



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

JUDGMENT

Introduction

1. The claimant is a Limited Liability Company that engages in manufacturing of garments for export. At all material times she employed in her Changamwe Production unit, 1760 employees under fixed term contracts because her business is solely based and determinant on pre contractual orders from her customers. In this case, all the employees (herein after called the grievants) were hired under fixed contracts running from 2.1.2015 to 24.12.2015. It is the claimants case that due to reduction in her business orders, she decided not to renew the contracts for all the grievants after they expire on 24.12.2015 and instead proceed to shut down the Changamwe production unit indefinitely.

2. According to the claimant, the respondent union mistook the said decision to mean that the grievants had been unlawfully terminated on ground of redundancy and allegedly incited them to engage in illegal Industrial action. As a result, the claimant brought this suit basically seeking injunction to prohibit the intended illegal industrial action and declaration that she was not legally obligated to renew the fixed contracts for the grievants after they expired on 24.12.2015.

3. The respondent has denied the claim by the claimant and raised a counter claim basically seeking declaration that the claimant is estopped from refusing to renew the grievants fixed term contracts without serving prior notice; declaration that the grievants are fixed, permanent and pensionable employees; and in the alternative, the grievants be paid monies, allowances and/or benefits due to them for the period they have worked for the claimant.

4. Before the hearing of the suit both parties brought Applications seeking conservatory orders but I declined to grant both applications by the ruling delivered on 6.5.2016. When the suit came up for pre-trial directions, the parties agreed to dispense with the hearing and instead thereof, adopted their witness statements and documentary evidence as their respective cases. Thereafter their counsel filed written submissions.

Analysis and Determination

5. After careful consideration of the pleadings, evidence and submissions, it is clear that the grievants

were employed by the claimant under fixed term contracts; that all their contracts were due to expire on 24.12.2015; that the claimant made a managerial decision not to renew all the grievants contracts after expiring on 24.12.2015 but instead shut down the whole production unit; that the fixed term contracts expired automatically on 24.12.2015 and the production unit was therefore shut down. The issues for determination are:-

(a) Whether the orders sought by the claimant's suit should be granted.

(b) Whether the orders sought by the counter claim should be granted.

Reliefs to the claimant

6. In my ruling delivered on 6.5.2016, I made a finding that the employment relationship between the claimant and the grievants ended on 24.12.2015 after their fixed term contracts expired that day. That decision was never challenged on appeal and no evidence was adduced to contradict the same. Consequently I reiterate the same verdict that there is no longer employment relationship between the grievants and the claimant. Likewise, no evidence has been adduced to prove that the claimant's Changamwe production unit is still operational. Consequently, I find and hold that the said production unit has since been shut down.

7. The question that arises is whether the claimant still needs permanent injunction to restrain the claimant and the grievants from going on strike or other form of illegal industrial action if their fixed term contracts are not renewed after expiry. In my considered opinion that relief is already overtaken by events.

8. I however make declaration that the grievants fixed term contracts expired on 24.12.2015 as prayed and that she is not legally bound to renew them.

Counter claim

9. The claimant has raised objection to the counter claim on ground that it is not verified by an affidavit. I will not deal with that objection because it is being raised too late in the day.

10. The respondent prays for declaration that the claimant is estopped from refusing to renew the grievants fixed term contracts without prior notice and in the alternative, declaration that the grievants are fixed, permanent and pensionable employees. The ground upon which the said declaration are sought is that the claimant had renewed the fixed term contracts in favour of the grievants whenever they expired. That based on that history, the respondent contends that the grievants had reasonable expectation that their fixed term contracts were going to be renewed. The claimant has however submitted that the contract terms were fixed and had an automatic expiry date.

11. As already observed above, the grievants fixed term contracts expired on 24.12.2015 and as such there is nothing to protect. The respondent cannot plead estoppel to revive a dead horse. The foregoing notwithstanding, I do not find any merits in the respondent contention that a notice was required prior to the claimants refusal to renew the fixed term contracts, because it is trite law that unless otherwise expressly agreed, the whole term of a fixed term contract constitutes a notice period. The reason for the foregoing view is that each party to the said contract has from day one of the contract notice that the contract will lapse on a stated or ascertainable date. Consequently I declined to make declaration that the claimant was estopped from refusing to renew the grievants fixed term contracts without prior notice.

12. As regards the declaration that the grievants had become fixed, permanent and pensionable employees, I wish to observe that no legal or other basis was demonstrated to warrant the grant of such declaratory order. In case the respondent wanted to rely on section 37 of the Employment Act, I regret to say the facts of this case do not support a case for conversion under the said provision. Consequently, I decline to make that declaration.

13. The last relief sought in the counter claim in the alternative to the said declaratory orders is the payment of monies, allowances and or benefits due to the grievants for the period they served the claimant. The respondent has submitted that section 18(4) of the Employment Act requires that an employee who is summarily dismissed for a lawful cause shall be paid all monies, allowances and benefits due to him up to the date of his dismissal. On that ground she submitted that because the grievants were lawfully dismissed, they should be paid what is due to them including service pay under section 35 (5) of the said Act. According to her, each grievants worked for five years.

14. The claimant has however submitted that she owes nothing to the grievants because she paid each one of them all their statutory and contractual remuneration during the life of each fixed term contract. According to the claimant the claim for alleged monies, allowances and benefits lack particulars and evidence to substantiate it. The question that arises is what money, allowances and benefits are being sought. I agree with the claimant that the claim lacks particulars and evidence to substantiate it. Although the respondent has submitted for payment of service pay under section 35(5) of the Employment Act, the said relief is not supported by the pleadings and evidence. Consequently, I dismiss the respondent's alternative prayer for monies, allowances and benefits.

Disposition

15. For the stated above, I enter judgment in favour of the claimant in the following terms:

(a) Declaration that the fixed term contracts for the claimant's employees in her Unit 2 Production Line at Changamwe expired on 24.12.2015 by effluxion of time.

(b) Declaration that the claimant is not legally obligated to renew the fixed term contracts after they expired on 24.12.2015.

(c) The counter claim is dismissed.

Each party will bear her own costs for the suit.

Signed, dated and delivered at Mombasa this 9th day of December 2016.

O.N. MAKAU

JUDGE