**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 715 OF 2014**

**REDLANDS ROSES LIMITED …….……..……..…….. CLAIMANT**

**VERSUS**

**KENYA PLANTATION and AGRICULTURAL WORKERS UNION ……. RESPONDENT**

**RULING**

Kaplan & Stratton Advocates for the Claimant

Muli Advocate for the Respondent

1. On **19th May 2014**, Industrial Cause **No. 715 of 2014** and Industrial Cause **No. 140 of 2014** from Nakuru Industrial Court now registered as Nairobi Industrial Cause No. 830 of 2014 **were consolidated under Industrial Cause No. 715** for hearing and disposal of the applications and claims therein. There are two applications for ruling herein, application dated 5th May 2014 by the claimant and the application dated 15th May 2014 filed by the claimant from the consolidated file.

2. The claimant herein, Redlands Roses Limited filed application dated **5th May 2014** seeking prohibitory and restraining orders against the respondent, Kenya Plantation and Agricultural Workers Union from engaging in any industrial action pending the hearing of their application. To this application, the respondent filed their Replying Affidavit sworn by Thomas Kipkemboi on 7th May 2014. On 16th May 2014, the claimant through Magdalene Kamuya filed their Replying Affidavit and the respondent filed a Supplementary Affidavit sworn by Thomas Kipkemboi and dated 23rd May 2014.

3. On **15th May 2014** the claimant filed their application dated **12th May 2014** in Cause No. 140 of 2014 in Nakuru High Court and now registered as Cause No 830 in Nairobi High Court of 2014 and consolidated under Cause 715 of 2014 seeking for orders of transfer of the file from Nakuru Industrial Court to Nairobi Industrial Court to facilitate consolidation and hearing of the same under Cause No 715 of 2014 and the orders granted therein on 7th May 2014 be set aside. The respondent has not filed any replies therein and the issue are all outlined in the Replying and Supplementary Affidavit of Thomas Kipkemboi sworn on7th May 2014 and 23rd may 2014 respectively and will be outlined below.

4. Both parties appeared in court on 29th May 2014 and made comprehensive submissions. These submissions were supported by each party with filed List of Authorities. These submissions reiterated the contents of each application, the grounds and supporting affidavits.

5. Application dated 5th May 2014 is seeking for orders

1. …
2. *That pending the hearing and determination of this application, this honourable court be pleased to grant an injunction prohibiting/restraining the respondent, its officials, representatives, agents, and/or its members from causing, effecting, inciting or otherwise calling for any industrial action by the claimant/applicant's employees and order prohibiting the respondent's members and/or the claimant/applicant's employees from engaging in any industrial action.*
3. *That pending the hearing and determination of this cause, this honourable court be pleased to grant an injunction prohibiting/restraining the respondent, its officials, representatives, agents, and/or its members from causing, effecting, inciting or otherwise calling for any industrial action by the claimant/applicant's employees and order prohibiting the respondent's members and/or the claimant/applicant's employees from engaging in any industrial action.*
4. *That the respondent's call for industrial action by its members and/or its members' failure and/or refusal to work is premature and unlawful. Their strike and/or refusal to work is unprotected, unlawful and/or prohibited*
5. *That cost of this application be provided for.*

6. This application is supported by the annexed affidavit of Isabelle Spindler and on the grounds that on 27th April 2014, the respondent issued a letter of complaint to the claimant regarding the suspension of one of its employees on the grounds that the said employee had engaged in a fight with his supervisor at the workplace. The respondent threatened that should the employee not be reinstated within seven days and the supervisor dismissed, its members, the employees of the claimant would assemble to demonstrate every days until the claimant stopped what was alleged to be unfair labour practice. That the subject matter was under investigation by the claimant using the internal disciplinary procedures and by issuing the threat notice, the respondent was interfering and intimidating the claimant. On 5th May 2014, the claimant employees refused to work and blocked the gate demanding the claimant to dismiss the supervisor and reinstate the employee suspended following a fight, which matter is still pending investigations by the claimant. The respondent action has been commenced prematurely and refused to engage in dialogue and negotiations and resulted to threats and industrial action of a strike contrary to the terms of the Collective Bargaining Agreement (CBA) between the parties herein. This industrial action of strike, if allowed to go on will cause the claimant serious losses as the claimant is engaged in the business of growing flowers for export. The crop will be damaged as it requires specialised tending and due to the strike the claimant will not be able to fulfil its orders for supply resulting in more losses due to claims by third parties for breach of existing contractual obligations for supply and export of flowers. The claimant is therefore seeking the protection of the court against the unlawful industrial action which will affect its interests and justice.

