



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

**AT MOMBASA**

**CAUSE NO.946 OF 2015**

**MOMBASA APPARELS (EPZ) LIMITED.....CLAIMANT**

**VS**

**TAILORS AND TEXTILES WORKERS UNION.....RESPONDENT**

**RULING**

**Introduction**

1. There are two applications for consideration herein. The first one is the claimants Notice of Motion dated 21.12.2015 seeking conservation order to prohibit or restrain the respondent, its agents or members from inciting or calling the claimants employees in Unit 2 production line at Changamwe (grievants) to participate in an illegal strike or any other form of Industrial action on account of the claimants decision not to renew or extend their fixed term contracts after their expiry on 24.12.2015. The second application is the Respondent's Motion dated 18.1.2016 seeking injunction to restrain the claimant from hiring other employees to replace the grievants at the said Unit -2 pending the hearing and determination of the suit herein. The two motions are supported by affidavits and are both opposed. When the motions came up for inter parties hearing on 18.2.2016, the parties agreed to dispose them of by written submissions.

**Claimant's submissions**

2. The claimant submitted that she hired the grievants on fixed term contracts which were all to lapse on 24.12.2015. That due to low business she decided not to renew the fixed term contracts for all the grievants after they expire on 24.12.2015. That she had also decided to close down the whole Unit 2 production line at Changamwe due to low business which was not economically viable to continue operating. She denied that her decision amounted to declaring the grievants jobs redundant and maintained that the grievants are bound by the terms of their fixed term contracts including the agreed expiry date.

3. She further contended that as a Company she had a managerial prerogative to manage her business including the election not to renew the fixed term contracts after they lapse. The claimant further contents that the respondent has not acted in good faith towards good industrial relationship with the management and as a result the grievants have had a history of persistent illegal industrial actions to arm-twist the claimant to meet unreasonable demands. That the grievants were again threatening to storm the Unit 2 production line after their contracts expire. She prays for the dismissal of the respondent's motion because the matters raised therein can only be canvassed well during trial. Finally the claimant has submitted that the Replying affidavit dated 2.2.2016, supporting affidavit dated 22.2.2016 are incompetent because they were sworn by an authorized person.

## **Respondent's submission**

4. The Respondent has submitted that the claimant's motion is incompetent and bad in law because it seeks to circumvent the consent order in **ELRCC 3 OF 2015** by which the parties herein agreed to have the grievants herein to continue working until the said suit was heard and determined. That the motion herein is also sub judice the claim No. 3 of 2015 and ought to be stayed until the determination of claim No.3 of 2015 and 717 of 2015. That granting the orders sought herein would sanction the victimization of grievants by allowing their termination despite the consent order existing in the said claim No.3 of 2015.

5. In addition, the respondent submits that the claimant's motion lacks merits because she has not proved that the grievants have planned to go on strike. That all what the claimant has deponed in the supporting affidavit without providing the source, is that she has received information that the grievants have plans to go on strike. That such allegation of an intended illegal strike is speculation and unproven. That the allegations are based on historical facts and which are not sufficient to raise an inference that the respondents intent to go on strike.

6. On the other hand, the respondents submits that the grievants are entitled to the renewal of their fixed term contracts after their expiry. That the said fixed term contracts had previously been automatically renewed and as such the grievants had legitimate expectations that the contracts would be renewed again. That the non-renewal of their contract this time round was due to improper motive on the claimant's part or countervailing circumstances. That according to the respondent, the reason for claimant's refusal to renew the fixed term contracts in favour of the grievants is because of their union affiliation with the respondent. That the grievants troubles with the claimants arose after they joined the respondent union and the union sought recognition for purposes of collective bargaining. She consequently prayed for her motion to be allowed and that the claimant's motion be struck out or dismissed with costs.

## **Analysis and Determination**

7. After careful consideration of the pleadings and the rival motions, affidavits and submissions, it is clear that the grievants were, at all material times herein, employed by the claimant on fixed term contracts which were to lapse on 24.12.2015. That the claimant has in exercise of her managerial prerogative decided that it was no longer profitable to continue operating her Unit-2 production line at Changamwe. That on the basis of the foregoing, the claimant has also decided that after the grievants fixed term contracts expire on 24.12.2015, she will not renew the same so as to allow her to close down the unit. That the reason for closing down the Unit 2 at Changamwe is not due to insolvency but intended to avoid the insolvency which is likely to result from low business which is based on seasonal orders from abroad. The issues for determination are:

- a. **Whether the two Motions are incompetent and/or sub judice claim No.3 of 2015.**
- b. **Whether the Motions by the claimant and the respondent respectively have merits.**

## **Incompetent Motions**

8. The respondent's believes that the claimants Motion is bad in law because it seeks to defeat the consent order issued in ELRCC NO.3 of 2015 which allowed the grievants to continue working. The court does not however agree with the said contention because the order for the grievants to continue working was only applicable as long as there existed an un expired valid contracts of employment in favour of the grievants or if the employer accepted to extend the said contracts. If the parties intended to be bound in a contract of employment indefinitely, they should have filed such a contract or consent order. In that respect the court does not find claimants motion incompetent or even subjudice ELRCC 3 of 2015. The two cases are distinguishable because the present motion and the suit are in respect of refusal to renew fixed term contracts that all ending on 24.12.2015 and not in respect of any earlier contracts or cause of action.

