REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 218 OF 2015

(Before D. K. N. Marete)

KENYA PLANTATION AND AGRICULTURAL

WORKERS UNION.....…….....….....CLAIMANT

VERSUS

SOTIK HIGHLANDS TEA

ESTATE LIMITED.....RESPONDENT

JUDGEMENT

This matter is originated by way of a Memorandum of Claim dated 14th June, 2012. It does not disclose the issue in dispute on its face.

This was to be followed by an Ammended Memorandum of Claim dated 15th April, 2014 which included paragraphs 4.6 and 4.7 as follows;

> *4.6 In the alternative, if prayer 4.1 above cannot be granted, we pray that this Honourable Court, do order the respondent to pay 12 months' salary as compensation for wrongful termination of services.*
>
> *4.7 Do order the respondent to pay gratuity, annual leave payments and one month's salary in lieu of notice.*

The respondent in a Memorandum of Defence and Counter-Claim dated 12th February, 2014 denies the claim and prays that this be dismissed with costs to herself. She also makes a Counter-Claim in this cause as shall be provided later in this judgement.

This was followed with Ammended Memorandum of Defence and Counter-Claim dated 18th June, 2014 which ushered in a retinue of amendments in the defence and prayers of the respondent. The matter was also clad with various applications and counter applications which were heard and determined in the cause of the hearing of the main cause.

The claimant's case is that the parties to this suit have a valid Recognition Agreement through the Kenya Tea Growers Association (KTGA) and have negotiated several Collective Bargaining Agreements (CBAs), including the one relevant to this suit. This cause is originated by industrial skirmishes and

disruptions *inter partes* at the workplace in June, 2012.

It is the claimant's further case that on 7th June, 2012 the respondent's employees reported on duty at 700 hours and commenced their routine activity of tea plucking. At about 730 hours, the mechanical tea plucking supervisor, one, Maeba came to Field No. 25 where the grievant's were on hand plucking and informed them that they should make sure that they should clear the area as he intended to embark on harvesting by use of tea plucking machines. The grievant's sought clarification from the supervisor who declined to explain the changes. The claimant contends that the chief shop steward and union representatives were never informed of the new change and neither was the branch office.

It is the claimant's further case that the workers sought the intervention of the Deputy General Manager who also did not shed light on this but instead engaged the General Service Unit (GSU) and Administration Police (AP) who came in and ordered workers out of the farm/estate. They also engaged the non violent workers in running battles where four (4) of them were injured.

On 7th June, 2012 at about 1100 hours, the claimant's Branch Secretary came in and tried to intervene and also secured a meeting with the management. At 1345 hours, the meeting was attended by the management, workers

representatives and the claimant's Branch Secretary whereby it was resolved that the workers take a break and resume at 700 hours on the following day.

On 8th June, 2012, they reported and resumed tea plucking until 1000 hours when the General Manager, in the company of all managers, came in and ordered all workers to vacate their areas of work. The chief shop steward sought audience with the General Manager but this was refused with orders to the General Service Unit (GSU) and Administration Police (AP) to clear off the workers. At 1100 hours, the claimant's Branch Secretary sought audience with the General Manager but this was also denied. The respondent ordered the GSU and AP to seal all avenues to the work places thereby denying workers access to their work places. On 9th June, 2012, the claimant's officials from the headquarters visited the premises but were also denied access.

The claimant's other case is that again on 11th June, 2012, officials of the claimant's Head Office, Branch officials, shop stewards and the county labour officer visited the premises but were again denied access. The respondent has declined and refused to heed the recommendation of the county labour officer to rescind her decision of lock out, suspension, termination and dismissal of 252 workers for being unprocedural.

The claimant's submits that the inaction by the respondent to unilaterally lock out, suspend, terminate and dismiss the 252 is unfair, unprocedural and unlawful and a contravention within the meaning of S. 41, 43, 44, 45, 46 and 49 of the Employment Act, 2007. Further, the action of withholding of salary for May 2012, involvement of police to intimidate workers is an indicator of use of excessive force to silence workers against an agitation of their rights. This was aimed at dismissing the workers and replacing these with machine plucking.

She prays as follows;

> *4.1 The Honourable Court find the action by the respondent unfair,*
>
> *unprocedural, unlawful and order the respondent to unconditionally reinstate all the 252 employees back to their place of work without loss of privileges.*
>
> *4.2 The Honourable court do order the respondent immediately to deposit in the bank accounts of the 252 employees salaries for the month of May 2012.*
>
> *4.3 The respondent be ordered to withdraw the services of GSU and Administration police the premises.*

4.4 The respondent be ordered to engage the claimants in dialogue to discuss the workers grievances without conditions.

4.5 The respondent be restricted from employing new employees to replace the grievant's pending hearing and determination of the suit.