7. In reply, the respondent through the affidavit of Thomas Kipkemboi state that as the Deputy General Secretary of the respondent Union he is conversant with the issues raised by the claimant with who they have a Recognition Agreement and CBA. That on 30th April 2014 the claimant suspended one of its workers, a member of the respondent who was alleged to have engaged in a fight with Benson Oiriri. The respondent wrote to the claimant on 27th April 2014 noting that Makhoha, their member, had been assaulted by Oiriri and had suffered injuries but the claimant had favoured Oiriri as their supervisor. The respondent wrote to protest the unfair labour practices to its workers [members] which was evident from the assault of Makhoha, and was considering peaceful demonstrations to express its disgust at the actions of the claimant. On 26th April 2014 the claimant wrote to the Agricultural Workers Association calling for a meeting on 5th May 2014 copied to the respondent Shop Steward at Ruiru Branch. On 30th April 2014 the claimant wrote to the respondent noting the proposed peaceful protest proposed for 5th May 2014 would be an illegal strike but proposed a meeting on 2nd May 2014 at their premises. On 5th may 2014 the respondent Henry Omasire went for the meeting at claimant's premises to discuss the issue of the suspended employee, and it was agreed that workers would not hold the proposed peaceful demonstrations as the matter was under discussions and at 1200 hours the meeting adjourned to allow the agreement between the parties to be put into writing and ready for signing but the police came in and lodged tear gas at workers and brutally arrested Mr Omasire and placed him in custody. The workers were dispersed and ordered out of the premises and the place barricaded forcing the workers out of their work places. Later the claimant allowed the workers back but commenced disciplinary proceedings

against them despite the lock out by the claimant. There was no call for a strike but peaceful demonstrations which are not a strike as defined by the Labour Relations Act (LRA). There was proposal for dialogue but the police were called to intimidate workers and the respondent is keen to have dialogue. On 6th May 2014 the respondent official went back to the claimant's premises for further meeting and proposed that the workers resume work but not be victimised. The respondent is seeking that the parties herein hold a meeting with a view to resolve the issues amicably.

8. In the Replying Affidavit of Magdalene Kamuya to the averments by Thomas Kipkemboi, she notes as the Human Resource Manager of the Claimant that on 5th May 2014 their employees went on strike and failed to report to work. The workers assembled outside the gate and when one director Mr Spindler talked to them, some noted that the shop steward had adviced them to attend a peaceful demonstration. They had no permit. Despite efforts to seek them to return to work, the workers refused contrary to the terms of the CBA. Later respondent officials arrived and held a meeting and insisted that Makhoha be reinstated which was declined. Later the local police arrived and sought to know from the respondent if there was a permit to hold the demonstration and noting there was none, the employees were asked to disperse forcing the police to use tear gas. The strike went on to 6th May 2014 while negotiations resumed but the respondent insisted that section 80 of the LRA should not be part of the agreement on the return to work as they wanted to avoid any disciplinary action being taken against their members. The negotiations proceeded to the afternoon as while these events were taking place; the claimant's advocates had proceeded to court in the morning and obtained restarting orders to stop the strike. The respondent officer Henry Omasire was served with the court orders while at the meeting in the premises of the claimant by Martin Kuria, a Court Process Server. The strike was called off immediately and the some workers resumed work and others resumed on 7th May 2014. That the claimant had not locked out the workers, rather they were on strike and prevented those who wanted to work from proceeding to their work places. The claimant could not have locked out the workers as they depend on their services, there are contractual obligations to be met and the claimant incurred huge losses due to the nature of their business that is dependent on the technical expertise of the employees.

