



**REPUBLIC OF KENYA**

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

**CAUSE NO. 973 OF 2015**

**KENYA PLANTATION AND AGRICULTURE WORKERS UNION...CLAIMANT**

*VERSUS*

**KAKUZI LIMITED.....RESPONDENT**

**Mr. Muli for Claimant / Applicant**

**M/S Opiyo for Respondent**

**RULING**

1. The notice of motion application dated 29<sup>th</sup> May 2015 and filed on the same date seeks the following orders;
2. That this Honourable Court be pleased to prohibit and / or restrain the Respondent from evicting its three hundred and nineteen (319) employees locked out and / or dismissed employees from the quarters they occupy pending the hearing and determination of this application.
3. That this Honourable Court be pleased to prohibit and / or restrain the Respondent from engaging new employees to take up the positions held by the locked out and / or dismissed employees pending the hearing and determination of this application.
4. This Honourable Court be pleased to reinstate the Respondent's three hundred and nineteen (319) employees locked out and / or dismissed employees to the positions they occupied before the lock out and / or dismissal meted out by the Respondent herein.
5. That costs of this application be borne by the Respondent.
6. The application is premised on grounds 1 to 19 set out on the notice of motion and reasons found in the supporting affidavit of Thomas Kipkemboi, the Deputy General Secretary of the Claimant / Applicant.
7. Instead of filing a replying affidavit the Respondent filed a notice of motion application under certificate of urgency seeking to set aside the status quo orders granted on 29<sup>th</sup> May 2015 and that the Hon. Justice Radido be pleased to recuse himself from conducting any further proceedings in the matter.
8. Justice Radido rendered a ruling on 2<sup>nd</sup> June 2015 while declining to recuse himself but never the less transferred the matter to Nairobi to be placed before the Principal Judge for further directions.

9. The Respondent filed a replying affidavit on 2<sup>nd</sup> June 2015 detailing its opposition to the application.
10. The nub of the response is that the employees at the Horticultural Section engaged in an unprotected strike on 25<sup>th</sup> May 2015 and failed to heed the request by the Respondent that they return to work forthwith.
11. The Respondent denies locking out the employees especially because this was a critical avocado harvesting season for the company.
12. The grievances raised by the employees are subject of **Industrial cause 775 of 2014, KPAWU –vs- Kakuzi** an economic dispute pending hearing and determination.
13. Notice to show cause letters were issued to the employees but they failed to attend a disciplinary hearing and were issued with dismissal letters on 26<sup>th</sup> May 2015. Some of the dismissed employees lodged internal appeals and were heard on 28<sup>th</sup> May 2015 and some employees were reinstated. Other employees lodged their appeals on 30<sup>th</sup> May 2015 and had not been heard at the time the suit was filed.
14. The company intends to hire short term casuals in the interim for the avocado harvesting season. It was therefore critical that status quo orders issued be set aside to allow economic activities to continue at the Respondent's company pending the hearing and determination of the main suit on the merits.

### **Submissions**

15. The parties agreed to proceed by way of written submissions and the Claimant filed on 19<sup>th</sup> August 2015, and the Respondent on 21<sup>st</sup> September 2015.

### **Determination**

16. The issue for determination is whether the Claimant /Applicant is entitled to the interim injunction sought.
17. From the deposition and written submissions filed by the parties, the Court finds the following;
- i. the Claimant / Applicant in paragraph 17 of the memorandum of claim via which Annex 'TK5' is annexed admits all the affected employees were summarily dismissed on 26<sup>th</sup> May 2015 for gross misconduct and were directed to vacate the company houses within seven (7) days from the date of dismissal.
  - ii. the Claimant has challenged the lawfulness of the said dismissals in the main suit.
18. It is apparently clear therefore, by the time the suit was filed and interim orders sought, to restrain the employer from dismissing the employees, the horse had already bolted from the stable and the Claimant / Applicant has to that extent not established a *prima facie* case for grant of an interim injunction to stop the dismissals pending the hearing and determination of the suit.
19. The lawfulness or otherwise of the said dismissals will be determined when the main suit is heard on the merits and appropriate orders are available to the Claimant / Applicant including reinstatement of the dismissed employees and / or payment of compensation if the dismissals are found to have been unlawful.
20. To this extent, the Claimant / Applicant has not established that it would suffer irreparable loss incapable of being remedied by way of damages if the interim orders are not granted.
21. On the issue of balance of convenience, the justice of the case demands that the merits of the case be heard and determined to avoid a situation where the employer is forced to remain with employees who may be guilty of dismissible offences.

22. With regard to the prayers to issue interim orders restraining the Respondent from evicting the affected employees from their houses, this is a matter governed by the Collective Bargaining Agreement (CBA) between the parties and the matter should be dealt with accordingly.

23. Regarding the prayer to issue mandatory injunctions to reinstate the employees to their jobs and prohibit the Respondent from recruiting new employees, in view of my finding that the lawfulness and fairness of the alleged dismissals will be determined upon hearing the main suit on the merits, it would be unjust to pre-empt that hearing on the merits by imposing the dismissed employees on the Respondent.

24. This Court is loath to descend to the employment arena by pre-empting internal management and disciplinary machinery from taking place unless the Applicant establishes exceptional circumstances for example where an applicant demonstrates gross disregard of the internal procedures and the law by the employer. This in the Court's view is not such a case, given the facts placed before Court at this stage of the hearing of this matter.

25. Accordingly, the Application is refused in its entirety and interim orders discharged.

26. The matter will take its normal course.

**Dated and Delivered at Nairobi this 20<sup>th</sup> day of November, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**