



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

**AT NAIROBI**

**CAUSE NO.881 OF 2017**

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

**VERSUS**

**KAKUZI LIMITED .....RESPONDENT**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 18<sup>th</sup> July, 2017)**

**RULING**

1. Before the Court are two Notices of Motion dated 9<sup>th</sup> May 2017 and 16<sup>th</sup> May 2017.
2. The first Motion seeks orders:
  1. *That the application be certified urgent and the same be heard exparte in the first instance.*
  2. *That an order do issue restraining the Respondents by themselves from terminating, dismissing, suspending and or locking out Mr. David Ndambuki the Chief Shop Steward from employment pending hearing and determination of the application filed herein.*
  3. *That costs be in the cause.*
3. The application is grounded on the affidavit of Thomas Kipkemboi and on the following grounds and such other grounds to be adduced at the hearing thereof:
  1. *That on or about the 29<sup>th</sup> of April 2017 the Chief Shop Steward Daniel Ndambuki as a workers representative held a workers meeting with the members of the Union outside working hours on issues of employment rights.*
  2. *That on the 4<sup>th</sup> of May 2017 the Respondent vide a letter dated 4<sup>th</sup> May 2017 of REF: KAK/17/LO525/WO/vm suspended the Chief Shop Steward with effect from 5<sup>th</sup> May 2017 indefinitely pending investigation on alleged serious misconduct.*
  3. *That the allegations of misconduct had not been explained to him nor is the period upon which the suspension is set to last set out in the letter, further the Respondent has ignored all efforts by the Claimant to consult over the purported serious misconduct.*

**4. That the suspension amounts to victimization and intimidation of the Chief Shop Steward for exercising his rights as an elected workers representative to hold workers meetings with members of the Claimant and other employees outside working hours.**

**5. That there is no provision of law for indefinite suspension and the said suspension violates the Claimant's constitutional rights conferred by Article 50(2),(b),(c),(j),(k) of the Constitution of Kenya.**

**6. That unless the orders sought are granted, the Respondents actions are calculated and aimed at busting the union and to constructively dismiss the Chief Shop Steward for engaging in activities that are confined in law.**

4. In response, the Respondent has filed an Affidavit in support of their application dated 16<sup>th</sup> May 2017 and in response to this given application deponed to by Denis Gitaka the Legal Manager Kakauzi Limited.

5. He avers that the ex-parte injunctive orders issued by this Honourable Court have for the most part been overtaken by events and create an uncertainty as to its enforceability.

6. Mr. Ndambuki has already been suspended on the 4<sup>th</sup> of May 2017, pending the investigations a fact that he failed to disclose to the Court.

7. That there is no victimization of the Chief Stewards, the grounds of his suspension were duly explained to him in his Show Cause letter and the said suspension was not indefinite as alleged by the Union as a hearing date was set and hearing heard.

8. They aver that the order contravenes Court precedent which provides that employers have a managerial prerogative to take disciplinary action against employees and that Courts should generally not interfere with an employer's disciplinary process. Further, the ex-parte injunctive orders promote indiscipline and insubordination amongst employees who carry out unlawful conduct as their actions are protected since the employer's managerial authority to take any action against them is hampered by Court orders.

9. They aver that Mr. Ndambuki will not suffer irreparable damages as he has already been suspended and awaiting the decision of the disciplinary process and will not suffer irreparable damages that will not be compensated in the form of damages.

10. They ask the Court to listen to their application dated 16<sup>th</sup> May 2017 and issue the interim orders sought.

11. The Second Application is via Notice of Motion Dated 16<sup>th</sup> May 2017.

12. In it the Applicants seek orders:

**1. That this Application be certified urgent and be heard ex parte in the first instance.**

**2. That the orders granted by the Hon. Lady Justice Hellen Wasilwa on the 11<sup>th</sup> of May 2017 be set aside.**

**3. That the Costs of this application be provided for.**

13. The application is set on grounds that:

**1. On the 21<sup>st</sup> April 2017 the Hon. Justice Nduma Nderi delivered a judgment in ELR 775 of 2014 KPAWU vs. Kakuzi in respect of a CBA dispute. The judgment was released on the 27<sup>th</sup> of April 2017 and on the 29<sup>th</sup> of April 2017 Mr. Ndambuki held an unauthorized meeting with**

*employees falsely indicating and misrepresenting that the interim payments which the employer had previously paid would not be set off from the wage award, subsequently he was issued with a suspension letter.*

*2. That on the 11<sup>th</sup> of May 2017 the Hon. Lady Justice Hellen Wasilwa issued an ex parte injunction order restraining the Applicant from terminating, dismissing, suspending and /or locking out Mr. David Ndambuki from employment pending the hearing and determination of the application filed by the Respondent Union dated 9<sup>th</sup> May 2017.*

*3. That the aforementioned injunctive orders have for the most part been overtaken by events and have created uncertainty as to its enforceability as:*

*a. Mr. Ndambuki was suspended with full pay on the 4<sup>th</sup> of May 2017 pending investigations of alleged misconduct.*

*b. That Mr. Ndambuki was issued with a notice to show cause on the 9<sup>th</sup> of May 2017 requesting him to attend a disciplinary hearing on the 12<sup>th</sup> of May 2017 which took place at 10 am.*

*4. Mr. Ndambuki was already suspended from employment and awaiting the decision of the disciplinary proceedings before the orders of 11<sup>th</sup> May 2017 were served upon the Applicant on 12<sup>th</sup> May 2017 at 12:09 p.m.*

*5. The grounds upon which the company was considering the termination of Mr. Ndambuki's contract were clearly stated and explained to him in the notice to show cause letter. It is thus not true that the suspension was indefinite. The grounds in the show cause letter were that Mr. Ndambuki had, in violation of the terms of the Recognition agreement entered between the parties, organized an unapproved union meeting during which he misled the Applicant's members as to the terms of payment they would receive pursuant to the Court Judgment in Nairobi ELR 775 of 2014, KPAWU vs. Kakuzi Ltd.*

*6. That Mr. Ndambuki's conduct was malicious, irresponsible and amounted to gross misconduct, he failed to inform the Court material facts, amounting to non-disclosure, its effects would be to unsettle the Applicant's employees causing unrest and disharmony.*

*7. The ex-parte orders contravenes current Court practices which provide that employees have managerial prerogative to take disciplinary action against employees without Court interference, further the orders were premature as the law provides that employees who are on suspension and whose services are terminated can still institute Court proceedings and seek reinstatement or compensation in the event that they are unlawfully terminated from their employment.*

*8. It is in the interest of justice that the orders given by Hon. Lady Justice Wasilwa are set aside and the status quo be maintained until the Respondent's injunction application of 9<sup>th</sup> May 2017 is heard and determined.*

14. In response, the Chief Shop Steward has sworn a Replying Affidavit dated 25<sup>th</sup> May 2017 where he opposes the application dated 16<sup>th</sup> May 2017 where they deny that they were suspended on the 4<sup>th</sup> of May 2017, issued with a show cause letter on the 9<sup>th</sup> of May 2017 and attended a disciplinary hearing on the 12<sup>th</sup> of May 2017, and state that the Court orders were sent to the Respondents on the 11<sup>th</sup> of May 2017 in advance via their email [mail@kakuzi.co.ke](mailto:mail@kakuzi.co.ke) which orders lifted his suspension and they were not at the time of service by email waiting on the decision of the disciplinary hearing.

15. He avers that on the 12<sup>th</sup> of May 2017, he personally served a copy of the Court order upon Dr. Karatine Nchoki who was chairing the meeting and who refused to receive the Court order or hear him out on his rights as set out in the notification to attend the disciplinary enquiry further refusing a

representative of his choice to attend the meeting.

16. He avers that as a duly elected workers representative he without prejudice has a constitutional right under Article 41(2)(c) 4 and 5 to hold meetings with members of staff who are not union members with the sole purpose of recruiting them into the union.

17. He admits to meeting a few employees of various departments outside working hours but he did not mislead the employees on the payments that they would receive pursuant to a Court judgment in **ELRC 775 of 2014 KPAWU vs. KAKUZI LIMITED.**

18. He avers that in their application dated 9<sup>th</sup> May 2017 and the Supporting Affidavit of Thomas Kepkemboi sworn on the same date, all material factors of the suspension were disclosed in paragraph 2, 3, 4, 5, 6, 6, and 8.

19. They aver that the suspension letter did not list out the allegations against him nor did they give a timeline of suspension, proof of any investigation has not been provided nor has a report. It is therefore the proper conclusion that his suspension is victimization aimed to constructively dismiss him from employment.

20. He avers that he did not breach the terms of the recognition agreement putting the Applicant to strict proof thereof.

21. He asks the Court to dismiss the application.

22. In response the affidavit of Daniel Ndambuki, the Legal Manager of Kakuzi, Mr. Denis Gitaki has filed a Further Affidavit dated 30<sup>th</sup> May 2017.

23. In it he avers that he only became aware of the email sent to them by the Claimant after reading the affidavit filed on the 29<sup>th</sup> of May 2017. The email had not been opened as it did not contain a subject title and came from an unknown email address. It appeared suspicious in view of recent cyber threats. They aver that the Claimant ought to have telephoned to follow up the email.

24. He avers that it is not true that Mr. Ndambuki served the Court order during the disciplinary hearing of the 12<sup>th</sup> of May 2017 he only asked the panel if they had received the order before the hearing commenced but did not provide details of the order or a copy of it. The order was only served after the hearing took place.

25. He avers that the Claimant's suspension had already been effected by the time the order had taken place and is advised that the Court has no jurisdiction to lift a suspension ex-parte or even at the interlocutory stage.

26. He avers that it is premature for the Claimant to raise issues relating to the disciplinary process and at the same time ought to be substantively determined after a full hearing after witness have testified and documents adduced. The Respondent has not made a decision in regard to Mr. Ndambuki's employment.

27. He avers that it is not true that Mr. Ndambuki has been targeted for trade union actives, but for holding a meeting without permission and failing to adhere to the terms of the Recognition Agreement. While he does have a constitutional right to hold meetings and recruit members, it should be done in an orderly manner and in accordance with the agreed terms. Notice and consent are paramount and should be given.

28. They ask for their application to be allowed.

29. The matter was heard orally in Court where the parties submitted on both applications.

30. The Claimants rely on all their affidavits. They reiterate that the Shop Steward had the right to hold a meeting with employees under Section (4) (g) Labour Relations Act and Section 56 (1) (a) and (b) of the same Act. They submit that the Company has 347 unionisable employees and total labour force 2000. They submit that the Recognition Agreement provides for no mass meeting of union employees be held in the company premises. It did not restrain the Chief Shop Steward from meeting the non unionisable employees. The right to meet is also sanctioned under the Constitution and Article 41 (2) (2) (c).

31. They submit that the Claimant was targeted in his capacity as a Trade Union Representative and it is also an attempt to restrain him from recruiting non-members into the union. The suspension period is yet to be defined which they submit is unjust.

32. The Claimants oppose the application to set aside the order and that the allegation that the disciplinary process has been concluded is a nullity. No minutes have been tabled before the Court and there is no investigation report.

33. The Respondents submit that they rely on their affidavits and add that the Claimant has not been targeted over his union activities. They submit that the Claimant had not indicated that he had permission to hold the meeting and that contravened the Recognition Agreement, terms which the Claimant is bound. They submit that the issues that amounted to gross misconduct can only be determined after a full investigation and hearing and to this end rely on **Kenya Plantation & Agricultural Workers Union versus James Finlay Kenya Limited Cause 272 of 2014** where it was stated that:

***“1. 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 circumstance 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..”***

34. By the time the Cause came to Court, Mr. Ndambuki had already been suspended and that is why they filed the application of 16<sup>th</sup> June 2017 to state that the union application has been overtaken by events. They failed to disclose to the Court that their representative had already been issued with a show cause letter on the 9<sup>th</sup> of May 2017 requesting him to attend disciplinary proceedings, the letter was not disputed. Any interim order will be highly prejudicial to the Respondent as it is their prerogative to conduct any disciplinary process. If the order is upheld, it will lead to impunity by the employees especially in cases of gross misconduct. They rely on the findings of **Dennis Ratemo vs. The Kenya Film Commission [2014] eKLR** where it was held that:-