10. The Claimant also states that on the morning of 7th May 2014 they issued suspension letters to seven employees to which the respondent officials protested against and despite service of court orders to stop the strike on 6th May 2014, the respondent went to Nakuru High Court and filed Industrial Cause No.140 of 2014 without disclosing that the issue was already being addressed under Industrial Cause No.715 of 2014 in Nairobi and there were orders stopping the strike. Under Industrial Cause No. 140 of 2014, the respondent herein as the claimants therein obtained orders stopping the claimant herein from undertaking disciplinary action against its employees, to maintain the status quo with and with a view to resolve the lock-out, which the court directed without full disclosure that there was another suit pending and orders stopping a strike had been made. That the respondent is engaged in multiplicity of suits, there have been previous incidents of forum shopping and duplicity in **IC 1006 of 2012 and Misc. 4 of 2013** where the respondent went to the Nakuru high Court and filed fresh suits despite being served on the same subject. That there is also **IC 71 of 2014** where the respondent has filed another similar suit in Nakuru High Court whereas the parties are based in Thika and there are directions to transfer the file to Nairobi. The claimant in this cause is based in Ruiru and there was no reason to file proceedings in Nakuru instead of Nairobi.

11. That the orders made in **IC 140 of 2014** should be set aside as the respondent was not honest and failed to disclose material facts to the court and should not benefit from the orders so obtained.

12. Mrs Opiyo for the claimant submitted that the respondent is in breach of the Recognition Agreement between the parties and that by seeking reconciliation without following the terms of the agreement and CBA is acting prematurely and contrary to laid down procedures of disputes arbitration. The respondent failed to follow section 76 of the LRA and called for an illegal strike which cannot benefit from the provisions of Article 36 if the Constitution as the claimant is not a public authority against whom demonstrations can be held. That by calling a 'strike' as a 'peaceful demonstration' the impact of the same is that of a strike and in this case it was unprotected and the claimant cannot be found to rely on illegal action against the claimant. on 6th May 2014, the employees who wanted to be at work were prevented and while the respondent was aware of court orders stopping the strike after Henry Omasire

had been served the respondent went ahead and filed IC 140 of 2014 in Nakuru. That knowledge of the orders by the respondent through any of its officials was enough for the respondent to be deemed to have been aware of the court case in Nairobi in IC 715 of 2014. The claimant relied on the case of Kenya Tea Growers Association versus Francis Atwoli & 5 Others, petition No.64 of 2010. The orders obtained in IC 140 of 2014 were so obtained upon non-disclosure to the court of material facts contrary to what was held in the case of Saflo Ltd versus Lloyd Masika [2010] eKLR that in an ex-parte application all material facts must be disclosed to the court and where this is not done the credibility of such a party comes into question and cannot as a result enjoy an equitable relief.

13. Mr Muli on his part for the respondent stated that HENRY Omasire was on the 5th of May at the claimant premises to discuss the dismissal of Makhoha but at 1300 hours police came and barricaded the premises and dispersed the workers who being anxious with what had happened had converged for a peaceful demonstration. The police used tear gas and arrested Omasire and later released and on 6th May 2014 he returned to the claimant premises for more negotiations when the employees resumed work but several employees were suspended. When the respondent officials noted what was happening at the claimant premises, the employees locked out, they instructed their advocates to file suit and since their head offices are in Nakuru, this became the appropriate court to seek relief. THz orders were emailed to the claimant at 2.59 pm and only after the filing and obtaining orders in Nakuru in IC 140 of 2014, Omasire was able to travel to Nakuru with the orders issued on 5th May 2014 in IC 715 of 2014 as all along he had been engaged at meetings with the claimant at their premises. That despite service on Omasire on 6th May 2014 with orders issued under IC 715 of 2014, he is not an officer authorised to received summons or orders as he is not a principal officer as defined under section 2 of LRA and Rule 12(1) of the Court Rules. The respondent being a trade Union, its principal officers are the Chairman, the General Secretary and the Treasurer of which Omasire is neither. IC 140 of 2014 was filed in good faith and not for purposes of duplicity or forum shopping, the respondent is apologetic to this fact and upon notification had consent with the claimant to have the file transferred and consolidated under IC 715 of 2014 in Nairobi and there is no need to pursue the suits separately.

