



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.25 OF 2019

TAILORS AND TEXTILES WORKERS UNION.....CLAIMANT

VERSUS

CHAMUNDA SPIN LIMITED.....1ST RESPONDENT

CHAN SERVICES LIMITED.....2ND RESPONDENT

KANAK DAVE (in his capacity as director).....3RD RESPONDENT

RULING

The ruling herein relates to two applications filed by the claimant and dated 26th March, 2019 and 3rd May, 2019.

Application dated 26th March, 2019 was heard on 24th April, 2019 and ruling reserved for 10th July, 2019. While pending ruling the claimant wrote letter 3rd May, 2019 seeking to have the file to file application dated 3rd May, 2019 and the file was released back to the registry for this purpose.

The claimant was directed to serve application dated 3rd May, 2019 and attend hearing on 14th May, 2019 and the ruling due was put in abeyance for the parties to have access to the file at the registry.

On the due date there was no attendance and the file was returned to the registry.

On application dated 26th March, 2019 the claimant is seeking for orders that the 1st respondent be prohibited from victimising the 26 unionised employees through unjustified, unlawful and unfair redundancies and that the 1st respondent be stopped from the unjustified and unfair outsourcing of its employees from the 2nd respondent as there is no merit or justification. The claimant is also seeking that the 1st respondent be ordered to deduct and remit trade union dues to the claimant with regard to unionised employee and its members; to sign a recognition agreement and proceed to negotiate a collective bargaining agreement (CBA) and the contracts issued with the 2nd respondent be revoked.

The application is supported by the affidavit of Rev. Joel K Chebii the general secretary of the respondent and on the grounds that the claimant has recruited 26 employees of the 1st respondent as members and sent the check off forms to the 1st respondent to effect trade union dues and remit accordingly and in accordance with section 48 of the Labour Relations Act on the 7th February, 2019. Upon receipt of the check off forms the respondent in a bid to victimise the unionised employees secured an advocate to advice on the procedures of outsourcing labour.

On 27th February, 2019 the claimant was served with *Notice of Outsourcing Labour* to Chan Services Limited effective 1st April, 2019 with a notice of one month running from 1st March, to 1st April, 2019 and 26 unionised employees were unlawfully and unfairly terminated being victimisation due to their union membership in contravention of section 46(c), (d), (e) and (f) of the Employment Act.

Rev. Chebii also avers that the 26 employees were victimised due to their unionisation and which is discriminatory contrary to section 5 of the Employment Act. The outsourcing of the 26 employees is without justification.

On 12th March, 2019 the 26 employees were sent on forced leave without pay or signing any leave forms contrary to the practice of the respondent. On the same date the 26 employees were issued with letters terminating their employment and without stipulating the payment of terminal dues. The 1st respondent has since then commenced outsourcing process in disregard to concerns addressed by the claimant.

Rev. Chebii also avers that the actions of the respondents are illegal and unfair and the orders sought should issue pending the hearing and determination of the claim and suit herein.

In reply the respondent filed the Replying Affidavit of Robert Gwaro Kenyaga the accountant of the 1st respondent and who avers that he has authority to reply herein. The claimant is not entitled to the orders sought. The 1st respondent is a small scale company engaged in the manufacture and sale of blankets and has been in operation since 1st October, 2017.

The 1st respondent came into operation after purchasing manufacturing machines from Mega Spin Limited which was engaged in similar business and collapsed and declare redundancies around 30th March, 2017. The respondent then employed most of its workforce from the former employees of the defunct Mega Spin Limited due to their experience in the industry.

The respondent relies on raw materials from India and has been facing stiff competition from bulk imports from China with readymade blankets. There is also a he challenge in importing raw materials through shipping and this has rendered the respondent unable to pay salaries unless there is work.

Faced with financial challenges the 1st respondent sought to outsource the entire workforce in the general workers machine attendants department to enable it focus on core business to reduce overheads. In January, 2019 the 1st respondent sought legal advice on the legal framework on outsourcing labour and the employees having got wind of redundancy and outsourcing to the 2nd respondent 26 employees in the subject department brought the claimant with the sole aim to defeat the process.

On 7th February, 2019 the 1st respondent was served with letter and check off forms and in response the claimant was informed of the outsourcing effective 1st March to 1st April, 2019 being termination notice as well. The affected employees would be outsourced to the 2nd respondent.

The claim for deduction and remittance of trade union dues is legitimate and in the February, 2019 payroll this was done and placed in the claimant's account on 7th March, 2019. This was also done with regard to March, 2019.

Mr Gwaro also avers that the claimant members were issued with outsourcing notices and notice of redundancy with copies sent to the labour officer in line with section 40 of the Employment Act. The claimant replied and opposed the outsourcing citing that such was victimisation of its members which is not true. The claimant is opposed to the outsourcing process but this is the only meant to secure the employees from the redundancy.

The subject employees were sent on leave to allow the respondent process the terminal dues which were paid on 31st March, 2019 in line with section 40 of the Employment Act. As such the orders south cannot issue as the 1st respondent has followed the law.

Both parties made their oral submissions and as noted above, the ruling was reserve for 10th July, 2019 but this was put in abeyance to allow the claimant file application dated 3rd May, 2019.

The claimant is seeking that;

1. *Spent.*

2. ...

3. ...

4. *The court be pleased to issue prohibitory and injunctive orders stopping the*

1st respondent from victimising the 26 union members through unlawful, unjustified and unfair redundancies against the court orders of 26th/03/2019.

