



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

**AT KERICHO**

**CAUSE NO. 2 OF 2015**

***(Before D. K. N. Marete)***

**KENYA PLANTATION &**

**AGRICULTURAL WORKERS UNION .....CLAIMANT**

**VERSUS**

**UNILEVER TEA (K) LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter came to court vide a Memorandum of Claim dated 12th January, 2015. The issue in dispute is there in cited as;

*“Wrongful and unfair dismissal of Wesley Korir and 46 other employees”*

The Respondent in an Amended Memorandum of Defence filed on 16th February, 2016 denies the claim and prays that the same be dismissed with costs. She also raises a Counter – Claim

The claimant’s case is that as a union in this sector, she has a valid Recognition Agreement with the respondent. They have also negotiated several Collective Bargaining Agreements in their course of business.

The claimant’s case is that she has been engaging the respondent on CBA negotiations for the period 2014 - 2015 and are agreed on most of the items except wages, retirement age, gratuity and hours of work. The respondent has deliberately declined and or refused to conclude the CBA thereby leading to a stalemate.

The claimant’s further case is that the action by the respondent aggrieved the workers prompting them to seek audience and instead of the respondents addressing the workers grievances they resorted to intimidation and also an *Ex-parte* injunction Industrial Court Cause No.449 of 2014. This was made due to misinformation and non disclosure of material facts. This is as follows;

- *THAT, the application is certified urgent as urgent for inter-partes hearing on 9<sup>th</sup> October 2014 at 9.00a.m.*
- *THAT, pending the hearing and determination of this application, this Honourable Court and is*

*hereby pleased to grant an order of injunction restraining the Respondent, its officials and/or agents and its members and/or its representatives from continuing with strike or inciting its members into continuing with the strike and an order prohibiting the Respondents members and/or the claimants employees from remaining on strike.*

- *THAT, pending the inter-partes hearing of the application dated 22<sup>nd</sup> September, 2014 all the claimants' members being in the Respondents employment to resume work immediately and not later than the 25<sup>th</sup> September, 2014 and all matters relating to the strike in issue to be resolved in accordance with the grievance procedures as agreed between the parties.*
- *THAT, parties to meet towards resolving the grievances in issue by close of 25<sup>th</sup> September, 2014 and to report to court the outcome of the proceedings by hearing date.*

The claimant's other case is that in compliance with the orders of court, the County Labour Office of Kericho summoned parties to a meeting on 21st September, 2014 to resolve partment issues but the respondent refused to show up. Further, instead of complying with the orders of court, the respondent's proceeded to issue show cause letters to the grievants and thereafter summarily dismissed them from employment in contravention of the orders of court.

The claimant avers that the respondent in so acting violated Order Nos. 3 and 4 issued on 24th September, 2014 and also acted contrary to the spirit of tripartism. This was also a miscarriage of justice and an abuse of the process of court moreso bearing in mind that the application in issue was dismissed with no order as to costs.

She prays as follows;

*16) The dismissal of Wesley Korir and forty six others is wrongful, unfair and an abuse of the court process.*

*17) That Wesley Korir and forty six others be and are hereby forthwith reinstated to their employment without loss of privileges and benefits.*

*That in the alternative should the above not be practical the Honourable Court do issue a declaration that;*

*18) The grievants dismissal be and is hereby reduced to normal termination of employment.*

*19) The Respondent pay the grievant full terminal benefits and 12 months compensation calculated at gross rate for wrongful loss of employment within two weeks from the date of Judgement in default the principal amount to attract interest at court rates and execution to issue.*

*20) The Respondent do issue a certificate of service to each of the forty six grievants forthwith.*

*21) That costs of this suit be provided for.*

The respondent denies wrongful and unfair dismissal of the claimant's members and avers as follows;

*(i) The grievants in flagrant disregard of the law and procedure went on a strike and declined to return to work. As such, the grievants behavior constituted gross misconduct and their summary dismissals were warranted and justified.*

*(ii) The grievant's dismissals were carried out in accordance with the applicable provisions of the law and the Collective Bargaining Agreement (hereinafter 'CBA')*

*(iii) This cause is brought in bad faith and the Claimant's claims in these proceedings are false and*

*fraudulent.*

*(iv) The Claimant is not entitled to the orders sought herein.*

The respondent's further case is expressed as follows;

*4) The Respondent's employees who were part of the claimant's union proceeded on a strike on 22<sup>nd</sup> September 2014. Despite the Respondent pleading with them to return to work, the employees declined and absented themselves from their duties. During the strike, the employees committed various criminal activities which included the uprooting of tea bushes and destruction and burning of various company property. The Respondent suffered substantial losses amounting to kshs.18,130,173/- as a result of the grievants' actions.*

*Annexed hereto and marked "UTKI" is damages report indicating the estimated cost of damage per item.*

