



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 4 OF 2012

(Originally Nairobi Cause No. 1145 of 2011)

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION

CLAIMANT

v

AGRICULTURAL DEVELOPMENT CORPORATION

RESPONDENT

JUDGMENT

1. The Kenya Plantation & Agricultural Workers Union (Union) commenced legal proceedings against the Agricultural Development Corporation (Respondent) around 12 July 2011 seeking

4.1 The Respondent be compelled to end the lock out of the 6 employees namely:-

1. Mr. Joseph Juma Nyongesa
2. Mr. James Lokharu Longiti
3. Mr. Moses Lobuin
4. Mr. John Loleny
5. Mrs. Gladys Ndiwa
6. Ms. Agneta Achitsa

4.2 The Respondent be compelled to pay 20 months salary arrears for the grievants and all other employees in the establishment.

4.3 The Respondent be ordered to pay underpayment of wages to the grievants and all other employees in employment.

4.4 The Respondent be ordered to stop further Lock-out, suspension, termination and or dismissal of the claimant members.

2. Together with the Memorandum of Claim was a motion under certificate of urgency.
3. On 19 July 2011, Mukunya J (as he then was) issued restraining orders stopping the Respondent from locking out or dismissing employee members of the Union.

4. The Respondent filed a Memorandum of Response on 18 August 2011 and a replying affidavit to the motion.
5. The Respondent thereafter served upon the Union a Notice to Produce check-off lists and other particulars including of underpayments and other documents.
6. On 15 November 2011, the Union filed in response to the Notice to Produce what it referred to as *Applicants/Claimants Supplementary Memorandum*. This Supplementary Memorandum had check-off forms.
7. On 4 December 2012, the parties were advised by the Deputy Registrar that the file had been transferred to Nakuru for hearing and determination.
8. The Cause came up for hearing on 31 January 2013, but was taken out of the hearing list because the Respondent had not received a notice from the Court.
9. When the Cause next came up for hearing on 7 May 2013, the Union sought and got an adjournment to 10 June 2013, but even on this latter date, it sought an adjournment to enable it consider further documents filed by the Respondent.
10. The adjournment was again granted with an order that the parties agree and file issues for determination before 21 June 2013. The issues were not filed as ordered. The Court further directed that all the Grievants be called to testify.
11. On 9 July 2013, the Grievants filed affidavits deposing as to membership of the Union and to being employees of the Respondent. They all deposed that they served the Respondent upto various dates in July 2011.
12. The hearing commenced on 18 July 2013, when the Union called 2 to testify. Thereafter the hearing was adjourned to 22 October 2013 but it did not take off due to various reasons.
13. On 25 August 2014, the firm of E.M. Juma & Ombui came on record for the Respondent and on 29 October 2014, I directed that the Cause proceed from where it had reached.
14. On 9 June 2015, the Union informed the Court that it wished to close its case and the Court directed its case to be closed and fixed the Respondent's case for 5 November 2015.

Union's case

15. The first to testify on behalf of the Union was Joseph Juma Nyongesa (a Grievant). His testimony was that his employment was terminated on 26 July 2011. He contended that the Respondent's Manager called Charles Mulimo instructed him to go home and wait to be recalled. He made reference to his union activities at the material time.
16. He also stated that he had outstanding wages which had not been paid (May, June, September and November 1999, January to October 2000, March to June, August to October 2001, October to December 2002, November 2007, October and November 2010, August to September and November to December 2010 and July 2011).
17. This Grievant did not testify at all about a lock-out by the Respondent.
18. The other witness was Alice Namalwa. She stated that at time of testimony, she was still in employment (18 July 2013).
19. She also stated that she was not paid wages for part of 2007 and 2008, and she produced a document indicating outstanding arrears for the Grievants as exhibit C2.
20. But, in cross examination, she stated that she was not one of the Grievants.
21. On the allegations of lock-out, she stated that the 6 Grievants were evicted upon joining the Union and their houses were demolished.

Respondent's case

22. The Respondent called its Human Resources Officer, Kitale and 2 other witnesses.
23. The Human Resources Officer stated that Joseph Juma Nyongesa was a casual employee until 30 June 2011, but was thereafter re-engaged by a contractor sourced by the Respondent, while the other 5 Grievants never worked with the Respondent.
24. According to the witness, Joseph Juma Nyongesa failed to collect his earned wages.

Evaluation

25.The evidence of Alice Namalwa (Union’s second witness) does not appear to the Court to be credible considering that she was not present when and where the alleged events occurred. She is not even named as one of the Grievants.

Lock-out

- 26.It was incumbent upon the Union to prove that the 6 Grievants were employees of the Respondent and that they were locked out.
- 27.No evidence was led to prove that the Grievants except Joseph Juma Nyongesa were employees of the Respondent.
- 28.Such evidence could have been documentary or oral as the statutory framework envisages oral contracts.
- 29.It was equally upon the Union to prove a lock-out.
- 30.Even on this score, the Union did not discharge the burden of proving there was a lock out. The Grievant who testified did not remotely suggest there was a lock-out. His contention was that he was dismissed.
- 31.The other Grievants were not called and the Court can only reach the conclusion that the Union has failed to prove a cause of action of lock-out.

Salary arrears

- 32.The evidence before Court on account of salary arrears relates only to Joseph Juma Nyongesa. The claims in respect of the other Grievants cannot be sustained when there is no proof that they were employees of the Respondent.
- 33.As for Mr. Nyongesa, the Respondent’s witness admitted that he had uncollected wages. The same are legally due to him.
- 34.Just for the record, the Court notes that the cause of action herein was not presented on the papers as one for recognition agreement.
- 35.Before concluding, the Court notes from the record that on 12 January 2012, the Union was directed to pay the Respondent’s costs of Kshs 25,000/- and Court adjournment fees. On 18 March 2015, the Court again ordered the Union to pay adjournment fees and Respondent’s costs of Kshs 3,000/-.
- 36.There is nothing on record to demonstrate the Union complied with the orders.

Conclusion and Orders

- 37.The upshot of the foregoing is that the Court finds merit only in respect of the earned wages/salary arrears due to Joseph Juma Nyongesa and which wages the Court orders the Respondent to compute and pay to him within 7 days.
- 38.All the other heads of claim/relief are dismissed.
- 39.There will be no order as to costs.

Delivered, dated and signed in Nakuru on this 5th day of February 2016.

Radido Stephen

Judge

Appearances

For Union	Ms. Wachira, Advocate/Mr. Khisa (Unionist)
For Respondent	Mr. Juma instructed by E.M. Juma & Ombui Advocates
Court Assistant	Nixon