



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.68 OF 2018

[Formerly Cause No.1997 of 2016 (Nairobi)]

KENYA PLANTATION & AGRICULTURAL WORKERS UNION...CLAIMANT

VERSUS

KERIO VALLEY DEVELOPMENT AUTHORITY.....RESPONDENT

RULING

1. The ruling herein relates to two (2) applications dated 21st February, 2018 and application dated 19th March, 2018 filed by the claimant and the respondent respectively.

2. On application dated 21st February, 2018 the claimant is seeking for orders that;

An order be and hereby issued restraining and prohibiting the respondent by themselves, their agents, assigns, servants and or representatives from effecting a Voluntary Early Retirement and or implementing a restructuring program on any staff pending hearing and determination of this suit.

The present suit be set down for hearing on priority basis.

Costs of this suit [application] be in the cause.

3. The application is supported by the Affidavit of Henry Omasire the claimant's National Organising Secretary and on the grounds that the respondent wrote to the claimant on 8th February, 2018 on its intention to implement a voluntary early retirement (VER) programme to an intended 300 employees but failed to specify when the programme would take effect. Vide letter dated 14th February, 2018 the claimant replied disputing the reasons leading to VER and requested for a consultative meeting with the respondent.

4. Other grounds in support of the application are that the respondent has proceeded with the VER without consultations by issuing a memo to all staff seeking that they apply by 26th February, 2018. The VER commenced by the respondent is a redundancy scheme aimed at offloading permanent workers and replace them with contract labour. The VER targets and aims at frustrating the conclusion of the CBA in issue in this suit and unless the orders sought are granted the claimant stands to suffer irreparable injury that cannot be compensated by way of damages.

5. Mr Omasire avers in his affidavit that upon filing of the claim herein the court on the 24th February, 2017 directed the parties to pursue a report from the CPMU but the respondent has refused and or neglected to cooperate by their refusal to provide details in accordance with Rule 37 of the Employment and Labour Relations Court (Procedure) Rules. The respondent has now commenced a VER and has refused to hold consultations with the claimant. Such is targeted at frustrating the CBA in issue in this suit. The respondent management has now resulted into issuing threats and intimidation to employees and unless the orders sought by the claimant are confirmed, injury and loss will be the result.

6. In reply, the respondent filed a *Response to the Application* and signed by A.O. Ambege of the Federation of Kenya Employers acting for the respondent.

7. This response offends the provisions of Rule 17(1) and (9) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (Court Rules), which requires that;

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

...

(9) *A party may respond to an application by filing grounds of opposition verified by an affidavit.*

8. Where a defence to the claim was required, such should adhere to the provisions under Rules 13 and 14 of the Court Rules.

9. Since the respondent entered appearance herein on the 13th October, 2016 no defence or response to the claim has been made. This cannot be circumvented by the respondent filing a Response to the *Response to the application* dated 21st February, 2018. Any due defence to the claim at this stage should be with the leave of the court and in accordance with the Court Rules. In any event, with regard to the Notice of Motion in issue, a Replying Affidavit is the prerequisite. The averments in the *Response to the Application* cannot be ascertained as to the nature of facts set out therein as against averments and facts set out in an Affidavit.

10. On application dated 19th March, 2018 is seeking for orders that; *the ex parte proceedings as well as the orders of injunction made herein on the said dated prohibiting the respondent from rolling out a VER or implementing a restructuring program on any staff which orders were subsequently extended by the Deputy Registrar on 6-3-2018 and all other consequential proceedings and directions made by the Deputy Registrar the said date be set aside, reviewed and or vacated forthwith pending the hearing and determination of claimant's claim.*

Cost of this application be provided for.

11. The application is supported by the annexed affidavit of Josphat Nyarangi Motende the Human Resource and Administration Manager of the respondent and on the grounds that the respondent was condemned unheard in utter violation of Article 47 and 48 of the constitution and rules of natural justice. The claimant is guilty of material non-disclosure of circumstances surrounding the VER and also concealed that over 300 employees who were trained sensitised and consulted voluntarily had complied for consideration of the VER programme. He claimant misled the court into believing the VER was secretive and non-participatory or that it was intended to frustrate the conclusion of the CBA.

