



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.1245 OF 2016**

**NOAH OMBURO.....1<sup>ST</sup> CLAIMANT**

**STANLEY TITUS KEVOGO.....2<sup>ND</sup> CLAIMANT**

**EVERSON MWAKUJA MWABANGA.....3<sup>RD</sup> CLAIMANT**

**AND 60 OTHERS**

**VERSUS**

**APEX VISION LIMITED.....RESPONDENT**

**RULING**

The claimants through application and Notice of Motion dated 23<sup>rd</sup> August, 2016 filed under Certificate of Urgency are seeking for various orders that;

- a) Pending the hearing and determination of this application the respondent be restrained from terminating, suspending the claimants, declaring them redundant or interfering in any way detriment to the status of their employment on account of this grievant before the court or any other unlawful excuse pending determination of the claim.*
- b) An order be issued that the claimants have a right to engage in trade union under article 41 of the constitution and to engage in a collective bargaining and the respondent be ordered to comply with the requirement of the claimants chosen trade union, the Communication Workers Union.*
- c) The respondent be ordered to file into court produce to court or to the claimant's advocates all documents relating to their employment including schedule of overtime, leave done since their employment for proper inquiry into accounts.*

The application is supported by the annexed affidavit of the 1<sup>st</sup> claimant and on the grounds that the claimants were previously employed by Telkom Kenya at Power & Air Condition Engineering department and in 2010 the claimants [respondent?] took over the entire department of Telkom Kenya into its operations. Ever since the takeover the claimants have been working under uncertain labour conditions with the respondent and efforts to join a trade union has been frustrated as the respondent is reluctant and has frustrated the effort.

Other grounds in support of the application are that the respondent has been terminating the claimants and dealing whimsically without due process thus interfering with the claimants' entitlement to fair labour practices and in accordance with the law.

The claimants have been threatened by the respondent that they will be terminated from their employment and are apprehensive that should this be done they shall suffer irreparable loss and damage. By keeping the claimant in uncertain work environment, the failure to provide written contracts, the refusal to allow the claimants to join a trade union and refusal to engage in a collective bargaining agreement in order to circumvent the regulatory regime under the Employment Act which amounts to unfair labour practice.

The respondent has failed to compensate overtime and keeping the claimants' work terms uncertain and unchanged over the years.

Mr Omburo in his affidavit avers that together with the other claimants they are employees of the respondent under various departments. The claimants represent 48 other employees of the respondent.

The claimants were all previously employed by Telkom Kenya under a department which was taken over by the respondent. The claimants have been under contracts with the respondent since 2010. The contracts are changed erratically and under different terms. The employees have been agitating to join a trade union but the respondent has not been cooperative.

Mr Omburo also avers that when they were outsourced from Telkom Kenya there was an undertaking that they would be retained under the same terms as with the previous employer but this has not been the case. The respondent has acted contrary to the law.

Mr Omburo also avers that on 17<sup>th</sup> June, 2016 he was called by the human resource manager and was informed that he should park his bags as his contract had ended. The other claimants have also received similar verbal communications. The respondent has since been harassing the claimants.

Mr Omuro avers that he has a bank loan secured with his employment and if terminated from his employment his family will suffer irreparable loss and damage that cannot be compensated by way of damages.

The respondent filed a Replying Affidavit sworn by Sun Chengyong the head of Engineering Department of the respondent company and avers that the claimants have filed two similar applications as herein before the other could be heard and dated 11<sup>th</sup> July, 2016. The claim is filed by 63 claimants but this application is allegedly filed by 51 claimant and for good orders it would be prudent for all claimants be identified.

Mr Chengyong also avers in reply that there are only 3 contracts attached to the application and all other alleged 48 claimants lack *locus standi*. The consent filed for 48 claimants was done after the claim had been filed and the suit is fatally defective.

The respondent is not opposed to the claimants joining a trade union and the claimants are members of Communication Workers Union of Kenya.

Both parties made their oral submissions in court.

## **Determination**

The suit herein commenced on 24<sup>th</sup> June, 2016 when the claimant filed the Memorandum of Claim together with Notice of Motion under Certificate of Urgency. The claim herein is filed by the 3 named claimants and for 60 others.

