

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 146 OF 2016

JASON OYUGI MATOKE & 15 OTHERS.....CLAIMANTS

VERSUS

BIDCO AFRICA LIMITED.....RESPONDENT

RULING

1. The Claimants' application brought by Notice of Motion dated 4th February 2016 seeks an order directing the Respondent to pay the Claimants their withheld salaries for the months of May to September 2015. The application which is supported by an affidavit sworn by the 10th Claimant, Stephen Kamemba Mungai is based on the following grounds:

- a) The Claimants were suspended and forced out of the workplace from 13th May 2015;
- b) On 14th Augusts 2015, the Claimants received dismissal letters dated 13th August 2015;
- c) To date, the Claimants have not been paid their withheld salaries for the period they were suspended up to the time they received their dismissal letters;
- d) The Claimants have been living under difficult conditions as a result of unfair dismissal from employment;
- e) The Claimants consider the withholding of their salaries to be a violation of their constitutional rights;
- f) The Respondent will not suffer any prejudice if the order sought is granted.

2. The Respondent's response is contained in a replying affidavit sworn by its Human Resource Officer, Zipporah Mburu on 9th March 2016. She depones that the 1st to 15th Claimants worked as general workers on the shop floor in production and were paid according to the number of days worked. They earned a daily rate of Kshs. 484, inclusive of house allowance, with extra time worked being compensated as overtime.

3. Mburu further depones that the 16th Claimant worked as a skilled general worker in the Engineering Department, earning a daily rate of Kshs. 638.40, inclusive of house allowance. He was also compensated for any extra time worked.

4. On 10th March 2015, the Claimants proceeded on an unprotected strike, without giving any notice. The Respondent reported the matter to the District Labour Officer vide letter dated 16th March 2015. The Claimants went on subsequent unprotected strikes on 24th March 2015 and 27th April 2015. The Respondent states that each time the Claimants proceeded on an unprotected strike, it incurred huge losses in production.

5. The order sought by the Claimants is in the nature of a mandatory injunction. This is an extra ordinary relief to be granted in exceptional circumstances, upon the exercise of sound judicial discretion. Indeed as held by **Aburili J** in ***Maher Unissa Karim v Edward Oluoch Odumbe [2015] eKLR*** the test for granting a mandatory injunction is different from the one for prohibitory injunctions as settled in ***Giella v Cassman Brown [1973] EA***. Citing the Court of Appeal decision in ***Kenya Breweries Ltd v Washington***

Okeyo (2002) EA 109, Aburili J confirmed that a mandatory injunction should not be granted, in the absence of special circumstances.

6. This remains good law. In the case before me, no special circumstances have been presented, much less proved. In fact, the question as to whether the Claimants earned the salaries claimed in this application is a contentious issue, which can only be determined in a full trial.

7. For this reason, the claimants' application dated 4th February 2016 is declined with costs in the cause.

8. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF NOVEMBER 2017

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JUDGE

Appearance:

Mr. Enonda for the 1st – 5th & 9th-15th Claimants

Mrs. Omondi for the Respondents