



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 26 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 3<sup>rd</sup> February, 2015)**

**CYRUS KIOKO & 48 OTHERS .....CLAIMANT**

**VERSUS**

**WELLS FARGO LIMITED .....RESPONDENT**

**RULING**

The application before court is the one dated 14/1/2015. The application was filed under Certificate of Urgency through a Notice of Motion brought under the provision of Section 12 of the Industrial Court Act as read together with Article 41 and 43 of the Constitution and Section 45 and 47 of the Employment Act 2007. The application seeks order that:-

1. **This motion application be certified urgent and be heard on priority and exparte in the first instance.**
2. **Pending the hearing and determination of this motion interpartes this Honourable Court do issue an Interim Preservatory Order to stay and/or stop the operation and effect of the Respondent's letters dated 9<sup>th</sup> January, 2015 summarily dismissing the Claimants employment with itself.**
3. **Pending the hearing and determination of this motion and/or the main case herein this Honourable Court do issue an order to prohibit the Respondents from declaring a vacancy in respect of the Claimants positions with itself and from filling up the Claimants positions with itself and reinstate the Claimants back into employment and accord them duties in the normal manner with full salary, allowances and privileges.**
4. **In the Alternative to the prayers above and in the event the Court does not issue an order of reinstatement of the Claimants pending the hearing of the main case:**
  - i. **This Honourable Court do issue an order suspending the Respondents letter of 9<sup>th</sup> January, 2015 summarily dismissing the claimants from its employment and do further prohibit the Respondents from declaring a vacancy in respect of and filing up the Claimants position and thereby do hold the claimants on normal suspension or interdiction pending the full hearing and termination of the main case herein.**
  - ii. **This Honourable Court do order as would be in normal suspension or interdiction for the Claimants to be paid half of their salaries together with all the entitled to allowances and privileges pending the hearing and determination of the main case herein.**
5. **The Respondents to bear the costs of this application in any event.**

The application is supported by the annexed affidavit of Cyrus Kioko and based on the grounds that:

- 1. The dismissal of the Claimant's from employment was extremely abrupt without legal justification and completely without due process and fairness.**
- 2. The reasons for the abrupt and immediate dismissal did not and does not fall within the reasons which would entitle an employer to terminate employment and more so in a summary manner without due process.**
- 3. The Respondent's openly went out of their way to victimize and set up the Claimants for possible dismissal by denying them all avenues of redress.**
- 4. All the legal requirement as to validity of acts and fairness of any dismissal process having been flouted, it is fair and just that the orders being sought herein be granted.**

In the interim, the Applicants were granted orders in term of prayer 1. The court also ordered that the posts previously occupied by the Claimants should be not be filled pending hearing of this application.

The Applicants contention is that they are employees of the Respondents employed on different dates as technicians. The Applicants further aver that they were previously Members of Kenya Commercial Food and Allied Workers Union but came to be advised that the court had decreed that the said Union could not operate in the Security Sector. The Management then advised them from about year 2010 to choose a few of themselves to act as representatives of their fellow employees in engaging with management whenever they had any grievances. The Applicants as advised chose some of their own as representatives who raised various grievances with management but they were ignored. The bundle of letters indicating communication between Applicants and Respondents are annexed as Appendix **CK-1**.

The Applicants decided to join Kenya National Private Security Workers Union at the end of 2014 as per their annexure **CK-2** – a bundle of signed schedule showing their entry into the said Union.

On 5.1.2014, the Applicants again sought to pursue dialogue with the Respondents on various issues. The Management listened to them and without offering any solution told them that they were engaged in an illegality and called in security to get them out of the company premises and asked them to report back on the 7<sup>th</sup> Janaury 2015 and were served with letters of suspension marked **CK-3**. The letters asked them to appear on 9<sup>th</sup> Janaury 2015 for disciplinary hearing with a Union official or another employee. They consulted the office of the Kenya Private Security Workers Union who agreed to accompany them to the hearing.

On the day of the scheduled disciplinary hearing, the management decided to lock them out of the gate with the Union official and they were not heard. On the same day, they started receiving letters of termination alleging that they failed to turn up for the disciplinary hearing (**CK 4**).

The Applicants contended that they never engaged in an illegal strike as alleged but it is the management who chased them out of the company.

It is also the Applicants contention through the affidavit of Isaac G. M. Andabwa that the Union was denied access to the Respondents premises dispute being present and ready for the disciplinary hearing.