***“The Court considers that even if the Respondent was to proceed on the basis of a flawed disciplinary process, the Claimant can have restoration after a full hearing by grant of reinstatement, re-engagement to a position of equal value, with back salaries to the date of the suspension and without loss of benefits, statues and privileges. The Respondent avers that if the orders are granted he would be deprived of the right to administer the contract of employment and have the right to manage its business severely infringed by the Court on the basis of prima facie facts. This is the reason why this Court has consistently declined to issue provisional measures that have the effect of prejudging the propriety of the employers’ disciplinary process and decision...”***

35. They submit that the Court can grant the order after a full hearing of the Court and rely on the decision in **Idris Aden Muktar & 2 Others Vs. County Government of Garissa & Another [2015] eKLR** where at paragraph 45 it was stated that:

***“It is the Court’s finding that the orders sought cannot be given at this stage as they are orders in finality. Hon J. Rika in Alfred Njungu Kiungu vs. Bomas of Kenya Case No. 620/2013 faced with a similar situation rendered himself thus:***

*“The Protection given under the Employment Act are to be taken by employees as a shield not a sword placed in their hands to impose themselves with the aid of the court at the workplace. The Court has witnessed a large inflow of interlocutory applications where employees wish to be protected against disciplinary process. Some of the employees have approached the Court seeking ex-parte orders of reinstatement. Rule 16 (8) (a) of the Industrial Court (Procedure Rules) 2010 states that the Court shall not grant ex-parte orders which reinstate an employee whose services have been terminated.*

*I do agree with my learned colleague that reinstatement as a remedy should only be granted sparingly after hearing both parties, this Court had at an interlocutory stage ordered reinstatement of the Applicant which is tantamount to deciding the case to its conclusion.”*

36. They conclude that the application has been overtaken by events and ask the Court to set aside the order.

37. In response the Claimants submit that Mr. Ndamuki is not locked out from his employment and that the clause in the Recognition Agreement is not applicable except in the meeting of members. The meeting was with non-members. They reiterate that the Respondent cannot curtail the freedom of association. They ask the Court to confirm the orders.

38. Having considered submissions of both parties, the issue for determination is whether the Claimant has established a prima facie case with a likelihood to success to warrant issuance of orders sought. This is in line with the principles established in **Giella vs. Casmal Brown Limited (1973) EA 360** where the Judge held that before an order of Injunction is issued the Applicant must show he will suffer irreparable damage unless the orders sought are granted and that he cannot be compensated in damages. In any case, the Court will look at the lesser injury to be occasioned in deciding whether or not to grant an Injunction.

39. The Applicant has told Court that indeed he held a meeting in the premises but with non-union members and that he was targeted due to his trade union membership being a Shop Steward and that he never disrupted any work operations.

40. In deciding whether or not to grant an Injunction or not, this Court would consider the lesser injury that would be occasioned to the Applicant or Respondent as the case may be. In my determination grave injury would result in the Applicant if the prayers sought are denied as opposed to the Respondents.

41. It is also my finding that, it is indeed premature at this stage to decide on the greater good of each party without full determination of the suit.

42. This is what was the finding in the case of **Kenya Plantation & Agricultural Workers Union versus James Finlay Kenya Limited Case No. 272 of 2014**; where the Court declined to make any findings on contested issues of fact and in absence of the relevant parties' evidence to guide the Court. Since the Applicant came to Court after suspension, I note that from his letter of suspension, the period of suspension is not indicated.

43. It is also not indicated the conditions for the suspension in terms of his remuneration or salaries etc. The Respondents have averred that there was already set a disciplinary hearing which was to proceed later. There is no indication that Applicant had been notified of the same.

44. I will for that reason lift the suspension in place. The Respondents are however not barred from instituting fresh disciplinary processes against the Applicant but the process if any must adhere to laid down rules of procedure as per the Respondent's HR Manual and the law.

45. These orders will remain in force until the main claim is determined which in any case should be heard on priority basis.

46. Costs in the cause.

Read in open Court this **18<sup>th</sup> day of July, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Onyancha holding brief for Khisa for the Claimant

Nyakundi holding brief for Miss Opiyo for the Respondent