



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1197 OF 2015
KENYA ENGINEERING WORKERS UNION CLAIMANT
VERSUS
DEVKI STEEL MILLS LIMITED RESPONDENT

M/S. Guserwa for claimant

Mr Baabu for respondent

JUDGMENT

1. The claimant union filed a memorandum of claim together with a notice of motion application on a certificate of urgency on 9th July 2015. The claimant/applicant obtained interim orders on the even date restraining the respondent from locking out its employees contrary to Section 76 of Labour Relations Act, as read with Clause 26 of the parties Collective Bargaining Agreement (CBA). The respondent was to let all the employees locked out return to work unconditionally pending the hearing and determination of the application interpartes.

2. The application was later on dispensed with and the parties proceeded on the main suit. The interim orders were extended until the hearing and determination of the main suit.

Facts of the case

3. The claimant avers in the memorandum of claim that it has a recognition agreement and CBA with the respondent. That on 29th June 2015, the unionsable employees reported to work but were stopped at the gate and were informed that there was no work for them. The employees reported to the union office at Athi River and on 30th June 2015, the union wrote to the respondent's Managing Director informing him that in terms of the Recognition Agreement, the respondent has to pay salaries to the employees who have been unlawfully locked out. The letter was copied to the Ministry of Labour.

4. The claimant avers that the lock out was contrary to Section 76 of the Labour Relations Act since the respondent had not given the employees seven (7) days notice and there was no consultation with the union in terms of Clause 26 (b) of the CBA prior to the lock out.

5. The claimant prays that, the court orders the respondent to open the company doors to all employees locked out of employment against Labour Relations Act 2007 unconditionally.

Response

6. The respondent filed a reply to the memorandum of claim on 15th July 2015 in which the respondent avers;

- i. there was no dispute between the respondent and the claimant to warrant a lock out or declaration of redundancy of its employees;
- ii. that the claimant has not in its memorandum of claim disclosed existence of any dispute between the claimant and the respondent or between the respondent and its employees that would have warranted a lock out;
- iii. the respondent admits the existence of a Recognition Agreement but denies there is a valid CBA agreement between the parties;
- iv. the respondent denies that there was any lock out at all and states that all the employees were at work and attached '*Appendix JKI*' a bundle of the factory attendance daily work sheet from 8th July 2015 to 11th July 2015;
- v. the respondent states that it had issued a notice dated 29th May 2015 to all employees and copied to the Area Secretary of the claimant union to the effect that it had contracted Jokal Handling Services Limited to provide manpower services in the organisation. That the respondent would only concentrate on its core business. That all formalities to a successful change will be completed before then. That there would be no break in between as operations were expected to go on as usual. The notice is attached and marked '*App.KK2*'.

7. The respondent reiterates that the claimant falsely claimed there was a lock out as alleged in the letter written by the claimant dated 10th July 2015.

8. The respondent avers that, contrary to the allegations by the claimant, the claimant through its Area Secretary with a few disgruntled employees and some hooligans forcefully entered the respondent's factory on 29th June 2015 and switched off the factory machines and the operations stopped. The group ejected out all the working employees of the respondent and this amounted to an illegal strike, which caused a lot of losses to the respondent.

9. That the said strike was in violation of the Recognition Agreement which mandates the union to issue twenty one (21) days' notice to call a strike. The Recognition Agreement is attached.

10. That the claimant now baptizes the illegal strike a lock out in its letter to the Human Resources Manager of the respondent dated 10th July 2015 marked '*App.4*'.

11. The respondent prays that the suit be dismissed for lack of any merit and the interim orders be discharged.

Determination

12. The issues for determination are;

- i. whether the respondent locked out employees of the respondent on 29th June 2015 or whether the claimant, vide its area Secretary ejected employees who were working in the factory from the premises, switched off the machines and stopped operations, hence engaged in an unlawful strike.
- ii. whether the claimant is entitled to the reliefs sought.

Issue i

13. It is trite law that, a party must stand or fall on its pleadings.
14. The suit was brought vide a document titled "*Application memorandum*", a title unknown in the Rules of the court. The court however deems this document the memorandum of claim.
15. The said memorandum of claim does not disclose names of any employees alleged to have been locked out by the respondent on 29th June 2015.
16. The supporting affidavit to the claim, which ought to be a verifying affidavit by Roberts Araka, the Area Secretary of the claimant union does not also disclose names of employees purported to have been locked out by the respondent on 29th June 2015.
17. The claimant makes bare allegations that certain employees whose work station and numbers are not stated in the memorandum of claim, were locked out. There is no list of such employees attached to the memorandum of claim.
18. Furthermore, the memorandum of claim does not disclose existence of any dispute between the claimant and the respondent except bald allegations which are denied by the respondent in its reply to the memorandum of claim that the respondent closed its doors to claimant's union members.
19. Indeed the claimant avers;

"applicant is prepared and ready to listen to any problem if any which is forcing the respondent to close company doors to applicants union membership."
- This is the closest, the claimant came to disclosing existence of a dispute between the parties.
20. In terms of Rule 6 of the Industrial Court (Procedure) Rules 2010, which were in place when this suit was filed, a Labour dispute must first be reported to the Ministry of Labour for purposes of conciliation.
21. If the dispute is not resolved within thirty (30) days conciliator is to issue a certificate of unresolved dispute to allow the dispute be referred to the court.
22. Where the dispute is not referred to the Labour Office for conciliation, an affidavit must accompany the suit explaining why the dispute was not referred to conciliation.
23. The claimant in the present suit did not attach a letter reporting the dispute, a certificate of unresolved dispute, nor an affidavit explaining why the dispute was not referred to the Labour Office for conciliation. This in itself makes the suit incompetent. Conciliation process between the parties which took place on 4th September 2015 while this matter was pending before court did not bear fruit.
24. The memorandum of claim does not disclose existence of a dispute at all. The memorandum of claim does not disclose any cause of action capable of redress by the court, having not named the alleged employees, who are said to have been locked out by the respondent.
25. The respondent has denied that it locked any employees from its premises. In the circumstances the court need not go any further to find that the claimant has failed to prove its case on a balance of probability. The omission in the memorandum of claim can only be remedied via an amendment to the pleadings but not through a witness statement or oral testimony as the claimant purports to do vide the witness statement of Robert Araka Ouna filed on 17th November 2015..
26. The oral testimony by the parties did not take the case any further because as said earlier a case must stand or fall on the pleadings filed before court.
27. The court cannot be asked to direct the respondent to open doors to undisclosed employees who

allegedly were locked out of employment.

28. There are no averments of unlawful termination of employment or declaration of redundancy of any named employee. The dispute with regard to outsourcing is also not disclosed in the memorandum of claim. For these reasons, the suit lacks merit and is dismissed.

29. This being a labour dispute between two parties with a recognition agreement, and in the spirit of encouraging good labour relations at the work place, each party to bear costs of the suit.

Dated and delivered at Nairobi this 20th day of December, 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE