REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1445 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

KENYA SHIPPING, CLEARING, FREIGHT LOGISTICS AND

WAREHOUSES WORKERS' UNION..............................CLAIMANT

VERSUS

KAMILI PACKERS LIMITED..................................RESPONDENT

JUDGMENT

The Claimant filed a Memorandum of Claim on 18th October 2018 on behalf of 18 grievants whose names are set out in the tabulation at page 38 of the bundle of documents filed with the claim, seeking the following prayers:

1. The Respondent to pay the 18 employees redundancy benefits as tabulated in Appendix A.
2. The Respondent to stop deducting 5% from the salaries of employees working at warehouses.
3. The Respondent to refund the guarantee money to the employees with interest.
4. The Respondent to pay costs of the suit.

The Claimant also filed a Notice of Motion on even date seeking the following orders:

1. Spent.
2. That the court be pleased to direct and order the Respondent to pay the redundancy benefits to 18 employees who were converted from permanent to piece rate.
3. That there be a temporary injunction restraining the Respondent from not giving duties to those employees who joined Applicant union by either victimising, harassing and or sacking them until and after the hearing of the application.

The Claimant avers that on 20th August 2018 the Respondent decided to convert the terms of 18 of its employees from permanent to piece rate without paying them their redundancy benefits. It avers that the Respondent deducts 5% of the salary of employees without giving reasons for the deduction. It further avers that the Respondent has retained the deduction and that the deduction is unlawful.

In response to both the Application and the Memorandum of Claim, the Respondent filed a Replying Affidavit sworn by Faith David, the Respondent's Administrative and Human Resource Manager on 15th November 2018.

She deposes that the Claimant has not provided any evidence that it declared its employees redundant and denies that the respondent declared any of its employees redundant. She avers that without a recognition agreement with the Respondent, the claimant cannot file a trade dispute as provided under Section 54 of the Labour Relations Act to have *locus standi* to deal with trade disputes.

She avers that the Claimant has reported a dispute to the Ministry of Labour over the alleged failure by the management to recognise the union and a conciliator has been appointed. That a meeting was set for 8th November 2018.

She further deposes that the Claimant's averments on alleged redundancy termination is inaccurate as some of the employees absconded work, have disciplinary issues while others are still working with the Respondent. She avers that the procedure set out under the Employment Act would have been applied should the Respondent have declared any position superfluous.

Submissions

The parties agreed to have both the Application and the Memorandum of Claim heard at the same time. Consequently, they filed their respective written submissions to the suit.

Claimant's Submissions

The Claimant submitted that the Respondent has failed to address the issue before court. It submitted that the Respondent has converted the grievants' employment from permanent employees to piece rate employees. It submitted that this is proof that the Respondent has abolished their earlier employment.

It submitted that the Respondent has not produced any documents showing that the employees still continue to receive wages on a monthly basis that immediately the mode of employment changed from monthly to daily basis redundancy took place.

Respondent's Submissions

The Respondent submitted that in the absence of a Recognition Agreement the Claimant has no capacity to institute a suit on behalf of the grievants. It relied the case of ***Law Society of Kenya v Commissioner of Lands and Others*** as cited in ***Kenya Union of Employees of Voluntary and Charitable Organisations [KUEVACO] -V- Board of Governors and Maina Wanjigi Secondary school [2015] eKLR***.

It further submitted that as deponed in the Replying Affidavit there has been no redundancy.

Determination

The main issues for consideration are:

> 1. Whether the Respondent has the *locus standi* to file the suit.
>
> 2. Whether the grievants' employment terms was converted from permanent basis to piece rate basis therefore occasioning termination on account of redundancy
>
> 3. Whether the Claimants is entitled to the orders sought.

Whether the Respondent has the *locus standi* to file the suit.

The Respondent avers that since there is no recognition agreement between the Claimant and itself, the Claimant cannot file trade dispute on behalf of the grievants as provided under Section 54 of the Labour Relations Acts. It submitted that as provided under Section 2 of the Labour Relations Act, it is a recognition that creates *locus standi* for a union to file trade disputes.

Section 54(1) of the Labour Relations Act provides:

> ***"An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees."***

This section provides that a recognition is only necessary for purposes of collective bargaining and not representation. Article 41(2)(c) of the Constitution and Section 4(1)(a) and (b) of the Labour Relations Act provide that every worker has the right to join a Union and to participate in a trade union's activities. Consequently, the Respondent's argument that the Claimant needed a recognition agreement in order to represent the grievants herein is not correct as there is no requirement that a Union has to have recognition agreement to represent its members. A grievant only needs to be a member of a union in order to be represented. In this case the grievants membership to the Claimant has not been disputed thus the Claimant is in a position to represent the grievants. The fact that there is a dispute on recognition further confirms that the claimant has members among employees of the respondent. I therefore find that the Claimant has *locus standi* to represent the Claimants.

1. Whether the grievants' employment terms was converted from permanent basis to piece rate basis therefore occasioning termination on account of redundancy

The Claimant avers that on 20th August 2018 the Respondent converted the 18 grievants' employment terms from permanent to piece rate thus they were rendered redundant. The Respondent disputes there having been a redundancy and avers that some of the grievants absconded work, while others are still at work or have disciplinary issues.

The Claimant produced contracts of employment between some of the grievants and the Respondent, which indicated that some of the contracts were to be renewed subject to availability of work but did not indicate the duration of the contract. Further, the contracts of employment, the letters on wages revision and payslips indicate that the grievants were paid daily wages.

None of these documents indicate that the grievants were initially employed as permanent employees. In addition, there is no proof that the grievants' employment were converted to piece rate as provided under Section 18 of the Employment Act. I therefore find that the Claimant has not proved that there was a change in the employment terms of the grievants or that there was a redundancy as defined under section 2 of the Employment Act. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe its existence. The Claimant did not produce any evidence for comparison of the employment terms of the grievants before and after 20th August 2018.

In respect to the 5% deduction, I do not find any proof of any such deduction. With regard to the guarantee, the Respondent informed the grievants of such deduction in the Memo to all employees. As such, the Respondent deducted the salary guarantee. I find that the Respondent did not have the grievants consent to deduct the said sum thus the deduction is contrary to Section 17(11) of the Employment Act. I therefore order the Respondent to refund the amounts deducted as guarantee from the grievants.

Consequently, I find that the notice of motion has no merit and the same is dismissed **with the exception of the prayer for refund of salary guarantee as sought in the Memorandum of Claim, which is granted, and the respondent ordered to refund the same to the employees.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE