



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**PETITION NO. 12 OF 2014**

**KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....PETITIONER**

**VERSUS**

**KARATURI LTD (In Receivership).....1<sup>ST</sup> RESPONDENT**

**KIERAN DAY & IAN SMALL (Joint Receivers and Managers).....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before Court for determination are 2 motions dated 30 July 2014 by the Petitioner, and one dated 17 October 2014 by the Respondents.
2. The Respondents filed their written submissions in respect of its application aforesaid on 21 November 2014, while the Petitioner filed its submissions on 1 December 2014.
3. The background facts are rather straight forward.
4. On 30 July 2014, the Petitioner (hereinafter the Union) filed a Petition against Karuturi Ltd-in receivership and Kieran Day and Ian Small (hereinafter the employer) alleging that the employers had on or around 21 July 2014 sought to declare several employees redundant and sought to reengage the employees under new contracts without paying terminal benefits.
5. Together with the Petition, the Union filed a motion seeking various restraining orders. Ongaya J who heard the motion directed that the status quo be maintained and stopped declaration of redundancies pending *inter partes* hearing.
6. It appears the orders were not complied with and on 4 August 2014, the Union filed an application seeking leave to commence contempt proceedings against the employers. Nzioki wa Makau J dismissed the application on 14 August 2014.
7. On 7 November 2014, the parties suggested and the Court directed that both the initial motion of 30 July 2014 and the employers motion of 17 October 2014 be determined on the basis of the record and submissions. The parties highlighted the submissions on 10 December 2014.

**The motion of 30 July 2014**

8. In this motion, the substantive prayers pending determination are prayers

3 THAT, an order do issue Restraining the Respondent by themselves, their agents, assigns,

servants, and or representatives or any other person claiming through them or otherwise from compelling any employees to sign new contracts of employment pending hearing and determination of this Petition *inter-partes*.

4 THAT, an order do issue Declaring the Respondent by themselves, their agents, assigns, servants, and or representatives or any other person claiming through them or otherwise to pay all employees their statutory dues including unpaid wages, house allowance, pending leave or other benefits of whatever nature contained in the CBA including termination or redundancy benefits in accordance with the provisions of the CBA.

5 THAT, an Order do issue granting the Petitioners 12 months wages as compensation for wrongful loss of employment.

9. The Union's case is that upon the receivership of the 1<sup>st</sup> Respondent by a named bank, the Respondents arbitrarily and without notice changed the terms and conditions of service of its members without notice despite a Memorandum of Understanding between the Union and the Respondents on 28 February 2014.

10. Further, it is argued that the employer was compelling the employees to sign new contracts to the detriment of their fundamental rights and freedoms and contrary to the terms and conditions of service agreed in collective bargaining agreement(s).

11. The Union contended that the employer's action amounted to declaration of redundancy and that it wanted to employ the members afresh before paying full benefits/dues.

12. The employer on their part deposed that the employees' contracts were terminated on receivership and they were accordingly notified that any benefits above Kshs 20,000/- were unsecured. It was further deposed that the employees were reemployed on similar terms and conditions of service pre receivership.

13. The employer denied declaring redundancies, and that it is only 7 employees who faced disciplinary action over misconduct.

14. From the material placed before Court, it appears that the employees were informed of the termination of their contracts around February 2014. The terminations, would therefore be a *fait accompli*.

15. Any employee is of course free to challenge the procedural and substantive fairness of termination of contract or dismissal even when given a fresh contract/new terms of employment. Sections 41, 43, 45 and 47 of the Employment Act, 2007 provide protection to employees against procedurally and substantively unfair termination of service.

16. Reengagement on new terms cannot legally, stop an employee from bringing forth a claim on unfair termination/wrongful dismissal. The Union's members can still pursue such a course of action while serving under the new contracts.

17. Thomas Kipkemboi's supporting affidavit at paragraph 6 admitted that already the Union's members had been offered new contracts thus effectively terminating the previous contracts but did not pin point exactly what terms and conditions in the new contracts fell below what had been agreed in the collective bargaining agreement.

18. Based on this realization, it would serve no purpose to grant the orders sought by the Union at the interlocutory stage. In any case specific performance should be granted in very exceptional circumstances in the employment relationship.

19. Further, prayers 4 and 5 can only be granted after hearing and determining the Petition on the merits and not at the interlocutory stage. Compensation and final benefits cannot be awarded at the interlocutory stage.

20. Should the Petition or any Claim instituted succeed, the employees would have adequate remedy.

21. The motion dated 30 July is thus dismissed.

### **Motion of 17 October 2014**

22. This is a motion by the employer, seeking that

1. ....

2. ....

3. Pending the hearing and determination of this suit, an order do issue prohibiting the strike and restraining the Petitioner herein either by itself, its officials, its members, its agents and/or servants from continuing with the intended strike pursuant to the strike notice dated 14<sup>th</sup> October 2014.

23. The motion was served upon the Union and it filed a Replying affidavit sworn by Thomas Kipkemboi on 27 October 2014.

24. The Respondents through a Manager Patrick Ndungu Maina filed a further affidavit on 6 November 2014 in response to the Union's affidavit.

25. On 14 October 2014, the Union issued a strike notice to the employer. The reason for the strike notice was that the employer had been deducting union subscriptions from its employees members of the Union, but had failed to remit the same to the Union.

26. According to the strike notice, the strike action was to commence on 22 October 2014.

27. The strike notice prompted the employer to file the motion now under consideration under certificate of urgency. I certified the motion as urgent and directed that it be served for *inter partes* hearing on 21 October 2014. During the *inter partes* hearing on 21 October 2014, I granted prayer 2 of the motion and directed the Union to file its responses.

28. Among the grounds relied on by the employer was that the parties had not exhausted the mutually agreed dispute resolution mechanisms before issuing the strike notice, and further that the same issues were the subject of litigation in the Petition brought herein by the Union. Any dispute had not been referred to conciliation.

29. The Union contended and submitted that the employer had violated statutory provisions in the Employment Act and Labour Relations Act in deducting and refusing to remit union subscriptions and that the strike notice complied with the law.

30. The Union did not challenge the assertion by the employer that the parties had mutually agreed on how to resolve disputes before resorting to the ultimate weapon in industrial relations.

31. On this ground, the Court is satisfied that the parties should have exhausted the agreed dispute resolution mechanisms before calling for a strike.

32. But the Court also notes that the effective date of the called strike action has expired. Were the Union to call out its membership on strike, it would be required to give a new notice.

33. This motion therefore also stands to be dismissed.

### **Conclusion and Orders**

34. In conclusion, the Court dismisses both applications dated 30 July 2014 and 17 October 2014 with no

order as to costs because of the social partnership between the parties.

35. For the sake of clarity, the employer must remit any statutory deductions/union subscriptions deducted from members of the Union in the meantime to the appropriate persons.

36. The Court further directs that the parties exhaust the dispute resolution mechanisms mutually agreed, before further directions are given on the hearing of this Petition, which is hereby stayed.

**Delivered, dated and signed in Nakuru on this 20<sup>th</sup> day of February 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Union: Mr. Khisa, Organising Secretary, Kenya Plantation & Agricultural Workers Union

For Respondent: Mr. Nyamwange, instructed by Hamilton Harrison & Matthews Advocates