



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1830 OF 2015

BERNARD MUSYOKA NGWENZE & 10 OTHERS.....CLAIMANT

VERSUS

UZURI FOODS LIMITED.....RESPONDENT

Mr Nyabena for the Claimant

M/s Guserwa for the Respondent

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 14th October 2015 on a certificate of urgency. Hon Abuodha J granted interim orders in terms of prayer 2 of the application which reads;

“That pending the hearing and determination of the application the Respondent be restrained from victimizing, disciplining, intimidating, threatening locking out four hundred and fifty employees from their work place on account of their trade union activities”. The interim orders are still in place.

2. The Union is not a party to this suit although the Claimants/Applicants erroneously depose that they were victimized for joining the Claimants/Applicants. The Claimants allege that they have a constitutional right to belong and join a trade union of their choice.

3. That the lock out is aimed at defeating the Claimants’ constitutional right. That they have been told to sign a form withdrawing from the Union for them to be recalled. That those who have signed the forms have already resumed work. The Claimants pray that injunctive relief be granted against the Respondent.

4. The Respondent filed a replying affidavit deposed to on 27th October 2015 and the Respondent states the Application is devoid of merit. That in a dispute referred to the minister for labour on 3rd July 2013 for conciliation, the Conciliator recommended that the Respondent sign a Recognition Agreement with Bakery, Confectionary, Food Manufacturing and Allied Workers Union Kenya (BACOFOMAWU) and rejected the application by Kenya Union of Commercial Food and allied Workers (KUCFAW) for recognition.

5. That prior to that recommendation on 13th April 2015 the Respondent signed a Recognition

Agreement and Negotiation procedure with BACOFOMAW. That the Respondent continues to remit union dues to BACOFOMAWU.

6. That KUCFAW continues to write threatening letters that workers would go on strike unless KUCFAW was recognized by the Respondent. The Respondent has attached to the application strike notices issued by KUCFAW which is not a recognized union by the Respondent.

7. The Respondent states that these notices lack legal basis. The Ministry of Labour on 2nd October 2015 vide Mr P. N. Macharia warned KUCFAW to refrain from inciting the workers. That on 6th and 7th October 2015, the Claimants went ahead with an illegal strike and the Respondent issued three notices which were posted in public areas in full view of the Claimants and other workers instructing them to go back to work as the strike was illegal.

8. That a meeting was held at the Ministry of Labour between Management and Representatives of the rival Unions and it was recommended that the strike was illegal and that BACOFOMAWU was the legitimate union and KUCFAW should observe that demarcation of unions and to follow the law in addressing its grievances.

9. The Claimants failed to report to work and were issued with dismissal letters on 9th October 2015. That all terminal dues of the dismissed employees have been paid through sub-county labour office for collection by the affected employees on 14th October, 2015.

10. By a Notice of Motion dated 19th October 2015 the Respondent moved for review of the interim orders issued by Abuodha J on 15th October 2015 citing impossibility to implement the orders since they had been overtaken by events when the Claimants were dismissed on 9th October 2015.

11. The parties resolved that the two applications be heard and determined together since the issue in both of them were whether an injunction ought to be issued against the employer pending the hearing and determination of the main suit.

Determination

12. The Court observes that by the time the initial application was filed on 14th October 2015 and interim order issued on 15th October 2015 by Abuodha J, the Claimant's had already been dismissed from employment. The interim orders sought in that application were incapable of implementation since the horse had already bolted from the stable as it were.

13. The court further notes that the dispute in question is one of recognition of KUCFAW by the Respondent Employer Uzuri Foods Limited, yet the Union (KACFAW) was not a Claimant.

14. The court further notes that the dispute also involved a rival Union BACOFOMUWA a fact that was not disclosed in the initial application. The Claimants/Applicants are guilty of material non-disclosure in that respect and on that basis alone, they were not entitled to the interim orders granted by Abuodha J.

15. An interlocutory injunction may only be issued where the threshold set in the case of **Giella Vs. Cassman Brown & Co Ltd [1997] EA 358** has been met to wit;

- a. an applicant must show a *prima facie* case with a probability of success
- b. an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
- c. If the Court is in doubt, it will decide an application on the balance of convenience.

16. On the facts of this case, the claimants have failed the first hurdle, in that they have failed to establish a *prima facie* case that they are entitled to an injunction having come to Court after they had been dismissed from employment for engaging in unlawful strike.

17. The merits and demerits of that dismissal will be canvassed and determined in the main suit and the court will refrain from commenting on the same at this stage of the case. The court will also at the hearing determine if the Respondent had locked out the Claimants on account of their union activities because the facts placed before court by disputants materially differ.

18. The Claimants/Applicants having failed in the first hurdle, the court need not explore the other two requirements.

19. The Application is dismissed and the interim orders are lifted. The main suit to take its normal course.

Dated and Delivered at Nairobi this 9th day of December 2015

MATHEWS N. NDUMA

PRINCIPAL JUDGE