The respondent's case in defence is a denial of unfair dismissal of the grievant's employment and also that the claimant is disentitled to the orders sought. This is expressed as follows;

i. *The grievants in flagrant disregard of the law went on an illegal and unprotected strike and declined to return to work. As such, the grievants behaviors constituted gross misconduct and their summary dismissal were warranted and justified.*

ii. *The respondent did not and has never locked out any of the grievants as claimed in the memorandum of claim. The memorandum of claim is a deliberate misrepresentation of the facts and the contents thereof are misleading and calculated to deceive this honourable court.*

iii. *The employee's dismissals were carried out in accordance with the applicable provisions of the law and the collective bargaining agreement (hereinafter "CBA").*
iv. *This cause is brought in bad faith and the claimant's claims in these proceedings are false and fraudulent.*
v. *The claimant is not entitled to the orders sought herein*

The respondent submits a case of lawful termination and *in toto* denies the claim.

The respondents further case is that on 6th June, 2012, she was made aware of numerous anonymous leaflet scattered over the tea estate's citing a myriad of issues and calling for a strike. On 7th June, 2012, the grievant engaged in an illegal strike in the morning and despite efforts and agitation of the workers by the respondent to return to work, they defied and engaged the workers in other estates to join in. The claimant's branch office organising secretary and branch secretary encouraged the workers to continue with the strike.

The respondent's further case is that she instituted a return to work formula by issuing warning letters at 1100 hours, 1130 hours, 1230 hours and 1400 hours. These sought that they return to work and warned them of the consequences of such failure - see appendix 2. She also held two meetings at 1340 and 1430 hours with the grievant's whereupon it was agreed that the workers return to work forthwith. She denies that this was set for the following day.

The respondent contends that on 8th June, 2012, show cause letters were served on the workers. These urged them to show cause why they should not be dismissed for engaging in an illegal strike on 7th June, 2012. These letters were read out through a loud speaker by the respondent's estate manager, once in English and twice in Kiswahili, and at all times calling the names of the culprit workers. They all refused to heed with an exception of eight (8) who complied and partook disciplinary proceedings with varied outcomes depending on their cases and responses. The grievant's were in turn summarily dismissed for non compliance. A notice was made to the labour officer. They have to date refused to collect their terminal dues despite lots of cajoling by the respondent.

The respondent's disclaims a remedy of reinstatement of the grievant's and argues that this would send a wrong signal to her relationship with the workers.

She therefore denies the claim and files a Counter-Claim as hereunder;

Particulars of Claim

(7^{th} June 2012 to 31^{st} December 2013)

Number of grievants who remain in

occupation of the premises = 133

Basic wage for the hand pluckers = Kshs. 8,975

Housing allowance purusant to

Clause 16 of the CBA = 15% of month's salary I.e Kshs 1,346.25

Number of months that the grievants

remained in occupation in 2012 = 6 months 24 days

Kshs. 1,346.25 x 133 x 6 months 24 days = Kshs. 1,217,548.50

Particulars of Claim

(1st January 2013 to 16th June 2014)

Number of grievants who remain in

occupation of the premises = 133

Basic wage for the hand pluckers = Kshs. 10,052

Housing allowance purusant to

Clause 16 of the CBA = 15% of month's salary I.e Kshs 1,507.8

Number of months that the grievants

remained in occupation in 2012 = 18 months 15 days

Kshs. 1,346.25 x 133 x 6 months 24 days = Kshs. 3,709,941.90

TOTAL AMOUNT OWED = Kshs 4,927,490.40 (this amount continues to accrue until the grievants vacate the premises)

a. *A declaration by this Honourable Court that the strike of 7th June 2012 be deemed illegal.*

b. *Kshs 1,904,576.19 as costs and losses occasined by the strike.*

c. *An order that the grievants vacate the respondent's housing and handover possession of the same to the respondent.*

d. *Mesne profits of Kshs. 4,927,490.40 which sum continues to accrue until the grievants vacate the respondent's premises and hand over possession thereof to the respondent.*

e. *Interest on (b) and (d) above at commercial rates with effect from June 2012 until payment in full.*

f. *Costs.*

g. *Any other order or relief the Honourable Court may deem fit to grant.*

The matter came to court variously until the 17th February, 2016 where it was heard *inter parties.* The issues for determination therefore are;

1. Was the termination of the employment of the grievants wrongful, unfair and unlawful?

2. Is the Claimant entitled to the relief sought?

3. Who bears the costs of this cause?

The 1st issue for determination was the termination of the employment of the grievants wrongful, unfair and unlawful. At the hearing on 17th February, 2016 the claimant called CW1 – Jeremiah Omwanza Nyabochwa who testified in reiteration of the claimant's case. It was his testimony that at the material times to this case he worked for the respondent and also doubled as an assistant chief shop steward. He further testified that he no longer works with the respondent and that his evidence was on his behalf and that of all the other grievants. He narrated the events of 7th and 9th June, 2012 at the respondent's tea estate where they worked at shamba No. 25. He was able to testify on a narrative leading to skirmishes at the work place, the various interventions and the eventual dismissal from employment of the grievants by the respondent's.

On cross-examination, the witness testified that he was a tea plucker with Mr. Peter Achando as his head supervisor. Mr. Maeba was a mechanized tea harvester supervisor and that a Mr. Okul had issued and assigned duties a day earlier. He reiterated his evidence earlier presented and vouched for the truthfulness of No.4 and 5 of his witness statement. He testified that machine tea harvesting had been there for the last five years.

The witness seemed and appeared agitated. It was like the events of June, 2012 had occurred the previous day and he was emotionally disturbed by the same. It was not easy going across his testimony but this cannot be categorized by the way. Was he a hostile witness? I would be hesitant to outrightly answer in the positive.

The respondent called three (3) witnesses in support of her case. DW1- Daniel Maeba Omwenga duly sworn testified that he had worked for the respondent for ten (10) years and had been head supervisor mechanical tea harvesting since 2005. On 6th June, 2012 he worked at Field No. 18 when he received instructions to machine scale Field No.19. On the following day, 7th June, 2012

he headed for his assignment and did not go to Field No. 25. His evidence followed the trend of his witness statement and reiterated the respondent's case on the events and circumstances leading to the skirmishes at the respondent's premises and eventual dismissal of the grievants. This was the same with DW2 – Stephen Okul and DW3 – Silas Juma Jibwakale whose testimonies fell alongside the case of the respondent.

The claimant's written submissions bring out a case of the parties disputed versions of the events leading to dismissal and particularly the meetings of 7th June, 2012 between the respondent and the workers representatives. This is as

follows;

> *18. It is instructive to note that 20 attendees were in attendance in the minutes of page 11-13 while 17 attendees were in attendance in the minutes of 9-10 yet all of the two minutes have been signed only by Silas Njibwakale the respondent deputy general manager yet it beats logic that such a highly sensitive meeting would bear the signature of only the respondent deputy general manager and not the attendees who are from three different parties to confirm them as true record for the proceedings when they had not elected or voted him as a secretary or chairman to the meeting.*
>
> *19. My Lord the respondent witness Stephen Okun in his witness statement refers to minutes*

"were prepared to this effect" (see paragraph 12 of his witness statement.)

20. The Respondent Deputy General Manager a one Silas Njibwakale in his evidence in chief confirmed and admitted before this Honourable Court that the attendees did not sign the minutes but that he single handedly prepared, signed and stamped the minutes. The minutes therefore are not an official written record of the meeting see claimant witness statements of Mr. Jeremiah Omwanza and Stephen Nyamweno as stated in paragraph 9 and 6, 7 respectively. And are therefore invalid before these proceedings.

Can these proceedings be trusted in confirming the evidence of the respondent proceedings leading to the termination of the employment of the grievants? A shadow overhangs the subject.

The claimant also denies the validity and service of notices to show cause, the nature of disciplinary hearings and eventual letter dismissal for being defective and not in accordance with the law as known and applied in this country. She faults the return to work formula adopted by the respondent as borne out of the ultimatum principle under the provisions of Section 68 (5) of the Labour Relations Act of South Africa which provides that;-

5 " Participation in a strike that does not comply with the provisions of this chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice; Dismissal in Schedule 8 must be taken into account."

The Code of Good Practice; Dismissal in Schedule 8 provides in Section 6 that:-

6. Dismissal and Industrial Action

(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be in the light of the facts of the case including-

a. *The seriousness of the contravention of this Act;*
b. *Attempts made to comply with this Act; and*
c. *Whether or not the strike was in response to unjustified conduct by the employer.*

(2) Prior to dismissal the employer should at the earliest opportunity contact a trade union official to discuss the course of action it intends to adopts. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them."

The claimant submits that the dismissal of 252 employees was illegal and unlawful in that these were dismissed on the basis of the ultimatum principle which is unknown to our law. This was contrary to the Constitutional provisions of natural justice as provided by Article 41, 47 and 50 of the Constitution of Kenya, 2010. She further sought to rely on the authority of **Kenya Union of Commercial Food & Allied Workers v Del Monte (K) Limited, 2013 eKLR** where it was held that;-

"(a) Section 41 of the Employment Act, 2007 is in mandatory terms that an employer shall not terminate and employee on ground of misconduct before explaining to him in a language he understands and in the presence of a workmate or shop floor union representative of his choice, the reasons for which he intends to terminate his employment and the section forbids termination before hearing and considering the employees representation. The omission is fatal to the employer's case and it offends section 45(1) and (2) (c) of the Act. Any employer who ignores section 41 of the Act does so at his own peril.

(b) Section 7 and 8 of this Act subjects all employment contracts to the Act and leaves no room for the employer to invent his own disciplinary procedures which offend express provisions of the Act."

Again, the respondent applied collective disciplinary and imposition of punishment contrary to the parties employment relationship in **Kenya Plantation & Agricultural Workers Union v Carzan Flowers (2013) eKLR** the court held at page 7- 9 that;-

"As to issue three being whether collective disciplinary process and collective imposition of punishment is available in the employment relationship as appears to have happened in this case, the court holds that the employer is not permitted under the Employment Act and the Constitution to impose punishment collectively as every employees case must be considered on its

unique merits."

Further, as was established in the authority of **Kenya Plantation & Agricultural Workers Union V Plantation Plants (K) Limited (2013) eKLR**, employers would be in difficulty to establish compliance with the provisions of Section 41 and 45 of the Employment Act as hereunder;

" The procedure in Section 41 of the Employment Act, 2007 is meant to facilitate validation of the reason for intended termination or dismissal and where the process does not take place, the opportunity to validate the reason is lost making it difficult for the employer to discharge the onus under section 45 (2) of the Act to prove;

a. *That the reason for termination is valid.*
b. *That the reason for termination is a fair reason*

(i) Related to the employees conduct, capacity or compatability or

(ii)Based on the operational requirements of the employer and

c. *That the employment was terminated in accordance with fair procedure.*

In the penultimate, the claimant submits to a case of non-applicability of the ultimatum principle, if at all, in the event of unlawful strikes. This was reigned

in the authority of **Kenya Plantation & Agricultural Workers Union V Roseto Flowers (2013) eKLR** where the respondent had equally applied the principle of ultimatum to dismiss striking employees and the court at page 6-10 held that;-

"To answer the second issue the court hold that the ultimatum principle does not apply in event of an unlawful strike and the employer is required to apply rules of natural justice as provided for in the provisions of the Constitution and the legislation cited in the authorities referred to by the claimant in this case as well as the lawful provisions on disciplinary process as may be agreed between the parties. The court further holds that it was not open for the employer to invent the ultimatum principle as the path of terminating the employees' employment in oblivion of the clear provisions of section 80 of the Labour Relations Act, 2007 and the provisions of the Employment Act as cited in the authorities invoked for the claimant."

The respondent in their written submissions reiterate their case of an illegal strike and eventual dismissal of the grievants. It is her submission that Section 76 of the Labour Relations Act Cap 233 (LRA), provides for protected strikes and lockouts and states that;

"A person may participate in a strike or lock-out if-

a. *The trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of*

employment or the recognition of a trade union;

b. *The trade dispute is unresolved after conciliation*

(i) Under this Act; or

(ii)as specified in a registered collective agreement that provides for the private conciliation of disputes; and

c. *Seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorized representative of -*

It is her position, evidence and submissions that no notices had been issued and therefore the strike by the workers was uncalled for, illegal and unprotected. Again, unions are duty bound to discourage strikes and any breaches of law by workers as was established in 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."*

It is her submission that in the instant case the union representatives encouraged and did not discourage the workers from the continuing strike.