5. *This court be pleased to issue prohibitory and injunctive orders stopping the*

1st respondent from unjustified, unlawful and unfair outsourcing of 2nd respondents as it is meant to victimise the union members until this case is fully heard and determined.

6. *Employees engaged by the 1st respondent from 2nd respondent to replace the 26 grievants be stopped from working and grievants reinstated back to work.*

7. *The respondent directors Mr Kanak Dave be summoned in court and charged with contempt of court for failing to comply with Court orders of 26/03/2019.*

8. *The respondent director and Kanak Dave as named herein be committed to three (3) months civil jail for contempt for failing to comply with court orders dated 26/03/2019.*

9. ...

This application is supported by the affidavit of Rev Chebii and on the grounds that the claimant obtained orders on 26th March, 2019 stopping the respondent from victimising the 26 unionised employees. There was hearing on 24th April, 2019 and ruling scheduled for 10th July, 2019 but on 30th April, 2019 the 1st respondent unfairly declared the 26 employees redundant through lock out contrary to the orders of the court. To secure the confidence of the court and ensure obedience of court orders and as the respondents disregarded clear court orders, the directors should be committed to civil jail. The victimised employees are now forced to sign contracts with the 2nd respondent upon outsourcing by the 1st respondent. Such is in breach of the court orders and the law as there is wrongful loss of employment.

In reply the respondent filed the Replying Affidavit sworn by Robert Gwaro Kenyaga and who avers that

Upon the court hearing the application on 26th March, 2019 interim orders were issued pending service and hearing and orders that;

The respondent is hereby restrained from victimising all unionised employees and members of the claimant as an interim provision to allow the court hear both parties.

The claimant to serve the respondents who shall reply and attending hearing on 24th April, 2019.

Both parties attended on 24th April, 2019 and argued the application and ruling reserved. The interim orders were not secured by the claimant.

At the heart of the claim herein is the issue of redundancy, outsourcing and alleged victimisation of the claimant's members.

Whereas redundancy is a matter regulated in law and under section 40 of the Employment Act, 2007 and which must be addressed on the merits at a full hearing to determine whether the reasons and justifications for redundancy are lawful and fair. the issue of outsourcing of employees is not regulated in law but through case law, court have since established and held that this is a labour practice taking root in our jurisdiction and where applied should conform to fair labour practices as held in the case of **Wrigley Company (East Africa) Limited versus Attorney General & 2 others & another [2013] eKLR**;

... it necessary to set the parameters for a credible outsourcing program as follows inter alia:

a) Ordinarily, employers are not expected to outsource their core functions;

b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;

c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and

d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.

To delve into the above parameters, the court requires a full hearing and not through affidavits to determine each and every aspect of the outsourcing and make a finding. To issue the orders sought by the claimant at this stage would be to pre-empt the principles enunciated above. See **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**;

... [the employer is] within its rights to declare redundancies. ... [what the court is] to consider was that in this age of heightened technology, increased mechanization, and an increasingly skilled workforce, there are diverse business concepts which when effected, can cost effectively facilitate expansion and growth of a business, while reducing workforce requirements. Outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It not designed to deprive Kenyans of their jobs.

As such the court is required to make an enquiry into the reason(s), the justification and process leading to redundancy and outsourcing of particular employees as against others and make a finding as to whether there are lawful and valid reasons and where such results from operational requirements under section 43 of the Employment Act, 2007 and whether employment has terminated fairly or unfairly. In this regard, the court must delve into the merits and defences given. On the outcome, where there is finding of unfairness, there are remedies available and set out under section 49 of the Employment Act, 2007. These remedies are secured even where employment has since terminated.

With regard to application seeking for committal of the respondents for contempt of court orders issued on 26th March, 2019 as set out above, at the hearing on 24th April, 2019 the interim orders stopping the victimisation of the 26 employees and members of the claimant, the orders were not secured. The subsisting orders then stopped the victimisation of the employees.

Is there victimisation of the employees and members of the claimant?

Victimisation of an employee by an employer stems from unfair treatment is a form of discrimination and harassment and that the

harassment in the workplace covers unfair treatment as one of the issues protected by the law and recognised as unfair discrimination, unfair treatment and harassment. There must be a right due to the employee and while exercising such right and or asserting such right, the employee becomes the subject of discrimination as against other employees, the employee is harassed and treated unfairly.

This then calls for a serious audit of the due right(s), the restriction of the right(s) and an interrogation of the conduct of the employer said to have victimised the employee.

On the Memorandum of Claim filed together with the Notice of Motion on 26th march, 2019 the final orders sought are largely similar and once addressed the court shall have a perspective of the claims in issue, the defence by the respondent and make final orders thereof.

As of 24th April, 2019 there was no existing interim orders. The court heard the parties on the application dated 26th March, 2019 and reserved a date for ruling. As noted above, the matters set out in the application and Notice of Motion should be heard at a full trial.

Application dated 5th May, 2019 being premised on the alleged contempt of orders issued on 26th March, 2019 is without proper foundation.

Accordingly, applications dated 26th March, 2019 and 3rd May, 2019 are hereby found without merit and declined. Each party shall bear own costs. The claim herein shall be heard on priority basis.

Delivered at Nakuru this 11th day of November, 2019.

M. MBARU

JUDGE

In the presence of: