



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.150 OF 2016

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

FINLAYS (K) LTD.....RESPONDENT

R U L I N G

This is an application dated 25th October, 2016 whereby the applicant seeks the following orders of court;

- a) That this motion be certified as urgent and should be heard ex parte in the first instance.*
- b) That pending the hearing and determination of this motion inter parties and settlement of the dispute amicably this Honourable Court be pleased to issue a temporary order for injunction restraining the Respondent, his employees, servants and/or agents from evicting the grievant from the house allocated to him by the Respondent.*
- c) That this Honourable Court be pleased to refer to the parties herein to conciliation with regard to the intended summary dismissal of the grievant.*
- d) That costs of this application be provided for.*

It is grounded as follows;

- i. That Claimant/Applicant and the Respondent have a recognition agreement by virtue of which they have negotiated a Collective Agreement (CA) stipulating the terms of employment for employees who are members of the Claimant/Applicant.*
- ii. On 3rd October 2016 the Respondent served the grievant with a notice to show cause, dated 3rd October 2016 stating that the grievant incited workers to disobey instructions given to them by the management and that he should submit a written explanation by not later than 2.00 p.m. on 5th October 2016 explanation why disciplinary action should not be taken against him for the said offences.*
- ii. The grievant replied to the show cause notice on 6th October 2016, stating that he does not know of any incitement of workers.*

- iv. *A disciplinary hearing was conducted on the 7th October 2016, in the presence of the grievant and his witnesses, and the grievant was issued with a summary dismissal letter dated 8th October 2016.*
- v. *That grievant reported this dispute to the Applicant/Claimant which through its branch secretary wrote a letter dated 10th October 2016 to the Respondent appealing against the action taken and requesting to meet the Respondent in their offices over the same on 27th October 2016 at 11.00a.m at Chemase Estate.*
- vi. *The Respondent replied vide letter dated 12th October 2016, accepting the request for consultative meeting but wishing to have the meeting at 11.00 a.m. on 26th October 2016.*
- vii. *The Applicant/Claimant wrote to the Respondent vide a letter dated 13th October 2016 asking him to evict the grievant from the house allocated to him as his dismissal is a subject of dispute and that he should wait until the dispute is finalized.*
- viii. *The Respondent replied vide a letter dated 21st October 2016, stating that the grievant was dismissed from employment for gross misconduct and that he should have vacated the house allotted to him immediately as per the provision of Clause 17(b) of the current Collective Bargaining Agreement, and as a good gesture it will allow the grievant to continue occupying the house until 27th October 2016.*
- ix. *On 24th October 2016, the Respondent wrote to the Applicant/Claimant requesting to have the consultative meeting rescheduled to 2.30p.m. on Wednesday, 26th October 2016 at Engineering Department Boardroom.*
- x. *The Applicant/Claimant vide a letter dated 26th October 2016 wrote to the Respondent requesting to have the consultative meeting rescheduled to 2nd November 2016 at 11.30a.m. As they will be committed to other issues, on the proposed 26th October 2016.*
- xi. *The Claimant/Applicant is apprehensive that unless this Honourable Court prohibits and/or issues an injunction against the Respondent from evicting the grievant from his allocated house, the Respondent shall proceed with the intended eviction of the grievant and the grievant will suffer irreparable damage.*
- xii. *The Respondent shall not suffer any prejudice if the orders herein are granted as it shall have the opportunity to put forth its defense.*

The respondent in a Replying Affidavit sworn on 9th November, 2016 opposes the application and pleads that the dismissal the application lacks merit for reasons that the grievant was dismissed for absenteeism from work on 28th October, 2016 and 29th October, 2016. His case was that he was sick but this was not supported by any evidence to that extent. This therefore justified the action of the respondent against the grievant.

The claimant/applicant in her written submissions denies the involvement of the grievant in a case of incitement or misconduct as alleged by the respondent but tends to blame the events leading to dismissal on the respondent.

The respondent submits that the grievant's dismissal was occasioned by his failure to attend his appointed place of work, willful disobedience of his supervisor's lawful instructions and his perpetration of acts of incitement calculated to provoke his colleagues to decline and/or disregard the Respondent's agent's lawful instructions; acts which constituted gross misconduct warranting summary dismissal from employment - see annexure "TK 4" to the claimant's application's supporting affidavit.

The respondent sought to rely on the authority of **Kenya Plantation and Agricultural Workers Union vs. James Finlays Kenya Limited (2014) eKLR** wherein the court faced with similar application as the instant one, held as follows;

...As submitted for the respondent, in absence of a common position by the parties and in view of opposing pleadings, it will be necessary to take evidence at a full hearing to make a determination on the issue whether the termination was unfair or unlawful. In the circumstances of this case, it would be premature at the interlocutory stage to make a finding on that contested issue of fact and in absence of the relevant parties' evidence to guide the court.

Further, the respondent relies in the court's finding in **Kenya Plantation and Agricultural Workers Union vs. James Finlays Kenya Limited (2014)eKLR** above where court in construing a similar clause of a binding Collective Bargaining Agreement determined;

*...The court finds that the parties are bound by their agreement in clause 17 (b) of the collective agreement that where an employee is dismissed other than for gross misconduct and the dismissal becomes a subject of a dispute, such employee will not be required to leave the house allotted to him until the dispute is finalized. The court holds that the dispute as filed in court is such dispute as envisaged under the clause. So were the employees terminated on account of gross misconduct? **The court has considered the termination letters filed in the suit. The termination letters show that the employees were terminated summarily on account of reasons that the respondent said amounted to or were gross misconduct. In the circumstances, the court finds that the parties are bound by clause 17(a) which in this case does not entitle the grievants to continued occupation of the allotted housing accommodation.***

At the onset of this application this court issued the following orders;

- i. That this application is hereby declared as urgent and service thereof be dispensed with in the first instance.*
- ii. That an interim injunction be and is hereby issued restraining the Respondent from any way evicting the Claimant/Applicant from his allocated residence pending hearing and determination of this application.*
- iii. That this application, suit and orders of the Court be served onto the Respondent forthwith but not later than the close of the day on 28th October 2016.*
- iv. That the Respondent be and is hereby awarded seven days to file, and serve response to the application and suit.*
- v. That hearing on 10th November 2016 at 9.00hrs.*

On 10th November, 2016, the parties agreed on disposal of the application by way of written submissions and therefore today's ruling.

The claimant's case is that the grievant was at all material times an employee of the respondent as a tea plucker until 8th October, 2016 when he was wrongly, unlawfully and unfairly dismissed on account of gross misconduct. It is on submissions that the grievant should be allowed occupation of his residential quarters till hearing and determination of this cause.

The respondent on the other hand opposes this application and submits that the application lacks merit for reasons that the grievant was dismissed for absenting from work on 28th October 2016 and 29th October 2016. His case was that he was sick but this was not supported by any evidence to that extent. This therefore justified the action of the respondent against the grievant.

She seeks to rely on clause 17 of the subsisting Collective Bargaining Agreement which provides as

follows;

a) Where an employee is discharged, other than for gross misconduct he shall be entitled to a maximum of fifteen days in which to vacate the quarters allocated to him by his employer and to leave the estate. Where an employee of more than five consecutive years service is charged other than for gross misconduct, he shall be entitled to a maximum of 30 days, in addition to his period of notice in which to vacate any quarters allocated to him by his employer and to leave the estate within this period, the employee shall be paid his/her terminal benefits.

b) Where an employee is dismissed other than for gross misconduct and his dismissal becomes a subject of a dispute, such an employee will not be required to leave the house allotted to him until the dispute is finalized.

The respondent reliance on the authority of **Kenya Plantation and Agricultural Workers Union vs. James Finlays Kenya Limited (2014)eKLR**, supra presupposes a situation where the summary dismissal is not disputed. Clause 17 (b) above clearly provides for situations where the summary dismissal, like in the present case, is disputed. In such instances, the employee will not be required to vacate the house allocated to him until a resolution of the dispute is had.

I am therefore inclined to dismiss this application with costs to the claimant/applicant.

Delivered, dated and signed this 31st day of January 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Omwaka for the Claimant Union.
2. Mr. Langat instructed by M/s Bett & Company Advocates for the Respondent.