She further relies on the authority of Section 80 of the Labour Relations Act as justification for disciplinary process and ultimate termination of the employment of the grievants. This is as follows;

> *"80 (1) (a) An employee who takes part in, calls, instigates or incites other to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and is liable to disciplinary action;…"*

In the case of **Lamathe Hygience Food v Wesley Patrick Simasi Wafula & 8 others (2016) eKLR** the court held that;

> *"The last stage is the issuance of a strike notice in writing to the employer and or adverse party. This, as correctly submitted by the Appellant, was never followed through. The totality of this is that the strike envisioned by the respondents failed to meet the threshold required for it to be valid and protected, rendering it unlawful. In fact, according to Section 80 of the Labour Relations Act, a worker engaging in an unlawful strike is deemed to have breached his contract of employment and liable to disciplinary action."*

Further, the court held as follows;

> *"As observed by this court in the case of Maseno University v Universities Academic Staff Union (2015) eKLR, an employer is entitled to summarily dismiss a worker who engages in an illegal strike and in the process, absconds duty. Indeed, the provisions of Section 44 of the Employment Act as aforesaid provides for summary dismissal. For clarity, summary dismissal takes place when an employer, for valid reason as provided for under Section 44 of the Employment Act, terminated the employment of an employee without notice or with less notice than that to which the employee is otherwise entitled by any statutory provision or contractual term."*

The respondent also made submissions in support of her prayers in the Counter-Claim and advanced the

argument that she was entitled to mesne profits for the continued occupation of her premises after cessation of employment. She claimed an amount of Kshs. 4,927,490.40 this amount continues to accrue until the grievants vacate the premises.

The totality of the events and processes leading to the dismissal of the grievants are noted by this court. However, the court observes that employment relationships are personal in nature and not collegiate. The respondent submits a case whereby she rolled out a return to work formula and informed the parties of their show cause cases through a broadcast to the workers in various languages through a public address system. No cases or personal intervention in the entire process are demonstrated except for eight (8) employees who attended hearings and were awarded hearing and various sentences by the respondent.

The respondent justifies this action by reliance on the ultimatum principle as established by South Africa law and jurisprudence. The claimant disowns and disclaims this and insists on the substantive and procedural aspects of law as provided by *inter alia* section 41, 44 and 45 of the Employment Act, 2007. I agree. Whereas I also agree with the submissions of the respondent that the grievants were involved in an unprotected strike, I must find that this strike was largely prompted by the methodology and communication strategy of the respondent which at all times was wanting and failed in articulation and effect. This did not make matters for the industrial environment any better and the workers are not entirely to blame. The allegations of union representatives being party to the aggrandizement of the commotion and strike are not demonstrated and therefore cannot be relied on or stand. The counter-claim is, on this note, dismissed for want of merit.

I note a big lapse in the procedure adopted by the respondent in determining the situation and eventual dismissal of the grievants. The participation of the union representatives and the efficacy of their contribution, if at all, is not demonstrated. This is illustrated by the contested minutes of the meetings of 7th June, 2012 which were controversially sighed by one, Sila Njibwakale, the Deputy General Manager of the respondent and not any other attendee or participant. I therefore find a case of wrongful, unfair, unprocedural and unlawful termination of the employment of the grievants and hold as such.

On a finding of unlawful termination above, the claimant is entitled to the relief sought. However, a determination of the relief sought must note and take into account the role of the parties in the confrontation, confusion and dispute leading to termination. In as much as I make a finding of unlawful termination of employment, there is a high probability that the grievants were not entirely out of blame. This court notes the politics of transition between machine tea harvesting and hand plucking. It was a contest between customary/traditional tea plucking and technology. This was emotional and commotional, particularly in the absence of education and counseling of the hand pickers like in this case. It is my feeling that a determination of relief that ignores this factor is likely to result in absurdity: a case of undue reward to possible malevolent workers. This should never be the case.

I am therefore inclined to allow the claim and order relief as follows;

i. That a declaration be and is hereby issued that the termination of the employment of the grievant's was wrongful, unfair , unprocedural and unlawful.

ii. That the respondent be and is hereby ordered to pay the grievant’s salaries for May and the period worked in June, 2012.

iii. That the respondent be and is hereby ordered to pay one (1) month’s salary as compensation for unlawful termination of the employment of the grievant’s.

iv. That the respondent be and is hereby ordered to pay the grievant’s terminal benefits due but uncollected at the time of termination.

v. That the Commission of Labour be and is hereby ordered to, with the involvement of the parties, compute the amounts payable to the grievant’s in (ii), (iii) and (iv) of these orders of court.

vi. That the grievant's be and are hereby ordered to vacate and render

vii.vacant possession of the respondent's premises within seven (7) days of these orders of court.

viii.That each party shall bear their own costs of the claim.

Delivered, dated and signed this 30th day of June 2016.

D.K.Njagi Marete

JUDGE

Appearances

Mr. Khisa for the Claimant Union.

Mrs. Opiyo instructed by Kaplan & Stratton for the Respondent