



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.32 OF 2014

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION.....CLAIMANT

VERSUS

UNILEVER TEA (K) LIMITED.....RESPONDENT

RULING

This is an application dated 1st August, 2016 by the claimant/respondent and seeks the following orders of court;

- 1. That, this Application be certified urgent and be heard ex-parte in the first instance.*
- 2. That, an Order do issue restraining the respondent, its agents, assigns and representatives from effecting show cause notices, disciplinary action and or victimizing against any employee for their participation in the strike between 12th and 23rd July, 2016 in respect of the judgement delivered on 30th June 2016 over the outstanding issues pertaining to the 2014-2015 CBA.*
- 3. That, costs of this application be provided for.*

It is grounded as follows;

- 4. The respondent did issue a circular on the 27th June, 2016 to all workers affirming its decision to uphold whatever outcome the court would determine in the 2014-2015 dispute and eventual signing of the CBA.*
- 5. On 30th June, 2016 the Honourable Court did declare judgement in ELRC No.32 of 2014 between KPAWU v Unilever Tea Kenya Limited.*
- 6. The respondent reneged on their commitment to follow the court procesS and sign the CBA after the court judgement and instead issued a circular dated 11th July, 2016 stating that they would not implement the said judgement thus provoking all the workers to resort to an industrial action to*

enforce the judgement.

7. On 24th July, 2016 the respondent entered into a Return to Work Formula with the claimant towards resolving the stalemate and they committed that “No victimization by either party subject to applicable law”

8. The respondent rather than enforcing the Return to Work Formula has instead resorted to issuing show cause letters since the 27th July, 2016 targeted to specific individuals yet all and over 16,000 workers were participated in an industrial action to enforce the judgement of this honourable court.

9. The said actions by the respondent amounts to victimization of employees as all employees participated in a legal industrial action to enforce the judgement of this Honourable Court.

10. The industrial action was justified and therefore legal in view of the compelling circumstances seeking enforcement of the judgement delivered on 30th June, 2016 by this Honourable Court.

11. The show cause notices and disciplinary hearing notices issued by the respondent to the employees are actions overtaken by events by virtue of the signing and the existence of a return to work formula between the parties the matter is therefore moot.

12. The respondent actions are actionable to outright victimization of employees.

13. Unless an injunction is issued halting and prohibiting the respondent actions to selectively target the workers the respondent actions are calculated to constructively dismiss the employee against which is against the spirit of the Return to Work Formula.

The application is not opposed. It is the claimant's/applicant's case and submission that there is nothing on record in opposition to this application.

The claimant/applicant submits that the strike which occasioned this application was a consequence of the inaction of the respondents. Their Managing Director issued conflicting circulars on their approach to the outcome of the judgment or determination of court on the issues in dispute thereby provoking the unionisable employees into a strike. However, a Return to Work Formulae was signed on 24th July, 2017 thereby settling the industrial instability. This formulae ousted victimisation of the workers with a rider that any criminal activities would be subjected to the applicable law. The respondent reneged on this and issued show cause letters to the unionisable employees and therefore this dispute.

The respondent submits that the application is not premature. He denies victimisation of the employees and submits that disciplinary action is against employees who vandalised and destroyed her property. It is her further submission that the Return to Work Formulae only ousts victimisation subject to applicable law. In the instant case, this is the Employment Act, 2007 which allows discipline for misconduct.

She also submits that this application is opposed as these issues have been raised in her other applications dated 4th August, 2016. A determination of this would effectively lead to a dissipation of the current (this) application as brought out.

The basis of this application is the Return to Work Formulae as set out and signed by the parties. This is coupled with the submission by the respondent that the application is opposed through an antagonistic application dated 4th August, 2016.

The Return to Work Formulae is as follows;

1. The parties do acknowledge that there are pending issues on Collective Bargaining Agreement (CBA) for the years 2014 to 2015. Parties have agreed to consider the 2016 to 2017 CBA together.

2. Parties have agreed that normalcy shall be restored and all employees to resume duty immediately and in any case not later than 7.00am on Monday 25th July, 2016.

3. There will be no pay for work not done.

4. No victimization by either party subject to the applicable law.

5. Parties have agreed that a follow-up meeting with a view of concluding the two CBA's shall be on 26th July 2016 at the Cabinet Secretary for labour's office at Nairobi.

6. Parties have agreed on the implementation of an additional (interim), 5% for the year 2014 to make it 10% for the same year and additional 5% for 2015 to make it 10% for the same year. All implementation of the interim payments shall be done on or before 15th August 2016.

7. Parties have agreed that the pending CBA of 2016 to 2017 shall have 10% interim increase to be paid at 5% each year.

The applicable clause of this return to work formulae is clause 4 as hereunder;

4. No victimization by either party subject to the applicable law.

This clause provided for non victimisation of the union members, subject to the applicable law. And this is the crux of the matter. What is the meaning of *subject to the applicable law*? The parties are opposed on an interpretation of the last limb of this clause.

Overall, Return to Work Formulae as set out in industrial relations are a means of righting a bad or unfortunate industrial relationship or action. These mostly happen in the event of strikes, lawful or otherwise. This is more so when the parties realise the futility of any prolonged industrial action on their part. These are clearly industrial pacts for return to work by the workers.

It is the essence of Return to Work Formulae that the interest of the striking workers are not left to the mercy of the employer, always all powerful. The pact therefore, like in the instant case provides a safe avenue and haven for the striking workers to return to work unscathed by any intervening action prior to this arrangement. This was the case and intention here and therefore the sculpting of clause 4 of the Return to Work Formulae.

The last limb on *subject to applicable law* is ambiguous and can be interpreted variously but it certainly would not have been intended to allow a situation where disciplinary proceedings would result after the Return to Work Formulae. This would not be envisioned in a Return to Work Formulae whatsoever. It would breed nonsense to the philosophy and principles of a Return to Work Formulae. I therefore find the case and submission of the respondent unsustainable and agree with the claimant/respondent.

The respondents argument and submission that this application is opposed does not hold water. There is nothing on record in support of this submission. The submission that this application is opposed courtesy of antagonistic application does not sound suave. This would *in toto* be unprocedural and has no basis in law.

I am therefore inclined to allow the application with costs to the claimant/applicant.

Delivered, dated and signed this 8th day of December 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Ng'eno holding brief for Mrs. Opiyo instructed by Kaplan & Stratton for the Respondent/Applicant.
2. Mr. Khisa for the Union.