



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 12 OF 2014

IN THE MATTER OF ARTICLE 41(1),(2),(A) & (5) OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 59(1),(2),(3) & (5) OF THE LABOUR RELATIONS ACT

AND

IN THE MATTER OF SECTION 10(3),(E) OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF SECTION 40(1),(A),(B), (C) & (D) OF THE EMPLOYMENT ACT

AND

IN THE MATTER OF CONTRVENTION OF THE RIGHTS UNDER CLAUSE 25 OF THE PARTIES C.B.A.

BETWEEN

KENYA PLANTATION & AGRICULTURAL WORKERS

UNIONPETITIONER

AND

KARUTURI LIMITED(IN RECEIVERSHIP).....1ST RESPONDENT

KIERAN DAY & IAN SMALL (JOINT RECEIVERS & MANAGER).....2ND RESPONDENT

JUDGMENT

1. The Kenya Plantation & Agricultural Workers Union (Union) commenced legal proceedings against Karuturi Ltd (in receivership) (1st Respondent) and Kieran Day & Ian Small (Joint Receivers & Manager) (2nd Respondent) on 30 July 2014 alleging that its members rights as agreed in a collective bargaining agreement had been violated.
2. Filed together with the Petition was a motion under certificate of urgency.
3. Ongaya J before whom the motion was placed on 30 July 2014 ordered that the *status quo* be

- maintained.
4. On 4 August 2014, the Union lodged another application seeking that leave be granted to commence contempt proceedings against several named persons.
 5. When the initial motion was served upon the Respondents, they raised a Preliminary Objection on the ground that the application was incompetent and fatally defective.
 6. The Respondents filed a Response to the Petition on 10 October 2014.
 7. On 17 October 2014, the Respondents filed an application seeking an order prohibiting a strike which had been called by the Union. The Court issued an order prohibiting the strike.
 8. The Court heard the 2 applications filed by the parties and delivered a ruling on 20 February 2015. The Court dismissed both applications and directed the parties to go for conciliation before the Commissioner for Labour.
 9. The Conciliator acting on behalf of the Commissioner received submissions from the parties and filed a report with the Court on 14 April 2015.
 10. The Union filed its version of issues for determination on 26 May 2015, while the Respondents filed their version of issues for determination on 5 June 2015.
 11. The Union filed its submissions on 18 September 2015, while the Respondents filed submissions on 30 October 2015, and on 9 February 2016, the Court directed that judgment would be delivered on 8 July 2016.
 12. However, the date for delivery of judgment was brought back to today on the application of the Union.

Background

13. The Union and Karuturi Ltd entered into a recognition agreement around 29 November 2013.
14. On 10 February 2014, CFC Stanbic Bank Ltd appointed the 2nd Respondents as Receiver and Manager of the 1st Respondent.
15. Upon their appointment, the 2nd Respondent issued a general notice to all employees and an excerpt of the notice stated that

By virtue of our appointment, all employees' contracts that existed with the company prior to our appointment on 10th February 2014 were effectively terminated. The provisions of the Companies Act CAP 486 (section 311) Laws of Kenya provides that all employees in the Company's employment at the date of appointment are entitled to a preferential payment of salaries and wages in arrears for a period of four months prior to the date of our appointment subject to a maximum limit of KES 20,000

.....

Any amount due over and above the preferential amount of KES 20,000 together with other claims that you may have against the Company including leave pay, gratuity etc will rank as an unsecured claim against the Company in liquidation to be dealt with by a liquidator if and when one is appointed

....

16. The notices all set out each employee's dues (salaries, gratuity and leave).
17. Around 1 April 2014, the 2nd Respondents purported to issue new contracts of employment to the employees. Under the new contracts, the employees were to be engaged on similar terms and conditions save that the duration of the contracts was to run during the tenure of the receivership.
18. Around 10 June 2014, the Respondents entered into a Memorandum of Agreement with the Union to the effect that the 1st Respondent had rejoined the Agricultural Employers Association (Association) and would be bound by the terms of the collective bargaining agreement between the Union and Association.
19. The said collective bargaining agreement between the Union and the Association had been registered by the Court on 27 February 2014 under RCA No. 68 of 2014.

20. It is in this respect that the Union moved Court contending that the employees had been declared redundant unlawfully and were being offered new contracts before payment of accrued dues/benefits in violation of the Constitution, various statutes and the collective bargaining agreement.
21. The Union sought the following prayers

17. THAT, Section 311 of the Companies Act, Cap 486 Laws of Kenya does not suspend and/or override the provisions of Section 59(1), (2),(3) & (5) of the Labour Relations Act, 2007 as read together with the provisions of Section 10(3),(e) of the Employment Act, 2007 Laws of Kenya where a CBA exists.

