



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1984 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 17th April, 2015)

LEONARD OMONDI ALUKO (acting on his own behalf and on behalf of

“KENYA UNION OF COURIER AND ALLIED WORKERS”1ST APPLICANT

MARTHA OPINI.....2ND APPLICANT

WYCLIFFE OCHOKI3RD APPLICANT

GEOFFREY MUTHINI.....4TH APPLICANT

SILA KEMBOI.....5TH APPLICANT

VERSUS

G4S KENYA LIMITED (G4S Courier Services).....RESPONDENT

RULING

1. The applications before court are the ones dated 7/11/2014 and 7/1/2013 respectively. It was by consent agreed that both applications be argued concurrently.

The application dated 7/11/2014 was filed by the Applicants herein under **Certificate of Urgency** filed through a Notice of Motion dated the same day.

2. The Applicants sought orders that:

1. ***THAT this suit matter be certified as urgent and be heard exparte in the first instance.***
2. ***THAT the parties be and are hereby granted a 30 day period to reach an out of court settlement with regards to this matter and to register the same with the court.***
3. ***THAT the 1st Applicant be and is hereby granted leave of court to act as the representative of the 2nd, 3rd, 4th and 5th Applicants in this matter between these parties as under Article 22 of Cap 237 of the laws of Kenya until this dispute is resolved or until the “KENYA UNION OF COURIER AND ALLIED WORKERS’ is sully registered as a trade union or whichever occurs***

first. Applicants are not proper parties to this suit.

4. *THAT a declaratory order to issue that the rights of the 2nd, 3rd, 4th and the 5th Applicants to freedom of conscience, religion, belief and of opinion guaranteed under Article 32, of the Constitution of Kenya and their right to equality and freedom from discrimination guaranteed under Article 27 of the Constitution of Kenya have been and are being violated.*
5. *THAT a specific performance order do issue to the Respondent to review its policy on hours of work in order to accommodate the rights of the 2nd, 3rd, 4th and other of its employees who are devotees SDA Church to observe their day of worship on Saturday within acceptable limitations.*
6. *THAT in the intervening period, interim preservations orders to do issue restraining the Respondent by its managers, supervisors, employees and/or agents from taking any disciplinary actions against the 2nd, 3rd, 4th and other of its employees who are devotees of the SDA Church on account of their observing Saturday as a day of worship.*
7. *THAT a specific performance order do issue to the Respondent to reinstate the 5th Applicant and treat him in all respects as if the employment had not been terminated; or in the alternative.*
8. *THAT leave of court be and is hereby granted to the 5th Applicant to file a petition for an award of any relief(s) available as remedies for unfair dismissals within 90 days from the day of determination of this suit.*
9. *Any other relief as the Honourable Court shall deem fit to grant.*
10. *Costs of and occasioned by this application be borne by the Respondent.*

3. The application was based on the grounds that:

1. *THAT the 1st, 2nd, 3rd and 4th Applicants are all unionisable employees of the Respondent while the 5th Applicant is an erstwhile employee of the Respondent and his summary dismissal is in the crux of this application.*
2. *THAT the 2nd 3rd 4th and 5th Applicants are devotees of the Seventh Day Adventist (SDA) Church. The Seventh Day Adventists ordinarily observe Saturday as their day of worship. 2nd 3rd 4th and 5th Applicants herein state that Saturday is their Sabbath.*
3. *THAT the 1st Applicant is a shop floor representative of the employees, and is also the interim Secretary General of “Kenya Union of Courier and Allied Workers”, a trade union undergoing due registration at the Registrar of trade unions. He is an Applicant in this cause in his personal capacity, since the 2nd 3rd 4th and 5th Applicants and other SDA devotees not before this court have requested him to guide and represent them in this delicate matter.*
4. *THAT the dispute in this application arises from a new requirement by the Respondent that the 2nd 3rd 4th and 5th Applicants and other employees of the Respondent who are devotees of the SDA church not before this court to work on Saturdays.*
5. *THAT prior to the dispute before the Court, 2nd 3rd and 4th Applicants and 16 other employees of the Respondent who are devotees of the SDA church not before this court had not been requited to work on Saturdays. In order to accommodate them, the Respondent had generally allowed arrangements such as working on Sundays to compensate for the half day work hours that they did not serve on Saturdays.*