*5) The employees were issued with various warnings and ultimatum to resume work which they refused to heed. The strike action was unprocedural, unjustified and unreasonable. Further, the claimant had neither declared a dispute nor issued any strike notice prior to the strike.*

*6) The Honourable Justice Byram Ongaya on 24<sup>th</sup> September, 2014 granted orders restraining the strike action and directed the employees to return to work immediately and not later than 25<sup>th</sup> September 2014 as parties tried to resolve the grievances. The Respondent's employees however continued with the strike until 28<sup>th</sup> September 2014. The following is a sequence of events that occurred after the order was made:*

*(i) The Union sent a letter dated 22<sup>nd</sup> September 2014 to its members informing them of the court's decision. In addition, the company put up a notice informing the employees of the court's order on 24<sup>th</sup> September 2014.*

*(ii) The District Labour Officer, Grace Mweresa together with the union officials visited the Respondent's tea estate on 24<sup>th</sup> and 25<sup>th</sup> September 2014 and duly informed the employees of the court order. The claimant's officials were given full access to address the employees despite the fact that they had not alerted the management of their intended arrival/meeting.*

*(iii) As at 25<sup>th</sup> September 2014 at 10.30 am, 2,161 employees had not reported to work in Kericho, Kapgwen and Jamji estates. Parties had a meeting with the aforesaid DLO on 25<sup>th</sup> and 26<sup>th</sup> September 2014. The employees all resumed work on 29<sup>th</sup> September 2014.*

The respondent's further case is a denial of a violation of Orders 3 and 4 issued by court on 24<sup>th</sup> September, 2014. It is her averment that these orders did not deter her from taking disciplinary actions against the employees and was therefore entitled to take a disciplinary action against employees who for among other reasons;

- Absented themselves from the place of work without lawful cause in contravention of section 44 (4) (a) of the Employment Act, 2007 and clause 24 of the CBA.
- Failed to follow management's instructions to carry out their duties contrary to section 44 (4) (c) of the Employment Act and clause 24 of the CBA.
- Participated in the destruction of company property contrary to section 44 (4) (g) of the Employment Act and clause 24 of the CBA.

The respondent's penultimate case is that the dismissal of the grievants were done in accordance with the

law and CBA *inter partes*. The respondent pursued all procedural aspects of issuing warnings, show cause letters and also instituting disciplinary proceedings in which the grievants were represented by 15 shopstewards.

The respondent's further denies a case of reinstatement on grounds that the relationship with the grievants is irretrievably broken down due to their illegal and unruly behavior. Again, reinstatement would send the wrong signals to other members of staff as regards the consequence of unauthorized absence from work. They are also not entitled to the relief sought.

In conclusion the respondent raises a Counter – Claim and seeks repossession the housing granted to the grievants by virtue of their employment as well as a refund of the rent, electricity, water, garbage collection, cleaning and security costs incurred thereof. It is her further case that it is entitled to mesne profits from 9 th October, 2014 to the date the grievants hand over possession of the premises to the Respondent. The grievants have remained in occupation of the premises for 15 months. As such, the sum of Kshs.2,149,149 inclusive of the rent, electricity, water, garbage collection, general maintenance and security costs is owed to the respondents to date.

She prays as follows;

- a) *An order that the grievants vacate the Respondent's housing and handover possession of the same to the Respondent.*
- b) *Mesne profits of Kshs.2,149,149 which sum includes the Respondent's costs for providing the grievants with electricity, water, garbage collection, general maintenance and security costs and which continues to accrue until the grievants vacate the Respondent's premises and hand over possession thereof to the Respondent.*
- c) *Interest on (b) above at commercial rates with effect from 9<sup>th</sup> October 2014 until payment in full.*
- d) *Costs.*
- e) *Any other order relief the Honourable Court may deem fit to grant.*

The matter came to court variously until 24th November, 2017 when the parties agreed on disposal by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in her written submissions dated 29th November, 2017 pegs her case on the interim orders of court issued on 24th September, 2014 as follows;

- a) .....
- b) .....
- c) *That pending inter-partes hearing of the application dated 22<sup>nd</sup> September, 2014 all the claimants members being in the Respondents employment to resume work immediately and not later than 25<sup>th</sup> September, 2014 and all matters relating to the strike in issue to be resolved in*

accordance with the grievance procedures as agreed between the parties. (emphasis mine)

d) That the parties to meet towards resolving the grievances in issue by close of 25<sup>th</sup> September, 2014 and to report to Court the outcome of the proceedings by hearing dated. (emphasis mine)

e) .....

f) .....

g) That parties are encouraged to compromise the suit.

...from the contents of the show cause letters it's clear that the grounds relied upon in the summary dismissal letter is based on 'the matters relating to the strike in issue' which issues the Honourable Court in Cause No.449.