12. Other grounds are that there is a defence which raises serious factual and legal contestations to the claimant's claim and despite the respondent advocate seeking the file be placed before the Judge for consideration the Deputy Registrar without jurisdiction purported to extend the interim orders.

13. The claimant has moved to court without instructions of the clients who are employees of the respondent and who now confirm their voluntary choice of the VER. The public interest which has informed the restructuring of the respondent's operations is for the efficient, effective and economic use of resources pursuant to article 232(1) of the constitution which overrides the claimant's personal gain and interest.

14. The claimant will be compensated through monthly members' contribution the over 300 employees stand to be prejudiced as their right to choose the VER is trampled upon and the respondent's effort to restructure its organisation to achieve optimum service delivery as a minimal cost and is at risk of losing over Kshs.300 million for the VER and the orders sought should issue.

15. Mr Motende also avers that in a bid to turn around its productivity and efficiency the respondent has engaged the national treasury to allocate funds for the VER to offload less productive but willing employees and plans are to roll it out in stages with consultations with the claimant.

16. Both parties made their oral submissions in court.

Determination

Is there material non-disclosure by the claimant while obtaining the orders or 22nd February, 2018?

Whether the orders of 22nd February, 2018 should be set aside Whether there exist grounds to set aside ex parte orders herein

17. It is common cause that the suit herein was filed by the claimant on 28th September, 2016 together with an application and Notice of Motion seeking for orders that;

An order do issue for the substantive suit to be heard on accelerated basis due to compelling circumstances.

18. The court moved in that regard directed the claimant to serve the respondent and attend for hearing directions on 13th October, 2016. On the allocated date the respondent attended and was granted 21 days to file defence and parties to attend court on 5th December, 2016 for taking hearing directions.

19. The matter then came up in court on 23rd February, 2017 when the court directed the parties to consult and file a report from CPMU.

20. The matter went silent in terms of court appearances until the application by the claimant dated 21st February, 2018 and subject herein.
21. The court moved, issued interim orders on 22nd February, 2018 restraining the respondent from proceeding with the VER programme on any staff in its employment.
22. The basis of the orders sought by the claimant were set out in the annexed Supporting Affidavit of Henry Omasire and on the grounds that by notice dated 8th February, 2018 the respondent gave notice on its intention to implement a voluntary early retirement (VER) programme to an intended 300 employees but failed to specify when the programme would take effect. That where such a VER is effected it will frustrate the suit herein which remain urgent and not heard where the respondent has failed and or refused to cooperate and share information and material necessary in terms of Rule 37 of the Court Rules and for the CPMU to be able to address the pending matter before them and file a report with the court.
23. As set out above, there is no substantive response to the application by the claimant the respondent having opted to make a *Response to the Application*.
24. The respondent is seeking that the orders of 22nd February, 2018 be set aside for material non-disclosure.
25. In **Aviation & Airport services Workers Union (K) versus Kenya Airport Authority & Another (2014) eKLR** the court in addressing the consequences of material non-disclosure when obtaining court orders held as follows;

When a party comes to court on an application supported by an Affidavit under oath and fails to outline and disclose matters that are material to the granting of orders, such a party is acting in a manner suggesting that they are peddling falsehood while under oath. The consequences of such conduct are well settled in law. Any advantage gained by such non-disclosure, the grant of ex-parte orders will be taken away from the offending party ...

26. In the Supporting Affidavit of Mr Motende dated 19th March, 2018 he has attached annexure "JNM2.b" minutes a meeting held on 7th February, 2018 with the agenda of unveiling the VER programme. Present were respondent employees and who included r Patrick Kangogo the Chief shop Steward.
27. Another meeting was held on 9th February, 2018 and also present were respondent employees including Mr Kangogo the Chief Shop Steward.
28. Presentations were made by the union that the VER was not a negotiated programme and there was no participation in the development of the VER criteria.
29. By letter dated 8th February, 2018 the respondent wrote to the claimant union with reference to the intention to implement the VER programme. The essence of this letter was to inform the claimant the following;
- The Authority intends to implement VER to offload three hundred (300) employees. However, if the envisaged number will not be achieved, the authority will consider other alternative options which will be implemented in accordance with the Employment Act (2007) and the existing Collective Bargaining Agreement (2012).*
30. This letter in my reading of it does not set out the timeline for the implementation of the intended VER programme. No commencement date or end date. This letter is the basis of the claimant's application dated 21st February, 2018.

Is there failure to disclose material facts or concealment of material facts?

31. The gist of the letter dated 8th February, 2018 emanating from the respondent is to share an intention. There is No fixed date as to when the VER was to commence.
32. I take it the claimant became and got concerned when her members got VER applications on 19th February, 2018 to agree to it or decline. The respondent has attached annexure "JNM 8(b)" being some of the returns received from the applications. Such are contested by the claimant as having been obtained without informed consent.
33. Present at the VER programme implementation meeting on 7th and 9th February, 2018 was the Chief Shop Steward and Mr Kangogo. Although Shop Stewards remain employees and subject to the direction and control of their employers, they enjoy special dispensation and are viewed as co-managers of the labour force at the workplace. That noted, where a matter relating to a negotiate term in a CBA is in issue, even where a Chief Shop Steward is invited Their Trade Union must be notified before any processes are initiated with the intention of varying, changing or in any manner changing terms and conditions of employment. Such is to ensure the shop steward is not victimized for discharging his roles or caught up in a matter and manner that would require the approval and informed agreement with the employer or in this case his trade union. In this case and noting the on-going suit, recourse should have been sought to engage the claimant directly in a matter involving the exit of over 300 employees envisaged under the VER programme. To take the presence of the Chief Shop Steward as the absolute authority in representing the claimant's interests was to avoid the obvious and the substantive issues addressed in the suit herein.
34. The orders therefore granted in the interim were justified to the extent that the court on good basis and on the interim stopped the VER exercise.

35. In **Ruaha Concrete Co. Ltd et al versus paramount universal Bank Ltd et al, HCCC No. 430 of 2002** the court held that;

The duty is not to make full and fair disclosure of all material facts, the material facts are those which is material for the judge to know in dealing with the application as made, materiality is to be decided by the court, and not by assessment of the applicant, and the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to any additional facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including:

- a. The nature of the case the applicant is making when the makes the application.*
- b. The order for which the application is made and the probable effect of the order on the 'defendant or the plaintiff.*
- c. The degree of the legitimate urgency and the time available for the making of the inquiries*

36. The respondent has opted to file application dated 19th March, 2018 seeking o set aside the orders issued on 22nd February, 2018. There exists a right to be heard as a constitutional right. However such right(s) must be appreciated in context.

37. Where the court is seized of a matter, the respondent party ought to address the matter present before introducing new matter(s) or making counter-applications before addressing the subsisting application. In this regard, where the respondent found the application by the claimant problematic, good cause was to file a Replying Affidavit thereto to appraise the court on what defences existed and address the court on the need to vacate the subsisting orders instead of filing a new application.

Matters now set out in the application dated 19th March, 2018 could have well been good basis for a reply.

38. In the court addressing the question of a party filing a counter-application in the case of n **Kenya Plantation & Agricultural Workers Union versus P. J. Dave Flowers ltd, Cause No.101 of 2015(Nakuru)**, it was held before undertaking such a procedure, a respondent should address the pending application and that;

The natural and legal consequence of an inter parties hearing at an interlocutory stage will seek the orders granted ex parte either confirmed or vacated after hearing both sides. It serves no useful legal purpose to file a counter application(s).

39. In addressing a matter similar The Court in the **Enock O Kinara versus Postal Corporation [2017] eKLR** relied on the case of **Mobile Kitale Service Station versus Mobil Oil Kenya Limited & Another (2004) eKLR**; where the Court held that the rationale of issuing interlocutory orders is that;

An interlocutory injunction is given on the court's understanding that the defendant is trampling on the rights of the plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.

The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose – to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it. [Emphasis added].

I agree with these findings as set out above.

Accordingly, save for the variation of the interim orders on 20th April, 2018 application dated 19th march, 2018 is found without merit and is hereby declined. Noting the substantive claim has not been heard since 2016 and the interim orders now confirmed, parties shall be allocated a hearing date on priority and within the month of June, 2018. Costs in the cause.

Delivered in open court at Nakuru this 16th day of May, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants: Nancy Bor & Martin Oletiyana

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