



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1792 OF 2013

BAKERY, CONFECTIONERY, FOOD MANUFACTURING AND ALLIED WORKERS'

UNION (KENYA) CLAIMANT

VERSUS

PREMIER COOKIES LIMITEDRESPONDENT

Mr. Muchai for claimant / Applicant

Mr. Oduor for Respondent

RULING

1. Exparte interim orders were issued by myself on 11th November 2013, pursuant to a notice of motion on a certificate of urgency filed on 6th November 2013.
2. The effect of the interim orders was to restrain the Respondent from denying the Grievants access to their place of work and replacing them with other employees pending the hearing and determination of the application which was set for hearing on 5th December 2013.
3. Meanwhile, the Respondents instead of responding to the application as directed in the said order filed a fresh application on a certificate of urgency on 26th November 2013 seeking to set aside the exparte orders of 11th November 2013.
4. Interim orders setting aside the interim orders were granted by **Hon. Mbaru J.** and the matter was also set to be heard simultaneously with the earlier application on 5th/12/2013.
5. The applicants aggrieved by the orders of Hon. Mbaru J. filed a fresh application on a certificate of urgency on 4th December 2010 seeking the orders of Mbaru J. to be vacated, annulled and/or set aside and that the status quo ante 28th November 2013 with respect to 39 employees be maintained.
6. From the outset, it is important to note that the Respondent ought to have responded to the initial application instead of filing a fresh one before a different judge. This is abuse of process of the Court which has led to proliferation of urgent applications on the same subject matter.
7. The Court also observes that the Court which dealt with the second application should have nubbled

that practice in the bud by refusing to entertain it and ought to have directed that they respond to the pending application.

8. Be that as it may, all the applications were canvassed on the 5th December 2013 and the issue for determination was whether or not to issue an interim order restraining the employer from terminating the contracts of 39 Grievants and replacing them with other employees pending the hearing and determination of the main suit herein.

9. The applicant union submitted that over 90 employees of the Respondent were victimized for joining the union and that as at the time of coming to court on 11th /11/2013, 39 employees were still in employment and had been protected by my initial order.

10. **Mr. Muchai** for the union urged the Court to protect the rights of the employees to join a union of their choice and restrain the Respondent from unduly victimizing them contrary to the *Labour Relations Act, 2007* and *Article 41 of the Constitution of Kenya 2010*.

11. On the contrary, the Respondent submitted through its counsel **Mr. Oduor** that the 39 Grievants were on fixed term contracts of employment which were due to expire on 30th November, 2013.

That this fact was not disclosed to the Court, when I granted the applicant union interim orders on 11th November, 2013.

12. That the effect of this non-disclosure means that the Court, through its interim order would impose the 39 employees on the Respondent pending the hearing and determination of this suit.

13. That the role of the Court is to enforce the contractual obligation of the parties but not to impose a new contract on them.

The said contracts of service are annexed to the application dated 26th November, 2013.

14. The Court is satisfied indeed that the Grievants are on fixed term contracts and is alive to the fact that, it cannot extend the employment of the Grievants beyond their contracts of service.

15. The Court has carefully studied the memorandum of claim filed on 6th November, 2013 and the main prayers thereof ; inter-alia are:-

(i) A declaratory order that the action taken by the Respondent against each of the ninety (90) Grievants leading to their economic loss amounted to victimization and unlawful and / or wrongful redundancy.

(ii) An order for the annulment and cancellation of all the letters purporting to place “fixed contracts” on the regular and continuous service rendered by Grievants herein to the Respondent over the years.

(iii) An order for the annulment of all letters purporting to declare any of the Grievants redundant since June 2012.

It is clear that the legality of the fixed term contracts is at the centre of this dispute.

However, whether or not the contracts were imposed on the Grievants in violation of the employment law and the Constitution is a matter that cannot be determined without hearing the case on the merits.

16. The issue for determination following the case of **Giela Vs. Cassman Brown (1970) EA 358** is, whether;

- (a) the applicant has established a prima facie case with a probability of success;
- (b) the Grievants will suffer irreparable injury, which would not adequately be compensated by an award of damages; and
- (c) if the Court is in doubt, it will decide the application on the balance of convenience.

17. The Court will at this stage refrain from making any “*determination on the merits of the application or any defence on it. A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the suit.*”

See *Mary Aliviza & Another Vs. Attorney General Kenya, Application No. 3 of 2010 EALS, Law Digest 2005 – 1 2011 P.1.*

18. The Court has on the matter presented before it, arrived at the conclusion that there exists a right which has apparently been infringed by the Respondent as to call for an explanation or rebuttal from it.

19. However, the Grievants would not suffer irreparable harm if the Court does not issue conservatory orders because they have currently made a claim for damages in the memorandum of claim to which they may be entitled.

20. Furthermore, the balance of convenience in the circumstances is not to impose a contract of employment on an employer where there is a dispute as to the existence of an employment contract or not.

20. Accordingly, the application for interim orders pending the hearing of the main suit is dismissed.

The matter is to proceed on the merits and costs will be in the cause.

Dated and delivered at Nairobi this 26th day of March, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE