



**REPUBLIC OF KENYA**

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

**CAUSE NO. 95 OF 2014**

**BANKING, INSURANCE & FINANCE UNION (KENYA) ..... CLAIMANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD ..... RESPONDENT**

**KENYA BANKERS ASSOCIATION ..... INTERESTED PARTY**

**RULING**

1. On 8<sup>th</sup> October 2015, the Claimant filed their application through Notice of Motion under the provisions of section 12(4) of the Industrial Court Act (Employment and Labour Relations Court Act), section 74 of the Labour Relations Court Act and all other enabling statutes. The Respondent filed Grounds of opposition on the 21<sup>st</sup> October 2015.
2. The claimant's application is seeking for orders restraining the respondents from subjecting any of the unionisable employees of the Respondent to a disciplinary process (Capability hearing) on the basis of performance until the main suit is heard and determined and that the respondents be prohibited from issuing warning letters or final warning letters, terminating or dismissing unionisable employees on the basis of performance until the suit herein is determined. The application is supported by the annexed affidavit of Joseph Ole Tipape.
3. The application by the Claimant is on the grounds that the Claimant filed the suit herein on 30<sup>th</sup> January 2014 with an intention to stop the respondents from disciplining the unionisable employee on account of performance development plans (PDP) and where the Respondent is allowed to continue with the processes of the PDP the suit herein will be negated. That most unionised employee risk losing their jobs and the outcome of the matter before Court can only be known after judgment and to thus allow the Respondent to use the challenged PDP will prejudice the claim. The suit will have been in vain. The industry will be in chaos if the respondents is left to conduct own disciplinary process outside the CBA currently in force between the parties.
4. In the affidavit of Joseph Ole Tipape he depones that as the 1<sup>st</sup> deputy general secretary of the Claimant union, the Claimant moved to Court in January 2014 seeking to restrain the Respondent from disciplining/terminating the services of the unionised employees on account of PDP and the matter is pending in Court not determined. Unionised employees of the respondents have been issued with warning letter, termination letters and dismissal letters for non-performance by the use of the PDP which is herein challenged. 12 such employees have since been terminated while several others are on warning notice or final warning notices.
5. Mr Ole Tipape also avers that all shop stewards have been moved to management of the Respondent

bank so as to disable Claimant functions at shop level and it would be desirable to secure the employment of unionised members pending the determination of the suit herein.

6. The Respondent in opposition in their grounds of opposition submitted that the current application is *res judicata* as the prayers sought [prayers (2), (3) and (4)] in the Notice of Motion are similar to prayers in Notice of Motion to orders sought in application dated 25<sup>th</sup> May 2015 and a ruling delivered on 23<sup>rd</sup> July 2015 and thus the application offends section 7 and 8 of the Civil Procedure Act. Appendices 1a and 1g in the application are similar to appendices 12a and 12e of the earlier Notice of Motion and a ruling has been delivered. Appendices 2a and 2d are warning letters previously attached as appendices 11a to 12g in the earlier application and a ruling has been delivered.

7. Further grounds of opposition are that the Respondent has 1,305 unionisable employees out of which only 12 have been allegedly terminated per appendices 6 while in the earlier application appendices 1f and 1g has 5 letters of termination. That materials relied upon in the earlier application is now in the current application, the Claimant should not be allowed to litigate in instalments. The application is an abuse of the Court process and without full disclosure. The Claimant has refused to have the main suit to be heard vide paragraph 14(c) of the Court ruling delivered on 23<sup>rd</sup> July 2015. Any challenge on termination of employees should be in a spate suit distinct from the current suit. The PDP is cyclical and the injunction issued on 8<sup>th</sup> October 2015 has paralysed the respondent's performance process of settling and review of objectives, appraisal, reward and sanctions. Application should be dismissed with costs.

8. Both parties made their oral submissions in court. Each party relied on their filed records in this regard.

### **Determination**

9. The basis of the application by the Claimant is that the 1<sup>st</sup> Respondent bank has subjected unionisable employees to disciplinary process, the capability hearing on the basis of performance, the subject of the suit herein. That such unionised employees have been issued with warning letters, final warning letters, termination letters and dismissal and therefore the Court should restrain and prohibit the Respondent from such action as this will compromise the claim before court. The 1<sup>st</sup> Respondent has raised objections noting that the orders sought and the nature of application is *res judicata* as similar orders and materials were used by the Claimant in their application herein and dated 25<sup>th</sup> May 2015 and a ruling has already been delivered.

10. First, on the issue of the application being *res judicata*, application dated 25<sup>th</sup> May 2015 was premised on the prayers that;

1. ...
2. *The Court be pleased to issue interim orders restraining the respondents from unprocedural and unlawfully terminating Hillary Mwanja Munyalo who is a key witness in the main suit and eight (8) others until this application is heard and determined inter parties*
3. *The Court should order that the final warning letter issued to Hillary Mwanja Munyalo be withdrawn and expunged from his employment records until the trade dispute reported to the Cabinet Secretary, Social Security and Services is disposed of.*
4. *The Court be pleased to issue further orders restraining the respondents from terminating the services of all the unionisable employee who have already been issued with capability notices (disciplinary hearings), warning letters and final warning letters due to performance until the main suit in Cause No. 95 of 2014 pending adjudication before the Court is heard and determined.*
5. *The Court do issue an order prohibiting the Respondent by themselves or by their recognised agents or principles [principals] from terminating the services of unionisable employees who have already been issued with uncalled for capability interview notices (disciplinary hearings), warning letters and final warning letters due to performance development plants (PDP) until this application is heard and determined inter parties.*

6. That this Court do issue an order compelling the respondents to stop the already envisaged unlawful and unfair termination, harassment and intimidation of Mr Hillary Mwanja Munyalo a key witness in this case.

