



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1339 OF 2013**  
**PAUL NDWIGA MUTUKU MBOGO.....CLAIMANT**  
**VERSUS**  
**PENTA TANCOM LIMITED.....RESPONDENT**  
**RULING**

1. The ruling herein relate to preliminary objections filed by the Respondent on 28<sup>th</sup> July 2015 on the basis that;

*a. In exercising judicial authority, the courts are guided under article 159(2) (c) of the Constitution of Kenya by the principles of alternative forms of dispute resolution including reconciliation, Mediation, arbitration and traditional resolution mechanisms.*

*b. This matter was fully settled pursuant to a meeting held between the parties in the presence of the Kenya Plantation and Agricultural Workers Union Thika Branch Secretary, the Chief shop steward and the secretary shop steward on 12<sup>th</sup> February 2013.*

2. Both parties filed their written submissions.

3. The Respondent submitted that on 20<sup>th</sup> January 2013 the claimant diverted the respondent's vehicle registration No. KAM 956Z from its assigned course, he stopped at Gachororo area, a place known for siphoning fuel, this was observed by the respondent's store keeper Esther nyokabi who alerted the respondent. Subsequently the claimant was issued with a show cause letter and in response he admitted to siphoning fuel from the stated vehicle. He was terminated as a result of this misconduct. The claimant being unionised reported the matter to Kenya Plantation and Agricultural Workers Union who wrote to the Respondent and a meeting was held on 12<sup>th</sup> February 2013 at the union offices. Present were the claimant, branch secretary, shop steward and a representative from the respondent. At the meeting the claimant admitted to his misconduct and the union requested that the summary dismissal be converted to normal termination and parties settled on the Respondent withdrawing the summary dismissal and the claimant gave his resignation letter. No other action was to follow once the claimant submitted his resignation letter. The claimant however refused to submit the resignation and instead instructed his advocate hence this suit.

4. That under Article 159 of the constitution, the Court should uphold the dispute resolution mechanisms. The claimant voluntarily submitted himself to the dispute resolution mechanism and thus should be made to abide by its outcome. The Respondent relied on the decision in **Wario Gorise versus Vicky Nyathiru**

## **Kabetu (Director Estate Muthithi Plantation) {2013} eKLR.**

5. In reply, the claimant submitted that it is true that a meeting was held on 12<sup>th</sup> February 2014 but the minutes for the said meeting are not signed by the claimant or his union representative said to be present. That where parties agreed to reduce the termination from summary dismissal to a normal termination, the dues under the collective agreement between the Respondent and the union ought to have been paid to him which was not the case here. It is therefore erroneous that the claimant was supposed to tender his resignation and not make any claim/s thereafter. That the parties had agreed on principle to have the claimant terminated subject to payment of his terminal dues and so as to have the matter marked as resolved.

6. Section 58 of the Labour Relations Act provides for the settlement of disputes between parties. The procedures set therein were not followed by the parties herein. There was no conciliator. That a settlement that panel that was not properly constituted, the Court has powers to set aside its agreement as under section 47 of the Labour Relations Act. The arbitration in this case was not successful so as to rely on the cited cases.

### **Determination**

7. The issue in dispute in this case is the unlawful dismissal without payment of terminal benefits and accrued dues. To thus plead that the dismissal is *wrongful, unprocedural* and *unfair* the Claimant as indeed all ordinary employees have a legal right not to be wrongfully dismissed, unprocedurally dismissed or unfairly terminated. The injuries the Claimants suffered can generally be said to be wrongful dismissal, or unprocedural dismissal or unfair termination. The conceptual foundation for such claims where proved is article 41 of the Constitution that guard against unfair labour relations.

8. The provisions of article 159(2)(c) of the Constitution are that parties are encouraged to undertake alternative disputes resolution mechanisms on condition that such mechanisms do not contravene the Bill of Rights or inconsistent with the Constitution and written law. In this regard the fore, where the claimant has a right under article 41 of the constitution, the same should be protected even before seeking to apply the provisions of article 159 as one falls under the Bill of Rights while the other is not. In this case, the Respondent submit that parties enters into a dispute resolution in a meeting held on 12<sup>th</sup> February 2013. An agreement was reached. Such agreement is however not attached herein for the Court to assess and appreciate that all the issues were settled and that the claimant has no other claim with regard to what was settled. Even in a case where there was such a settlement, which the claimant has contested, there are rules and procedures in challenging such a settlement and or consent.

9. Without going into the merits of the case, the issues addressed in the case of **Wario Gorose versus Vicky Nyathiru Kabetu** as submitted by the Respondent arose at the judgement level upon the Court assessing the entire claim. The issues herein with regard to the resolution of the matter arose in a preliminary objection before parties are heard on the substantive issues. To therefore apply as herein, the Respondent must have a clear case that the matter has since been resolved through alternative dispute resolution mechanism and an agreement arrived at that is beyond reproach, is certain and the Court can candid be able to ascertain that each party to the agreement was well aware of the same and the terms were settled. To therefore cite article 159 of the Constitution without any tangible outcome in agreement, consent, letter of resignation by the claimant or his written authority stating that he has withdrawn any claims against his former employer, the Court must then grudgingly protect that which is fundamental and covered under the Bill of Rights, the right to fair labour practice under article 41.

10. I agree with the submissions made by the claimant to the extent that where a registered trade union with a Recognition Agreement with an employer is engaged in the settlement of a dispute, sections 47 and 58 of the Labour Relations Act apply. The unionisation of an employee is a fundamental right protected under article 41 of the constitution and where such a union intervenes so as to resolve a dispute, the same must be assessed vis-à-vis the applicable collective agreement in force between the union and the employer at the time the cause of action arose or when the alleged dispute resolution took place. The presence of the union is something fundamental to the employee that cannot be removed in proceedings

such as the ones where the employer states that there was a settlement of the dispute between them and the employee. The agreement to such resolution must receive the approval or consent of the union or an unequivocal communication from the employee that he agreed to appear alone without his union appearance or representation at the dispute resolution table. Such a process is lacking here.

11. To therefore terminate the case at this point on the basis that parties held a meeting contemplating to resolve the matter would be the injustice. The case shall proceed on its own merits.

**The preliminary objections herein are dismissed. Parties shall take hearing dates for the main suit.**

Delivered, dated and signed in open Court at Nairobi this 10<sup>th</sup> August 2015.

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

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