting affidavit of Kenneth Kareithi, the 1st respondent's Chief Operating Officer, the further affidavit by Ken Kareithi filed on 14.10.2019 and upon the following grounds:

- a. There is no employer – employee relationship between the claimant and the 1st respondent.
- b. The claimant was recruited and employed by the 2nd respondent as per paragraph 7 of the statement of claim.
- c. The 2nd respondent was responsible for payment of salary and making of statutory deductions.
- d. The suit should be against the 2nd respondent alone and the 1st respondent is not a necessary party and should not be subjected to unnecessary litigation.
- e. The application should be granted in the interest of justice.

The claimant opposed the application by filing on 01.08.2019 the replying affidavit of Danchael Mwangure, the claimant's General Secretary. The application is opposed upon the following grounds:

- a. The 1st respondent has disregarded the clear directions by the Court given on 26.06.2019 on filing of the response, documents and witness statement and serving by 20.07.2009. The application is therefore premature or an abuse of Court process because it is filed in clear breach of the directions by the Court.
- b. The 1st respondent has a recognition agreement with the claimant.
- c. The grievant joint the trade union pursuant to the recognition agreement and the constitutional and statutory rights to do so. The challenged redundancy and lock out are based on the 1st respondent's violation of the grievant's rights. The 1st and 2nd respondents have colluded to unlawfully terminate the claimant's employment.
- d. The grievant performs core functions in the 1st respondent which is inconsistent with the outsourcing arrangement and legality of outsourcing is challenged. The issue before the Court is legality of the outsourcing contract.
- e. The 1st respondent supervised the grievant, allocated duty and victimised the grievant by locking him out and terminating the contract of employment without intervention of the 2nd respondent so that the 1st respondent is liable as alleged in the memorandum of claim.

The claimant and 1st respondent filed their respective submissions on the application. The Court has considered their respective positions. The Court makes findings as follows:

- a. The 1st respondent has clearly failed to comply with the Court's directions to file a response, documents and witness statement. The 1st respondent's filing of the present application which has a clear bearing on the directions and without due compliance is found to be an abuse of Court process in view of the provisions of section 3 of the Employment and Labour Relations Court Act, 2011 and the prescribed obligation for litigants to comply with the Court's directions for expeditious determination of suits before the Court.
- b. The fact of the 1st respondent outsourcing the services from the 2nd respondent to provide and manage human resource is merely one aspect of the dispute. The claimant has made specific allegations and claims against the respondent intertwined and also potentially exclusive of the outsourcing contract such as whether the 1st respondent unilaterally locked out the grievant and declared him redundant despite the outsourcing contract and the alleged employment by the 2nd respondent; whether the outsourcing is illegal in view of the recognition agreement; whether the 1st respondent or both respondents are liable, if at all; whether the 1st respondent could manage the

grievant directly and terminate the contract of service as alleged for the claimant; and the extent to which the contract of service was affected or impacted upon by the recognition agreement, if at all. The Court finds that such are serious triable issues which remain uncontroverted and which make the 1st respondent a necessary party for effectual, expeditious and complete determination of the suit at full hearing.

c. The Court has to make a finding on a pertinent triable issue alleged for the claimant and being whether the outsourcing contract for human resources by the 1st respondent in favour of the 2nd respondent was merely calculated as a smokescreen or design to defeat the recognition agreement. On that issue and other identifiable issues in the memorandum of claim, the Court returns that the 1st respondent is clearly a proper and necessary party to the suit.

d. The Court finds that the 1st respondent is a necessary party to the suit, there is no denial of the several allegations made against the 1st respondent and in the circumstances the application shall fail and pave way for the full hearing of the main suit when evidence will be taken towards effectual, complete, proportionate and just determination of the dispute.

In conclusion the application filed for the 1st respondent on 17.07.2019 is hereby determined with orders:

1. The application is dismissed with costs.
2. The parties to take prompt steps for the expeditious hearing and determination of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 22nd November, 2019.**

BYRAM ONGAYA

JUDGE