11. This application dated 25<sup>th</sup> May 2015 was supported by the annexed affidavit of David Kinyua Mbagia and on the main grounds that the Claimant lead witness Mr Hillary Mwanja Munyalo was being harassed, intimidated so as to frustrate the suit herein. The Claimant also laid the basis of the frustration of the suit by annexures to the affidavit noting that several other unionised employees in the employment of the Respondent had been subjected to performance related hearings and were threatened with termination, dismissal or had actually been terminated on that basis.

11. The current application is premised on the orders sought and on the affidavit of Mr Ole Tipape and the various annexures therein. The orders sought relate to current and ongoing disciplinary and or capability hearings that relate to the PDP process. It cannot therefore be said that the two applications are one and the same, the foundational basis of the entire claim relate to PDP processes and where one, two, three or more unionised employees of the Respondent are thus affected and the Claimant is desirous of raising such matters with the court, the Claimant cannot be stopped simply because last week, last month or two months ago, some other unionised employees were so affected and the Claimant moved the Court seeking orders in that regard. Whether the application has merit that has to be determined on its own merits.

12. A claim such as this one that is brought in a representative capacity by the union, affecting over 1,305 unionised members of the Claimant in the employ of the 1<sup>st</sup> Respondent, cannot escape high chances of similarities noting that the PDP process is likely to affect a given number of unionised employees in each cyclical. Where an application is therefore lodged by the Claimant for and on behalf of any of their members, even where the template application and Notice of Motion may be similar, the affected unionised employees are likely to be different in one way or the other. In this case it is not the numerical difference that is crucial, rather, it is that one member of the Claimant whose rights are being secured by each and every application submitted before this court. Such an application, where it has merit must be assessed as such and a ruling delivered. Such an application which is separate and distinct setting out the subject unionised employee is not a matter *res judicata*.

13. The application here relate to the termination of;

1. Alfred Mwagusi;
2. Edwin Odhiambo;
3. Monica Wahome;
4. David Ongiri;
5. Dennis Muia;
6. Evans Maisiba;
7. Charles Kuria;
8. Paul Mugiria;
9. Peter Mulandi; and
10. Francis Wachirah.

14. A keen look at the letters of termination is that they all relate to *continued poor performance within the last eighteen months ... which has been below business expectations and agreed standards and objectives*. Some of the termination letters relate to such poor performance in the last three (3) years. The common thread however is that the reason for such termination is poor performance based on agreed standards and objectives.

15. The claim herein relate to the challenge by the Claimant on the entire PDP process, a witness, Hillary Mwanja Munyalo has been called in this regard and did set out the procedures applied by the 1<sup>st</sup> Respondent with regard to the PDP application and or process. This evidence is on record and to the knowledge of the respondents. This is the core of the suit herein. The suit is still alive and ongoing pending determination. The warning letters issued to;

1. Miriam Munyeki;
2. Dickson Iregi;
3. Jackeline Maithia;
4. William Onguti; and
5. Zephaniah Akengo;

16. All these relate *performance ratings and improvement needed*. The warning letters also note that the employees have been under a PIP [performance improvement plan] that Hillary Mwanja Munyalo, the ongoing witness herein largely has spoken about. Without going into the merits of the evidence-in-chief for this witness, the current application and matters set out by the Claimant cannot be separated. The terminations letters noted above together with the set out warning letters directly speak to the PDP and PIP both subject of the main suit and matters already set out by Hillary Mwanja Munyalo herein. This is also part of prayer (iv) in the Memorandum of Claim thus;

*That the Court do issue an order compelling the Respondent to stop the envisaged arbitrary and unlawful terminations of the unionisable employees until the claimants union is fully involved in the introduction of the new terms and conditions of employment (Performance Development Plan, Performance Improvement Plan and capability hearings) in the parties CBA.*

17. Such matters are still pending and not determined.

18. At this point, to allow the Respondent to continue with a process that is under challenge, a subject of the suit herein, whether one, two or more unionised are affected is immaterial. What is crucial is to ensure the preservation of the subject matter pending the hearing and determination of the suit herein as otherwise, the entire process will be academic. The objectives of the Court in ensuring fair labour practices shall be lost where the respondents are allowed to dissipate the core of the suit even before one witness is able to conclude his testimony.

## **Conclusion**

**In the interests of justice and to ensure the suit is heard on merit, I order and direct as follows;**

- a. **The Respondent shall stop all further terminations, warnings, final or otherwise, dismissals or any matters that affect the employment of unionised employees and members of the Claimant union on the grounds of Performance Improvement Plans (PIP) or Performance Development Plans (PDP) pending hearing and determination of the suit herein.**
- b. **On this basis, the matter shall be heard on priority basis and within the months of November or December 2015.**
- c. **Parties shall attend at the Deputy Registrar on 9<sup>th</sup> November 2015 for allocation and blocking of agreed hearing date as the only matter for the date.**
- d. **Noting the orders herein it is paramount that the Claimant must cooperate to ensure the hearing and final determination of the matters herein and Where there is no such cooperation the respondents shall be at liberty to move the Court within 14 days for the discharge of the same.**
- e. **Costs in the motion.**

Dated and Delivered at Nairobi this 5<sup>th</sup> day of November 2015.

**M. Mbaru**

**Judge**

In the presence of:

Lilian Njenga: Court Assistant