



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 329 OF 2014

BENARD MUKOLWE & 122 OTHERS

CLAIMANTS

v

KARUTURI LIMITED (In receivership)

1ST RESPONDENT

IAN SMALL-(Joint Receiver Manager

KARATURI LTD)

2ND RESPONDENT

KIERAN DAY-(Joint Receiver Manager

KARATURI LTD)

3RD RESPONDENT

KARATURI LIIMITED

4TH RESPONDENT

TWIGA FLOWERS LTD

5TH RESPONDENT

RULING

1. The 123 Claimants through the firm of Muthanwa & Co. Advocates lodged a Memorandum of Claim against the 4 Respondents on 25 July 2014, and the issues in dispute were stated as

1. Unfair termination
2. Terminal dues for *resignees*
3. Terminal dues for retirees (voluntary)
4. Terminal dues for dependents
5. Terminal dues for retirees (early retirement)
6. Forceful eviction from company houses
7. Mass transfer of population and freedom from discrimination
8. Human dignity
9. Privacy

10. Fair Administrative action.

2. Together with the Claim was a Motion seeking some 4 prayers. Relevant for the purposes of this ruling are prayers 3 and 4 to the effect

3. THAT this Honourable Court be pleased to issue orders of temporary injunction against the Respondents by themselves, their agents, employees and or assigned (sic) from evicting or in any other way interfering with the claimant occupation of the Respondents 'company Houses' and or implementing the notice to the claimants dated 17th July, 2014 Ref: KL/pnm/17072014 until this application is heard and determined.

4. THAT costs of this application be provided for.

3. Ongaya J had on 25 July 2014 granted prayer 2 of the motion by ordering the Respondents not to implement the notices to the Claimants to vacate the housing accommodation allocated to the Claimants by the 1st Respondent pending *inter partes* hearing of the application. That order is still in force.

Claimants' case on the motion

4. The Claimants case is that pursuant to clause 25(e) of a Collective Bargaining Agreement between the Agricultural Employers Association (on behalf of the 1st Respondent and other employers) and Kenya Plantation and Agricultural Workers Union on behalf of the 1st Respondent's employees, the Claimants were entitled to stay in the houses provided by the 1st Respondent for a maximum period of three (3) months after declaration of redundancy, and for a period of thirty (30) days on transfer of ownership of the farm.

5. The Claimants asserted the notice given to them was grossly inadequate and their dignity and privacy would be abused and compromised were they to vacate the houses. The Claimants also contended that they would not be paid their terminal benefits if they were to vacate before the benefits were paid.

6. In this regard, Mr. Muthanwa for the Claimants submitted that payment of the benefits and salary arrears to the Claimants were intertwined with vacation of the houses and the Claimants should not vacate before the payments were made.

7. It is not disputed that the Claimants or some of them were issued with notices to vacate the 1st Respondents houses on 17 July 2014 by the 2nd and 3rd Respondents.

8. It further not disputed that the 1st Respondent was placed under receivership and the 2nd and 3rd Respondent were appointed as receivers/managers.

9. Mr. Muthanwa also submitted that section 95 of the Companies Act was not applicable.

Respondents' case

10. For the Respondents, Mr. Wamaasa relied on a replying affidavit sworn by one Patrick Ndungu Maina and filed in Court on 1 September 2014.

11. It was deposed in the affidavit that an audit carried out on housing had revealed that many of the persons occupying the 1st Respondents houses were not employees, former employees and it was these persons who were issued with notices to vacate.

12. A further payroll audit established that out of the 123 Claimants, only 45 were issued with notices to vacate and out of these 45, 34 had voluntarily resigned before receivership, 4 had resigned after receivership, 3 had been dismissed prior to receivership, 3 had deserted prior to receivership and 1 had his

services terminated prior to receivership. The rest, 78 in total were not issued with notices to vacate. Some of the Claimants were deceased.

13. Mr. Wamaasa submitted that the Claimants had not brought a claim for terminal benefits and that the Claimants who had left employment should have vacated the houses within 3 months but nearly one year down the line, some of them still retained the houses.

14. He also submitted that there was no employer/employee relationship with some of the Claimants.

15. In a brief rejoinder, Mr. Muthanwa submitted that terminal benefits should have been paid within 3 months and the failure to pay meant the 3 month period was extended.

Evaluation

16. I have considered the documents referred to and the submissions and come to the following conclusions in regard to prayer 3 of the motion.

17. Firstly, under section 31 of the Employment Act, 2007, an employer has the primary responsibility to provide an employee with reasonable housing accommodation failing which the employer must pay to the employee a sufficient sum as house allowance.

18. Secondly, the provision of housing accommodation and or pay of housing allowance in lieu is confined to where an employment relationship exists or survive. The corollary to this is that where an employer has terminated and or purported to terminate the services of an employee, the obligation to provide housing or pay in lieu ceases unless there is some other contractual provision to the contrary.

19. Third, that the right to housing under section 31 of the Employment Act is not tied to and does not survive termination, whether unfair or wrongful.

20. Fourth, in appropriate circumstances, the right to fair labour practices in Article 41 of the Constitution may be used by the Court to ameliorate the harsh effects of section 31 of the Employment Act, 2007, to enable a dismissed employee to secure alternative accommodation when he/she was provided with housing by the employer.

21. Fifth, the Claimants right, if at all to housing by the 1st Respondent was also governed by the provisions of clause 25(e) of the Collective Bargaining Agreement and a purposive interpretation of the clause restricts its application to those employees who are declared redundant and not those whose contracts of services have been terminated on account of other grounds or reasons.

22. Sixth, the Claimants have not alleged in the Memorandum of Claim nor demonstrated through affidavit or other documentation that they were declared redundant.

Conclusion

23. In my view, the Claimants have not met the test for the grant of injunctive relief as set out in the case of *Giella v Cassman Brown & Bros Ltd*. A *prima facie* case has not been made nor a demonstration that irreparable harm would be occasioned to the Claimants.

24. Arising from the above, the motion dated 25 July 2014 fails, and it is dismissed with costs to the 1st to 3rd Respondents.

25. The interim orders issued on 25 July 2014 are therefore vacated.

26. The parties herein were all subject to a Collective Bargaining Agreement. Collective Bargaining Agreements are preceded by recognition agreements which set out how individual and

collective grievances should be resolved.

27. The parties should exhaust those mutually agreed dispute resolution mechanisms.

28. In this regard and pursuant to section 15(1)(2) and (4) of the Employment and Labour Relations Court Act, the Court stays this Cause and directs the parties to appear before the Naivasha Labour Officer or such other officer as the Cabinet Secretary for Labour may appoint, for conciliation.

29. This matter to be mentioned on a date convenient to the parties and the Court for further directions after conciliation.

Delivered, dated and signed in Nakuru on this 13th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimants Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondents Mr. Wamaasa instructed by Hamilton Harrison & Mathews Advocates