6. ***THAT However in the recent past, the Respondent had begun to compel the 2nd 3rd 4th and 5th Applicants and other of employees of the Respondent of the SDA faith not before this court to work on Saturdays.***
7. ***THAT the Respondent has also instituted disciplinary proceedings against the 2nd 3rd 4th and 5th Applicants and other employees of the Respondent who are devotees of the SDA church not before this court on account of failing to report to work on Saturday, including warning letters to the 2nd 3rd 4th and 5th Applicants, and a summary dismissal to the 5th Applicant herein.***
8. ***THAT it is the 2nd 3rd 4th and 5th Applicants and other employees of the Respondent of the SDA faith not before this court case that the Respondent's actions are in contravention of Article 32 of the Constitution of Kenya which guarantees the freedom of conscience, religion and belief.***
9. ***THAT the Respondent's actions also contravene Article 27 of the Constitution of Kenya on the right to equality and freedom from discrimination.***
10. ***THAT the Respondent has no basis in any written or known law to compel them to work on Saturday nor take disciplinary basis on the account of their failing to work on Saturdays as the only requirement placed upon an employer under Section 27(2) of the Employment Act, 2007 and Section 7 of the Regulation of Wages (General) Order is to afford its employees one rest day every week and that "the day" is not specified. Nor can the Respondent cite ay ruling of a competent curt of law where employees have ever been forced to do something they consider sacrilege.***
11. ***THAT to insist that all its employees to have only Sunday as the day of rest under Section 27(2) of the Employments Act 2007 and Section 7 of the Regulations of Wages (General) Order, despite the fact that it is not specified anywhere in Kenyan law, is tantamount to elevating Sunday as an official worship day of the Respondent in contravention of Article 8 of the Constitution which states:***

"there shall be no state religion".

12. ***THAT the matters of conscience and religion are uniquely personal and for an employer to simply insist that its employees must report to work on Saturday and therefore ignore their day of worship is irresponsible in consideration of the efforts made by the Applicants to secure their day of worship, including offering to work on Sundays or in other departments on Sundays.***
13. ***THAT a reading of the minutes of the Respondents meeting with the Applicants demonstrates the Respondent's resolve to equalize its employees as far as working on Saturday is concerned. In doing so, the Respondent relies on its policy on hours of work. But the Applicants insist that when the rights and fundamental freedoms of "the individual" are under consideration, citing a "one fit all' policy will not do. And hereby cite the holding of Majanja J in Kituo cha Sheria & 8 others vs Attorney General (2013) eKLR that:***

a policy that does not make provision for examination of individual circumstances and anticipated exceptions is unreasonable.
14. ***THAT the new a human resource policy of the Respondent is unreasonable as it does not accommodate the unique spiritual needs of its employees and that it does not matter that only a section of employees raise the issue, and relies on landmark judgment of this honourable court delivered by Hon. LINET NDOLO in Prisca Kemboi & 2 others vs Kenya Post Office Savings Bank (2014) eKLR.***
15. ***THAT the effect of the Respondent's policy on hours of work does not to just limit the Applicants rights under Article 32 but obliterate them altogether. In their view, this flies right***

in the face of Article 24(2)(c) of the Constitution which prohibits limitations that derogate from the core and essential consent of rights and freedoms.

16. *THAT by its past conduct whereby the Petitioners were allowed time off on Saturdays to observe their day of worship, the Respondent waived its policy and is therefore estopped by deed from demanding compliance by the Petitioners and hereby relies on Sita Steel Rolling Mills Limited vs Jubilee Insurance Company Limited (2007) eKLR where the court held:*

“A waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.”

17. *THAT in defining the doctrine of estoppel, the Court in Serah Njeri Mwobi vs John Kimani Njoroge (2013) eKLR held:-*

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person”

18. *THAT in view of paragraph 17 above, there exists as established waiver by the Respondent of its right to enforce the Terms and Conditions of Service and Code of Conduct as far as working on Saturdays is concerned.*

19. *THAT the Respondent created a legitimate expectation in the Petitioners that they would be granted time off on Saturdays to observe their day of worship and that the arrangements thus created became part of the Terms and Conditions of Service of the Petitioners which cannot be varied by a general instruction from the Director of Courier Operations and relies on the landmark ruling of this Honourable Court in the Judgment of LINET NDOLO IN Prisca Kemboi & 2 others vs Kenya Post Office Savings Bank (2014) eKLR.*

20. *THAT the 2nd 3rd 4th and 5th Applicants and other employees of the Respondent of the SDA faith not before this court are on the opinion that they are seeking enforcement of their individual rights under the Constitution and their respective employment contracts and therefore plead with to the Honourable Court to find that these claims lend themselves to adjudication on their own merit.*

21. *THAT in view of the foregoing findings, the Honourable Court should reach the conclusion that the Respondent’s actions are in violation of the Petitioners’ right to observe their day of worship and grant the orders as prayed for in any wise way render justice to their cause.*

