



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

CAUSE NO. 116 OF 2016

MIGOTIYO PLANTATION LIMITED

CLAIMANT

v

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION

RESPONDENT

JUDGMENT

1. Migotiyo Plantation Ltd (employer) moved Court on 24 March 2016 against Kenya Plantation & Agricultural Workers Union (Union) and the issue in dispute was stated as *illegal strike by the union members of the respondent*.
2. The employer sought 3 main prayers, a declaration that the strike by the Respondents members on 21 March 2016 was illegal and unprotected, and a temporary injunction restraining the Respondent from calling or inciting the employees from taking part in unprotected strike and damages equivalent to Kshs 740,000 /- being the value of lost sisal fibres.
3. The employer also sought several interim orders in a motion filed simultaneously with the Memorandum of Claim.
4. The Court granted an interim order restraining the Respondent and its members from calling or taking part in an unprotected strike on condition that wages which were outstanding were paid on or before 24 March 2016.
5. When the application came up for *inter partes* hearing on 1 April 2016, the employer informed the Court that it had complied with the condition to pay outstanding wages.
6. With the disclosure, the Court directed that the Cause be set down for hearing on a priority basis because the orders sought in the motion and the final prayers outlined in the Memorandum of Claim were essentially similar.
7. The Court also extended the interim orders pending the hearing of the Cause and gave directions as to the filing of appropriate pleadings/documents.
8. On 25 April 2016, the parties agreed that the Cause be determined on the basis of the record and submissions. Rule 32 of the Employment and Labour Relations Court (Rules) 2010 allow such procedure/course of proceeding.
9. In the event, the employer filed its submissions on 31 May 2016, while the Union's submissions were

filed on 27 June 2016.

10. The employer identified 3 issues for determination and these were

(i) Whether the strike commenced by members of the Respondent who are employees of the Claimant on 21 March 2016 is illegal and unprotected.

(ii) Whether failure by Migotiyo Plantation to pay its employees' salaries at the end of the month is unlawful, illegal and amounts to unfair labour practices.

(iii) Whether a temporary injunction and a permanent injunction restraining the Respondents from further taking part or calling the employees on a strike should be granted and which issues the Union also adopted.

11. The Court will commence with an examination of the second issue as identified by the employer.

Whether failure to pay wages was unlawful, illegal and amounted to unfair labour practice

12. The answer to this issue should be self-evident and that is the reason why the Court has decided to start with it.

13. Under the common law, payment of wages is an *essentialia* of an employment contract.

14. The common law position has now been given statutory imprimatur in the Employment Act, 2007 (this was unlike the situation prevailing under the previous statutory framework).

15. The Employment Act, 2007 has as two of its purposes the definition of the *fundamental rights of employees* and *provision of certain basic conditions of employment*.

16. And it would be germane at this early point to note that the Act provides the essential and irreducible minimum entitlements of employees from which no employer may derogate.

17. One of the fundamental rights guaranteed to employees and which is also a basic condition of employment is the payment of wages as contractually agreed (daily, monthly or otherwise).

18. Clause 2 of the collective bargaining agreement between the members of the Sisal Growers and Employers Association (Kenya) of which the employer is a member and the Union expressly provided for the payment of wages accrued within a month at the end of the month.

19. The employers own document (in the form of an Internal Memo dated 21 March 2016) informed all employees that the wages for February 2016 would be paid from 24 March 2016.

20. Now, in terms of the aforesaid clause of the collective bargaining agreement, the payment of the wages was late by around 3 weeks.

21. The inference which the Court can draw from the Internal Memo is that the employer was not only in breach of a contractually agreed provision as to payment of wages but also sections 17 and 18 of the Employment Act, 2007.

22. The failure to pay the wages when due was therefore not only in breach of contract but also contrary to statutory provisions guaranteeing employees certain aspects of their fundamental rights and basic conditions of employment.

23. In that regard, at least looking at the contract and the text of the statute, the employer's action was unlawful and illegal.

24. However, the Court will not go as far as finding that the failure amounted to an unfair labour practice because of 2 reasons.

25. One, there is a social context/business environment to the employment relationship which a Court always ought to put at the back of its mind when addressing a situation as obtained between the partners herein.

26. In other words, each case merits examination and evaluation on its peculiar circumstances.

27. Two, this Court has a specific purpose for which it was established.

28. This particular statutory context or framework is not found with the other Courts.

29. Section 4 of the Court's constitutive Act has expressly provided that the Court was established for the purpose of *settling employment and industrial relations disputes and furtherance, securing and maintenance of good employment and labour relations in Kenya.*

30. The purpose for the establishment of this Court, in my view will require the Court to at times look beyond the text of the law to breathe life in the *grund norm* of employment relations, fair labour practices as envisaged by Article 41 of the Constitution.

31. Fairness transcends what is legal or lawful, *strictu sensu*, hence the assertion by the Court of the importance of the social context and business environment above.

32. The delayed wages were subsequently paid and it appears that the industrial relationship between the parties is back to normal.

Whether strike was illegal and unprotected

33. The relevance of the social context as against the business environment further becomes material therefore in this case, because the employer admitted that it had failed to pay wages as the same fell due because of factors beyond its control. The employer itself asserted that it had not been doing well financially and had even decided to declare redundancies.

34. That is the business environment for the employer.

35. But what of the social context of the employees who withheld their labour because wages were not forthcoming.

36. Although the Court was not addressed directly on the wages paid to the employees (members of the Union), the rates of remuneration as set out in the collective bargaining agreement suggest that the wages were hovering around the minimum wages and, which to those concerned with employment are not living wages.

37. In street language, the employees who went on strike were living from hand to mouth or to use shocking language, mouth to mouth.

38. These are the workers whose wages had delayed by some 3 weeks or so.

39. With this social context and business environment, can the Court fault the employees (there was no evidence or proof that it is the Union which called its members on strike) for not complying with the peremptory requirements of calling a strike as envisaged by sections 76, 78, 79 and 80 of the Labour Relations Act?

40. In my considered view, not in the circumstances of this case.

41. The strike may have been illegal or unprotected, but the employer rather than rush to Court to have the strike declared illegal or unprotected ought to have explored other avenues available to any ordinary employer and these included a lock-out and or negotiations in good faith with the Union and or employees.

42. Another reason the Court says so is because there is nothing on record to suggest that the employer had engaged either the Union or the employees immediately the wages fell due for payment and it realised it would not meet its contractual obligations. In any case, the employees had provided their labour in February 2016 and March 2016.

43. In y very humble view, this is not an appropriate case to declare that the strike was illegal and or unprotected.

Issuance of restraining orders

44. It must be obvious from the foregoing that the Court is not minded to grant the restraining orders sought by the employer.

Claim for loss of sisal fibre

45. The employer had a claim for Kshs 740,000/- which was alleged to have been loss of 8 tonnes of sisal fibre.

46. However, the claim required proof, which was not provided and it stands to be dismissed.

Conclusion and Orders

47. The upshot of the above is that the Court declines to find and hold that the employer merits any of the orders sought with the result that the Court orders

(i) that the Memorandum of Claim filed in Court on 24 March 2016 be dismissed with no order as to costs due to the ongoing social partnership between the parties.

Delivered, dated and signed in Nakuru on this 23rd day of September 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Co. Advocates

For Respondent Mr. Khisa, Assistant Secretary General

Court Assistant Nixon/Mwangi S