



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**CAUSE NO.124 OF 2017**

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

**v**

**KONGONI RIVER FARM (Star Division).....RESPONDENT**

**RULING**

1. The Kenya Plantation and Agricultural Workers Union (Union) instituted legal proceedings against Kongoni River Farm (Star Division), (Respondent) on 17 January 2017 and the issue in dispute was stated as *Violation of Section 20 & 21 of the Employment Act, 2007 Laws of Kenya*.
2. Simultaneously filed with the Memorandum of Claim was a motion under certificate of urgency seeking
  1. ...
  2. **THAT**, an order be and is hereby issued Restraining the Respondent by itself, it's agents, assigns, servants and or representatives from terminating, dismissing, and or suspending any employee for demanding printed payslips as a result of the internal memo by the respondent requiring all employees to open email accounts.
  3. **THAT**, the internal memo from HR office to all the employees requiring to open accounts for purposes of viewing of the payslips be and is hereby set aside and or invalidated.
  4. **THAT**, costs of this application be provided for.
3. When the motion was placed before the Court on 17 March 2017, it directed that it be served for *inter partes* hearing on 20 March 2017.
4. The motion was served and when it came up for *inter partes* hearing as scheduled, Mr. Khisa, Assistant Secretary General for the Union indicated that they had agreed that the Respondent be given more time to file responses to the motion.
5. Mr. Musembi who held brief for Mr. Ntabo on his part informed the Court that the Respondent did not have an objection to the grant of prayer 2 in the motion.
6. The Court therefore allowed prayer 2 of the motion, on the consent of the parties, and directed the Respondent to file a Response, documents and witness statements before 13 April 2017, and that *Agreed*

Issues before 30 May 2017.

7. A week later, 29 March 2017, the Respondent through a new firm of advocates filed a motion under certificate of urgency seeking

1. ....

2. THAT this Honourable Court be pleased to Stay, discharge, set aside, review or vary the Court Orders issued by Honourable Justice Stephen Radido on 20<sup>th</sup> March, 2017.

3. Cost of the Application be provided for.

8. The Court directed that this latter application be served for *inter partes* hearing on 31 March 2017. Because the Union had not had adequate time to respond to the application, it was rescheduled for hearing to 11 April 2017.

9. The parties presented their arguments on 11 April 2017.

10. Mr. Achiando who urged the application for the Respondent basically submitted that the advocate on record at the time the consent order was issued did not have express and/or implied authority to enter into the consent.

11. The counsel also urged that the Union had failed to disclose material facts to the Court when it moved Court.

12. According to the Respondent, the Union had failed to disclose that its members had participated in an unprotected strike which was the basis of disciplinary action.

13. The Union in opposing the application contended that there was no evidence before Court of a strike, any employee had faced disciplinary action on account of the strike, that issuance of a hard copy pay slip had statutory anchor in section 20 of the Employment Act, 2007 and that the consent order was validly entered into.

14. In the view of the Court the issues raised are rather straight forward.

### **Whether the Respondent's then Advocate had express or implied authority to enter into a consent**

15. The firm of Ntabo & Co. Advocates entered a Memorandum of Appearance on 20 March 2017 to act on behalf of the Respondent.

16. When the application was called out and addresses made by counsels on 20 March 2017, the said Memorandum of Appearance was on record.

17. The Court therefore could not doubt that Mr. Musembi had legitimate instructions to hold brief for Mr. Ntabo. Legally, therefore there was nothing to suggest that the advocate could not compromise the application.

18. As to whether the advocate on record had limited instructions which did not include instructions to enter into a consent as contended by Mr. Achiando, that is a question which the Court cannot resolve without hearing full facts and arguments from the said firm of advocates, Ntabo & Co. Advocates and the Respondent.

19. There was no affidavit from the said firm nor did the Respondent's current advocate move Court to direct the said firm of advocates to disclose the instructions it had been given.

20. The Court therefore concludes that the consent was validly entered into by an advocate acting for the

Respondent.

### **Non-disclosure of material facts**

21. It is true that the Union did not disclose in its pleadings and or affidavits that a strike had taken place, and that disciplinary action had been commenced against several employees.

22. If indeed an unprotected strike had taken place, and the Court does not doubt one took place, that would have been a fact which required disclosure by the Union and it would have been a ground to review and or vacate the orders of 20 March 2017.

23. However, in the instant case, the Court did not have the opportunity to examine the facts which had been presented before it by 20 March 2017, and the reason was simple, the parties agreed to compromise the motion by entering into a consent.

24. The Court can assume that the advocate on record at the material time had appropriate instructions at the material time.

25. The Court therefore concludes that any material non-disclosure should not affect the consent orders and directions issued on 20 March 2017.

### **Conclusion and Orders**

26. The upshot of the above is that the Court finds no merit in the motion dated 27 March 2017 and orders that it be dismissed.

27. Costs in the Cause.

**Delivered, dated and signed in Nakuru on this 14<sup>th</sup> day of July 2017.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant      Mr. Khisa, Assistant Secretary General, Kenya Plantation & Agricultural Workers Union

For Respondent    Mr. Achiando instructed by Okweh Achiando & Co. Advocates

Court Assistant    Nixon