Rule 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that a suit may be instituted by one party on behalf of other parties with a similar cause of action and further at Rule 9(2) and (3) provides as follows;

2) *Where a suit is instituted by one person, that person shall, in addition to the statement of claim, file a letter of authority signed by all the other parties:*

*Provided that in appropriate circumstances, the Court may dispense with this requirement.*

*(3) The statement of claim shall be accompanied by a schedule of the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant.*

The commencement of a representative suit must therefore be with authority of all the other parties unless the court in an appropriate case has issued directions otherwise. Other than the required authority by the other parties, the memorandum of claim must be accompanied by a schedule of the names of all the claimants giving details and particulars of the alleged breach(es) and reliefs sought by each claimant.

I have perused the Memorandum of claim filed by the 3 claimants for themselves and 60 others. Only a statement for each of the 3 claimants is attached. At paragraph 3 of the Memorandum of Claim the claimants avers as follows;

*At all material times relevant to this suit the claimants and about 60 others belonged to Telkom Kenya Ltd, at the Conditioning Power and Air Conditioning Engineering Department, [underline added].*

There is no letter of authority attached by the *about 60 others*, the claim has no schedule with details and particulars, claims or reliefs of the 60 others and the same is left bare as far as the 60 others are concerned. The claim is however clear with regard to the 3 listed claimants.

The claim shall proceed on its merits with regard to the 3 listed claimants. Where the claimant wishes to add other parties to the suit, such option is provided for by the Rules of the court.

On the substantive orders sought with regard to restraining orders against the respondent from terminating, suspending the claimants, declaring them redundant or interfering with their employment on account of this suit, and that the claimants should be allowed to enjoy their right to unionise, in reply, the respondent confirm that the claimants are unionised under the Kenya Communications Workers Union and attached to the Replying Affidavit of Chengyong is annexure "SC-4" on check-off of trade union dues. As such, the orders sought in this regard are thus addressed.

The question of termination of employment or suspension of the claimants by the respondents are matters that the court cannot address on the facts set out in the supporting Affidavit of the 1<sup>st</sup> claimant. The affidavit is not specific as to what exactly has taken place with regard to his employment or that of the 2<sup>nd</sup> and 3<sup>rd</sup> claimants. There must be specific evidence for the court to rely upon at this instance to stop the respondent from terminating employment or suspension of the claimants. The fears that may exist with regard to the claimants' employment or continued employment must have a basis. Once the claimants institute this suit, where the respondent has gone ahead to sanction the claimants for moving the court, such the court can address but not without good grounds.

The claimants aver that they should not be declared redundant. Again, redundancy is a matter regulated in law, where the respondent is faced with matters set out under section 40 of the Employment Act, 2007 and requires to terminate the employment of the claimants on account of redundancy, the court will only interfere where there is good basis that there is procedural and or substantive injustice in the respondent addressing the same.

At this instance, the orders sought cannot issue.

Before conclusion, section 10(6) and (7) of the Employment Act requires the employer to produce all work records once a suit has been filed. In the Memorandum of Claim, the 3 claimants have listed the issues in dispute as including underpayments, computation of overtime, and increment of salary an terms of employment. As set out the above, the duty is vested upon an employer to produce all work records. It will therefore assist the court and the parties herein for the respondent to produce the work records of the 3 claimants herein where such records exist. Without such records, it will be the case of the claimants as

presented against the respondents who has refused to comply with mandatory provisions of section 10 of the Employment Act. The court shall therefore not force the respondent to produce records that are required of them to produce.

Unionisation is a constitutional right. Such cannot be negated by the employer for any reason not justified in law or the constitution. Where the claimants are unionised as established above and they wish to have recognition by the respondent, the requisite threshold, the applicable procedures precedent are set out under the Labour Relations Act. I find no material facts at this instance that the respondent has refused and or failed to abide the law with regard to the unionisation of the claimants.

**The application dated 23<sup>rd</sup> August, 2016 is hereby dismissed with costs to the respondent.**

Delivered in open court at Nairobi this 17<sup>th</sup> day of July, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

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