In reply to this application, the Respondents filed their replying affidavit sworn by one Steve Kangethe on 19/1/2015. It is the Respondents position that the Applicants staged an illegal strike on 5/1/2015. That the Applicants complained of 3 issues vis delayed December salary, salary review and unwillingness to work under the current Technical Manager. The issue of December salary was addressed and they were informed that their salary were in their accounts on the material day. On salary review, they were informed that the next review would be done in May 2015 the last one having been done in May 2014. On issue of current Technical Manager, they were informed that the same was being handled by management. Having answered their questions, the Respondents pleaded with Applicants to go back to

work and they refused. All attempts to make them go back to work fell on deaf ears.

The Respondents deny that the Applicants came back to Respondents premises on 7.1.2015 but they did so on 6/1/2015 and staged a sit in at the gate and engaged with the press as per annex **SK 4**.

It is further the Respondents position that, vide a letter **SK 2** the Respondents had explained to the Claimants that the next performance review salary adjustment would therefore be done on 1<sup>st</sup> May 2015.

It is also the Respondents position that the Respondents and applicants had held meetings respecting grading and minimum salaries and signed a Memorandum of Agreement **SK 3** – signed on 19/7/2013.

The Respondents aver that when Applicants failed to return to work they were issued with show cause letters which were received but only 3 technicians acknowledged them as per **SK 5**. Only 1 technician gave a response to the show cause letter. They were thereafter issued with suspension letters on 8/1/2015 (**SK 6**). The letter further invited them for a disciplinary hearing on 9/1/2015 which they failed to attend (**SK 7**). They were thereafter summarily dismissed.

In their supplementary affidavit sworn on 27/1/2015 by Steve Kangethe, the Respondents further deponed that due to the delicate nature of the Applicants jobs to the Respondents clients the Respondents took immediate remedial action to avert a crisis and picked from its data base Applicants for employment, who were on the waiting list to take up the slots left by the Claimants as per Appendix **SKL 2** – which indicate that those picked up were to commence their duties on 19/1/2015. They also deny locking the Union representative outside the disciplinary process as alleged by the Applicants.

I have considered the averment of both parties. The issue for determination by this court is as follows:

**1. Whether the Applicants are entitled to the prayer sought on the Notice of Motion dated 14/1/2015.**

The Applicants sought preservative orders staying the operation and effect of the Respondents letter dated 9/1/2015 summarily dismissing the Claimants from employment. They also want the Respondents prohibited from declaring a vacancy in respect of positions held by the claimants and also reinstate them in employment. For this court to grant the order sought the conditions set in **Giella vs Cassman Brown & Co Ltd (1973) EA 358** must be met. The Applicants must show that they have a prima facie case with a probability of success. Secondly they must show that if this court does not grant orders sought, they stand to suffer irreparable injury which cannot adequately be compensated by an award of damages. Lastly, this court can grant the order sought on a balance of convenience.

The Applicants have submitted that they were unfairly dismissed without due process in that they and their Union representatives were denied a hearing in that on the day set for hearing, they were locked out of the Respondents premises. Further, there are 49 Applicants herein. From the evidence on record only 3 received and acknowledged suspension letters – which were also inviting them for disciplinary hearing.

As for the rest there is no proof that they were served with suspension letters nor invited for disciplinary hearing though Respondents aver that they received and tore the letter in question. Further, there is evidence that the Applicants had left the Union KUCFAW and joined the Kenya Private Security Worker's Union (KPSWU). However, it is apparent that the Respondents dealt with the KUCFAW instead of KPSWU as per Para 34 of their replying affidavit which shows that the Assistant Secretary General of KUCFAW and Labour Officers came to their offices on 7/1/2015 and had a discussion with them. The affidavit show that the officials of KPSWU were denied entry in the Respondents premises. From the foregoing, it is the finding of this court that the Applicants have established that they have a prima facie case with a probability of success having been condemned unheard and having been denied representation by their Union – against the provision of Article 41 of the Constitution.

It is also apparent that on 14/1/2015, this court gave orders restraining the Respondents from filing up the posts previously occupied by the Claimants. However, the Respondents purported to go ahead and issue

letters for certain persons to start work on 19/1/2015. This is a blatant disregard to orders of this court dated 14/1/2015. It may be true that the positions occupied by Applicants are sensitive but that did not give the Respondents a warrant to disobey court orders. It is therefore this Courts Order that the prayer sought by Applicants stopping filing of the posts still stands and any action taken against this order of 14/1/2015 is null and void.

The Applicants sought to be reinstated in employment but that would be tantamount to also condemning the Respondents without consideration of all the facts.

I believe damages could adequately compensate the Applicants if this court finds that the dismissal was unlawful. I will decline to reinstate them accordingly but would on a balance of probabilities treat them on suspension in which case they would be entitled to ½ pay pending final hearing and disposal of this case.

Read in open Court this 3<sup>rd</sup> day of February, 2015

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Namada for Claimant

No appearance for Respondent