9. The court does not however find any difficulties in finding that the respondent's motion is incompetent and bad in law for being supported by affidavits sworn un authorized person. Under Rule 6(1) of the

Industrial Court Procedure Rules 2010 (ICPRs), a statement of a claim must be brought by an authorized Representative of the union. Under rule 2 of the ICPRs, a claim is defined to include an application and motion. On the other hand, Section 2 of the Labour Relations Act (LRA) defines authorized Representative as the General Secretary of a Trade Union or a person appointed in writing by the General Secretary to perform the duties of the authorized representative. In this case the supporting affidavits were both sworn by Lakeh Mueni Kilozi, who described herself as a Deputy Shop Steward on 18.1.2016 and 22.2.2016. She never produced any letter from the Respondent's General Secretary authorizing to swear any affidavits in this suit. Consequently the respondent's motion is incompetent and bad in law.

10. In addition to the foregoing, the claimant has urged that the respondent's motion is incompetent because it seeks interlocutory injunction when in fact she has not sought permanent injunction in her counter claim. Under rule 16(3) of the ICPRs, a party can only apply for temporary injunction to restrain the respondent from breaching a contract or committing an injury if he has sought for injunction in the suit. In this case it is true that the respondent has not sought injunction and as such she is disqualified from seeking temporary injunction at this stage. For the reasons stated above the answer to the first issue for determination is that the claimant's Motion dated 21.12.2015 is properly before the court but the respondent's motion is incompetent and it is struck out.

### **Merits**

11. In view of the foregoing finding that the respondent's motion is competent, the court will not consider its merits. The court will however consider whether the claimant's motion has merits. The claimant contends that she has exercised her freedom of contract and managerial prerogative in declining to renew or extend the grievants fixed term contracts which were scheduled to expire by effluxion of time on 24.12.2015. According to her she has not breached the law or the grievants rights. She further contends that the grievants had no legitimate explanation that their employment would continue after the expiry of the fixed term contract on 24.12.2015. The court agrees with the claimant that the fixed contracts are meant to lapse automatically unless parties mutually agree to extend them. The only exception is in the sectors where law provides for conversion into regular employment contracts after extending the fixed term contracts to a maximum length of term set by the law. A good example is in the catering trade industry where the fixed term contract converts to regular contract after serving for a maximum of six months of continuous seasonal contracts. **{See rule 18 of the Regulation of Wages (Hotel and Catering trade) Order}**. The Regulations of Wages (Tailoring, Garment making and Associated trades order, which is relevant to this case does not set any ceiling of the period of time that the workers in the Textile Industry can work under seasonal contracts.

12. In view of the foregoing observation, the court agrees with the claimant that there is no legitimate expectation for an employee under a fixed term contract in the textile industry that he will continue serving after the expiry of the said contract. The continuity of the contract between the parties herein was subject to the parties mutual agreement. Without that agreement, the employment relationship must automatically end with the expiry of the agreed contract term. The court is therefore of the view that the employment relationship between the claimant and the grievants herein only existed upto 24.12.2015. Since no evidence of any intention to mutually extend the said contracts was filed after 24.12.2015, the court makes the reasonable conclusion that the said contracts of employment contracts lapsed automatically on 24.12.2015. In view of the foregoing inference the question that follows is whether the claimant's motion and the suit have not been overtaken by events.

13. The suit and the motion by the claimant were meant to protect her rights as an employer from illegal industrial action by the grievants. Since the employment contracts have already lapsed, the claimant and the grievants have already lost their status of employer and employee respectively. The employees can no longer, therefore purport to participate in any strike or other form of industrial action after losing their status of employees. Likewise the employer cannot seek to be shielded by this court from illegal strike or other unspecified industrial action after the lapse of the said contracts. If the former employees conduct themselves in breach of the Law and Order after the lapse of the employment relationship with the employer, they risk being met with the proportional measure by the relevant Agencies which are mandated to maintain Law and Order in the society. For that reason the court finds on a balance of

probability that the claimant's motion is overtaken by events and the court does not need to consider whether it meets the threshold for the grant of interlocutory injunction.

**Disposition**

14. The Motions by both the claimant's and the respondent's are strike out. Each party to bear her own costs.

**Signed, dated and delivered this 6<sup>th</sup> day of May 2016.**

**ONESMUS MAKAU**

**JUDGE**