18. THAT, the Petitioners have a Constitutional right under Article 41(5) of the Constitution of Kenya to enjoy the benefits of an existing CBA

19. THAT, the 1st Respondent as agents of the employer be and hereby directed to discharge all the past legal obligations of the Company to all its employees and pay terminal benefits to all its employees in accordance with the redundancy clause 25 of the parties CBA

20. THAT, the Petitioners' are entitled to 12 months compensation for wrongful loss of employment.

21. THAT, the terminal benefits in (21 ?) above be paid within 21 days from the date of judgment in default the principal amount to attract interest at Court rates and execution to issue.

22.

23. ...

22. With the background the Court can now address the issues as identified by the parties.

Whether appointment of Receiver/Managers terminated the employees' contracts

23. The Union's submission on this issue was that the Respondents had not demonstrated that they had re-engaged the employees (afresh) because no formal contracts post receivership had been produced. The Union cited section 9 of the Employment Act, 2007.
24. In the same vein, the Union urged that the contracts of the employees had not been terminated because the 1st Respondent was under the complete control and management of the 2nd Respondent.
25. The Respondents urged that upon the appointment of the Receivers/Managers they were not bound to carry on with the contractual relationships and that in effect all the contracts stood terminated on the appointment date and could only be continued at the option of the Receivers/Managers.
26. For this submission, the Respondents cited *Gavin Lightman on the Law of Receivers of Companies* and section 67 of the Employment Act, 2007.
27. The Companies Act and written text on receivership law seem to suggest that contracts (employment) stand frustrated by operation of the law where a company is placed under receivership and that such employment contract would subsist at the option of the Receiver/Manager.
28. The primary statute governing employment relationship (Employment Act, 2007) and more particularly sections 43 and 45(2)(b)(ii) envisage an employer having valid and fair reasons to terminate an employment relationship.
29. A Receiver/Manager would constitute an employer for the purposes of the Employment Act, 2007 (see definition of employer in section 2).
30. The question therefore begs whether a Receiver/Manager also ought to go through the rigours of the Employment Act, 2007 in discharging an employee upon appointment.

31. That there are two distinct statutory instruments which appear to be incongruous is not in doubt.
32. Appointment of Receivers/Managers is usually announced to the world at large through appropriate notices. Such a notification was no doubt made in the instant case.
33. The employees were also individually informed of the status of their employment upon the appointment of a Receiver/Manager on 31 March 2014.
34. In the Court's considered view, the appointment of Receivers/Managers discharge the employment contract and any continuation thereof is at the option of the Receiver/Manager and therefore the contracts herein were discharged by operation of law, and through the letters dated 31 March 2014.

Whether contracts post receivership had more favourable terms?

35. The *contracts* placed before Court were specimen or intended contracts. No material was placed before the Court to enable it determine whether the terms and conditions of service post appointment of the Receivers/Managers were less favourable to what the employees had previously enjoyed, what the statute provided for or the terms of the collective bargaining agreement in place.
36. With the dearth or inconclusive material and no evidence that the contracts were perfected by employees' signature, the Court is unable to answer this question as posed by the Union.
37. However, the Court wishes to observe that the terms and conditions agreed in a collective bargaining agreement are incorporated into an employee's contract by operation of the law, and therefore unless there is mutual agreement, an employer may not offer less favourable terms and conditions.

Whether members of Union are entitled to terminal benefits in accordance to the collective bargaining agreement

38. A collective bargaining agreement is the product of mutual negotiations and by operation of the law, the terms and conditions agreed therein accrues to the employee.
39. Any benefits or dues payable therefrom accrue to the employees but whether an employer under receivership can pay the same is a different factual and legal issue.

Are Receivers/Managers liable for liabilities accrued under employment contracts?

40. The Respondents submitted that they could only be liable to the employees from the time the Receivers/Managers took over and during the receivership and they referred to 1 March 2014 as the effective date.
41. The Respondents further submitted that they had not adopted the pre-receivership contracts and that any claims should be directed at the Company and not the Receivers.
42. In the Court's view, there are express statutory provisions which address the question of liabilities of Receivers/Managers while a company is under receivership and it is not within the mandate of the Court to rewrite and or override the law. That is a task for the legislature.
43. In any case the Respondent is now under liquidation and the Union/Grievants ought to lodge their claims with the liquidator for purposes of proof of the same as debts.

Do employees' dues rank in priority with secured creditors? /Inconsistency between section 311 of Companies Act and Labour Relations Act.

44. In my view sections 95 and 311 of the Companies Act Cap. 486 provide the answer to this question and any hardship which the law may occasion to employees in these times where the rights of employees have been given constitutional and statutory underpinning is best left to the legislative organs to resolve.
45. The Petition herein, in the Court's view was at most raising academic questions as there are clear statutory provisions dealing with the issues raised.

Conclusion and Orders

46. The upshot of the foregoing is that the Petition has no merit and is dismissed with no order as to costs because of the social partnership between the Union and employer.

Delivered, dated and signed in Nakuru on this 6th day of May 2016.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Khisa, Organising Secretary, Kenya Plantation & Agricultural Workers Union

For Respondent Mr. Wamaasa instructed by Hamilton Harrison & Mathews Advocates

Court Assistant Nixon