22. *THAT the 1st Applicant is acting in the benefit of both parties in this matter considering its delicate nature.*

23. *THAT the Applicants herein would be glad if the leave of court was granted to the first Applicant to conduct this resolution with the employer out of court on behalf of the 2nd 3rd 4th and 5th Applicants plus all other affected employees, in his personal capacity, and as if he was an official of a duly registered trade union.*

24. *THAT it is the undertaking of the 1st Applicant that all matters herein shall be dealt with tactfully.*

25. *THAT the 1st Applicant has in the past represented other employees of the Respondent in internal dispute resolution forums and the Respondent has recognized him as such.*

26. ***THAT the 1st Applicant is extraordinarily familiar with all the issues herein and their subsequent legal implications. That it is the greatest desire of all Applicants to see the Applicants and the Respondent herein continue with their employee employer relationship as if this unfortunate dispute never occurred.***

27. ***THAT the law indeed prohibits advocates in their capacity as advocates representing employees in disputes with their employers in any form where both parties are still intent in preserving the employer employee relationship.***

28. ***THAT the 2nd 3rd 4th and 5th Applicants' rights to fairness enshrined in the Constitution would be threatened if they were to be left to negotiate with their employer on their own, and this would lead to a miscarriage of justice.***

4. The application was 1st heard exparte on 7/4/2014 and orders granted in terms of prayer 1 and 6.

As concerns the 2nd applicaiton dated 7/1/2015, the same was filed in court on 22/1/2015 under Certificate of Urgency. The same was filed through a ***Notice of Motion*** with the Applicants seeking orders that:

1. ***THAT this matter be and is hereby certified as urgent and be heard exparte in the first instance.***
2. ***THAT the Respondents be and are hereby restrained from implementing the transfer of the 2nd Applicant as contained in the letter of transfer dated the 3rd day of December 2014 pending the hearing and determination of this application interpartes.***

5. The application was based on the following grounds:

1. ***THAT the matter in this suit is the fright to observe Saturday as the day of worship.***
2. ***THAT the Applicants had obtained orders exparte conservatory restraining the Respondents from taking any disciplinary action against the Defendants on grounds of observing Saturday as the day of worship on an application dated 6th November 2014.***
3. ***THAT the Applicants requested and the court granted opportunity for parties to attempt an out of court settlement under alternative dispute resolution mechanisms.***
4. ***THAT the Respondent operates businesses in different sectors of the economy.***
5. ***THAT the Applicants are employed in the courier operations sector.***
6. ***THAT the Applicants are willing to be relocated to other duty positions within the Courier and have identified shifts the Courier sector and similar positions within the organization where they could comfortably work.***
7. ***THAT the Respondent has however offered to transfer her to an entirely different industry namely guarding against her wishes without consulting her.***
8. ***The 2nd Applicant is aggrieved by this imminent transfer by a letter dated the 3rd day of December 2014 and issued 6th day of January 2015.***
9. ***She feels that this will amount to a significant change of working conditions in a manner she feels is unfair. Especially due to the facts that other Claimants in this matter have been to continue working in the Courier division while observing their day of worship.***

10. She feels that the implementation of the transfer should be stayed until the matter is either settled or determined in court after deducing.

11. THAT the said act of transfer amounts to unfair labour practice.

12. In the interests of justice, saving costs and saving time, all the applications pending on this file, namely, the principal one dated 6th November 2014 and this current one dated 7th January 2014 be mentioned concurrently on the 2nd February 2015.

6. The application was heard exparte on 23/1/2015 and no orders were granted in the Interim. On 2/2/2015 the court also granted orders in terms of prayer 2. After the Preliminary exchange of pleadings, the applications were heard inter partes on 17/2/2015 and 9/3/2015.

The Applicants intimated to court that they had abandoned all prayers sought in application dated 7/11/2014 save for prayer No. 6. They also seek a hearing date for this claim.

The 1st Applicant submitted that he has locus to file the application being a shop floor representative of the employees and a Secretary General of a union undergoing registration.

He further submitted that the employees belong to the SDA Church which observes Saturday as their day of worship.

7. The Applicants aver that the suit arises out of a new requirement by the Respondents that the Applicants and others should work on Saturday – that prior to this dispute in court, the Applicants were not required to work on Saturday and other arrangements were made for them to work on Sunday.

The Applicants further aver that the Respondents have instituted disciplinary action against the Applicants for not working on Saturdays.