The claimant submits that the entirety of the issues raised by the respondent's are based on the court orders issued on 24th September, 2014. These orders spelt out the methodology for dealing with the strike be amicably negotiated and thrashed out with a report to court at the next appearance. The court also ordered an immediate resumption to duty by the grievants and in all, the parties were ordered to compromise the suit. The respondent flouted these orders of court and therefore the resultant chaos leading to the situation we now find ourselves. This, the claimant submit invalidates any claim to lawful termination of employment by the respondent.

The claimant also discounts the Counter – Claim by the respondent for want of proof. It is her submission that no evidence have been tabled by the respondent to proof the claimant is responsible for the purported financial loss allegedly suffered by the respondent. It is her (respondent's) case to proof. The claimant submits that she cannot be held responsible for alleged losses that she did not

cause. Here she relies on the authority of **Kipkebe Limited v. Peterson Ondieki Tai (2016) eKLR** the court held that:

*'It is trite Law in evidence that he who asserts must prove this case. No evidence was adduced by the plaintiff. In such cases the burden of proof lies with whoever would want the court to find in his favour in support of what he claims.'*

107 "Whoever desires any court to give judgement as to any legal right or liability depended on the existence of facts which he asserts must prove that those facts exist"

108 "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side"

The respondent on the other hand submits a case of lawful termination of employment through dismissal. It is her case that the grievants were dismissed due to misconduct arising out of an illegal strike at the work place. This industrial action resulted in massive destruction of the respondent property besides affecting productivity as a consequence of disruptions and absence from work. She blames this on the claimant's poor management of her membership and supports her case on the authority of **Mohamed Yakub Athman & 29 Others v Kenya Ports Authority [2016] eKLR** this Honourable Court observed that;

*"Unions shall discourage any breach of the peace or civil commotion by their members; and every employee has the right to approach management on grievances, but such grievances should not be communicated violently. Grievances should be handled through the existing industrial relations machinery...Trade Unions representing Employees must be involved from the beginning, before resort to any industrial action. There is no place in our Constitution for outlaw strikes."*

She further seeks to rely on the authority of **Supreme Spring, A Division of Metindustrial Ltd vs**

**Mewusa & Others Case Number J 2067/10** the Labour Court of South Africa held as follows with regard to the duty imposed upon Trade Unions in controlling the behavior of their members in the course of industrial action.

*“The Respondent’s thesis that a trade union, as a matter of principle, has a duty to curb unlawful behavior by its members indeed enjoys merit. Indeed the principle of union accountability for its actions or omissions is beginning to gain recognition.”*

The respondent in support of the Counter – Claim submits that the grievants were entitled to housing and other related benefits during the pendency of their employment. On dismissal these ceased and therefore her entitlement to compensation for any continued enjoyment of these benefits thereafter. This also applies to losses arising out of destruction of property during the strike by the grievants – union members. She submits as follows;

*58. The Respondent submits that the Claimant Union cannot extricate itself from its members as it seeks to do under paragraph 50 of its written submissions. There can be no distinction between the Union and the grievants as the Recognition Agreement between the parties provides that the Claimant Union is sole Labour Organisation representing the Respondent’s employees. It is also noteworthy that in the suit herein, the Claimant is acting on behalf of the grievants and not in its own capacity; therefore any claim against the Claimant is essentially a claim against it and its members jointly and severally. See also the South African case of **Supreme Spring, A Division of Metindustrial Ltd vs MEWUSA** (supra) on the duty of the Union to curb the unlawful behavior of its members.*

I find a case of lawful termination of employment in the circumstances. As agreed, the issues relating to this cause arise out of a strike at the respondent’s work place in September, 2014. The parties resorted to court and the matter was managed one way or the other. This however did not deter the strike thereby

leading to disciplinary action and subsequent dismissal of the grievants from employment. The respondent submits a case of unwarranted destruction of her property and disruption of work all leading to massive losses. It is her case that this could have been avoided by the swift action of the claimant in the management of her members. It was not done. A finding of lawful termination of employment therefore suffices in the circumstances.

The place of industrial action, or do we call it strikes in the management of industrial relations in our system should now be re-evaluated. What with the now rampant and customary practice of seeking recourse to this at all times in the event of disagreement and misunderstanding between employers and employees? We must now wake up to the realization of the impact of strikes to the economy and consequential mainstay of our society. This is by a total reorganization and placement of strikes to their proper place. Disharmony, disruption and wanton destruction of property are not the essence of structured strikes or fair industrial relations. This, however, should not be misconstrued as a licence for mischief by recalcitrant employers. Parties beware.

The Counter – Claim is unfounded and not proven. It cannot be sustained in the circumstances.

On a finding of a case for lawful termination of employment, the claimant is disentitled to the relief sought.

I am therefore inclined to dismiss the claim with costs to the respondent.

Delivered, dated and signed this 15th day of December, 2017.

**D.K.Njagi Marete**

**JUDGE**

## Appearances

1. Mr. Khisa for the claimant union.
2. Mrs Opiyo instructed by Kaplan & Stratton Advocates for the respondent.