8. The Applicant have submitted further that on 8th September 2014, the 5th Applicant was issued with a warning letter as shown at page 43. Subsequently on 3/10/2014, he was dismissed as per the letter at page 42. Prior to this, a meeting was held between Courier Director and employees as per Minutes attached to the affidavit of the 2nd Applicant. The Director insisted that there would be no exceptions to working on Saturday on grounds of faith. He promised to intervene on behalf of the 5th Applicant.

On 25/10/2014, however, a notice of disciplinary inquiry was issued to the 2nd Applicant for failing to attend a refresher course on 18th and 26th October 2014, and both days were Saturday.

In the letter it was explained that an act of defiance could lead to dismissal.

9. The Applicants submitted that it is upon these happenings that they moved to court under certificate of urgency. They aver that the Respondents actions are a violation of their legitimate expectation to be given time off on Saturday to worship. It is also a violence of waiver given that they had worked for Respondents for 3 to 7 years and the issue had been waived. They also submitted that their actions violated their rights under Article 32 of Constitution.

The Applicants also submit that the Respondents actions are discriminatory contrary to Article 27 (4) & 95) of Court. They have submitted that the 5th Claimant's termination based on his religion is also discriminatory and therefore unlawful.

Further, the Applicants aver that to insist that Sunday is the only day of worship is tantamount to raising Sunday as the official day of worship yet there is no state religion under Article 8 of the court.

10. Concerning the application dated 7/1/2015, the Applicants aver that transferring the 2nd Applicant

from courier to guarding section is tantamount to demoting her and prejudicial to her. The Applicants want Respondent barred from transferring 2nd Applicant from courier to guarding section. In the same manner, the Applicants argue that this will be circumventing the court orders issued on 7/11/2014.

The Applicants also submit that this right of worship cannot be alienated and that the Applicant should not be transferred to frustrate her as the Respondents have done.

11. In response to the application of 7/1/2015 the Respondent have submitted that Courier division works from Monday to Saturday and not Sunday as this is how the Kenyan economy works. They submitted that the 2nd Applicant was employed in Courier section and could therefore not work on Sunday and this is what necessitated her transfer to another section based on her qualifications.

They aver that the transfer was not a demotion and is not discriminatory in any manner but an administrative decision conferred on the Respondent.

As to the application dated 6/11/2014, the Respondents aver that at the time the Applicants were employed, the issue of worship was not a matter agreed upon. On the issue of legitimate expectation the Respondent submitted that at the time the Applicants were employed, they always worked on Saturday unlike in case of Petition No. 38/2013. The Respondents have asked court to balance workers' rights vis a vis the employers rights. The Respondents cited various authorities and asked court to dismiss both applications.

12. The Applicants insisted that their rights are special rights and should be accommodated. They insist that forcing the Applicants to work on Saturdays and not Sunday is tantamount to elevating Sunday as the official day of worship.

Issues for determination

13. Upon consideration of the submissions of the parties, the issue for determination is whether the Applicants have established a prima facie case with a probability of success to warrant issuance of orders sought.

14. In determining this issue, the provisions of the law – Article 32 of Constitution of Kenya states as follows:

“(1) Every person has the right to freedom of conscience,

religion, thought, belief and opinion.

(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.

(4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion”.

15. Various case law have also addressed this issue amongst them:

Christian Education South Africa vs Minister for Education CC7 4/00)200, Seventh Day Adventist Church (East Africa) Limited vs Minister for Education & 3 others, Prisca Kemboi & 2 others vs Kenya Post Office Savings Bank Pet 38/2013.

From the case law and the Regulation and provisions of the Constitution and also in consideration of the

principles in the case of **Giella vs Cassman Brown**, I do find that the Applicants in both applications have established a prima facie case with a probability of success. I therefore find for Applicants and grant orders as hereunder:

Determination

This court confirms prayer No. 6 and order that an order do issue restraining the Respondents by its Managers, Supervisors, employees and/or agents from taking any disciplinary action against the 2nd, 3rd and 4th Applicants and others of its employees who are devotees of the SDA Church on account of observing Saturday as a day of worship pending hearing and determination of this claim.

In respect of the 2nd application, I also confirm orders sought and I restrain the Respondents from implementing the transfer of 2nd Applicant as contained in the letter of transfer dated 3rd December 2014 pending hearing and determination of the main suit.

The Applicants sought a date on priority and I allow the same and I direct that they be given a hearing date on priority basis at the registry.

Costs in the course.

Read in open Court this 17th day of April, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Karuri for Respondent

Wathome holding brief Miss Nyakwei– Present

Aluko for 1st Applicant