14. Mr Muli also state that the orders sought under the application of 5th May 2014 are wide and general and meant to stop any industrial action against the claimant in perpetuity and thus anticipatory which if issued would an unfair labour practice. There was a peaceful demonstration allowed by the law and at no time did the members of the respondent hold any strike. In any case what happened was a lock-out by the respondent. That the circumstances of this case require full hearing without the orders sought being made as to do so the court will be denied material evidence as to what exactly happened during the lock-out by the claimant. The orders sought have been overtaken by events as all workers have resumed duty. The respondent relied on the case of N O B versus A A O [2014] eKLR and the case of Benjamin Moses & 2 others versus Registrar General & 4 others [2014] eKLR.

15. That the orders made in IC 140 of 2014 are still valid, the claimant was required to maintain status quo but in defiance suspended 11 employees and in view of the subsisting orders, these employees should be reinstated to held the parties engage in good labour relations through a reconciliation process to address all the issues that necessitated the meeting that was held on 5th May 2014.

16. From both applications dated 5th May 2014 and the application dated 12th May 2014 several issues for determination emerge. These issues for determination are also addressed in view of the respondent's application filed under IC 140 of 2014 and dated 7th May 20143. These issues can be outlined as;

1. Whether the respondent properly served with the orders of 5th May 2014;
2. Whether there was a strike or a lock-out
3. Whether the Court should issue **an injunction prohibiting/restraining the respondent, its officials, representatives, agents, and/or its members from causing, effecting, inciting or otherwise calling for any industrial action by the claimant/applicant's employees and order prohibiting the respondent's members and/or the claimant/applicant's employees from engaging in any industrial action**
4. Whether due to the multiplicity of suits, order granted on 7th May 2014 should be set aside

17. Service of summons, orders or any judicial direction is a crucial process for any party adversely affected by such summons, orders or directions. Without service of the same, such a party has no notice, knowledge or information on what is against them to afford such a party an opportunity to offer a defence or consent to what is sought against such a party. This is what is principally outlined under the rules of natural justice, the *audi alteram preterm rule* widely now accepted that any fair procedure require notice on the other party. Basically it requires that before making a decision affecting another person's rights or interests, that other person should be given a hearing as held in **Rift Valley Textiles Limited v Edward Onyango Oganda, Civil Appeal No. 27 of 1992.**

18. however, in ex-parte proceedings parties come to court due to the nature of the urgency or each case and based on each individual case circumstances and before the other party can be heard and given a chance to respondent or consent to the issues raised, the Court may grant interim preservation orders, prohibitory orders, orders for specific performance, declaratory orders and any other directions that the court may deem appropriate relief and fit to grant as outlined under section 12(3) of the Industrial Court Act. Once a party has such orders set out under section 12(3) of the industrial Court Act, the same must be confirmed and certified by the Court Registrar and served in accordance with section 11(1) (b) of the Act;

> (b) The acceptance, transmission, service and custody of documents in accordance with the Rules;

19. With regard to the Rules applicable for the Industrial Court, rule 12 is relevant here;

***12.*** *Service on a corporate body.*

> *(1) Service on a corporate body may be effected—*
>
> *(a) On the secretary, the director or any other principal officer of the corporate body;*
>
> *(b) Where the process server is unable to find any of the officers of the corporate body mentioned in subparagraph (a), by—*

*(In) leaving the pleadings with an employee of the corporate body to be identified by the process server; or*

*(ii) Leaving the pleadings at the registered office of the corporate body; or*

*(iii) Sending the pleadings by prepaid registered post to the registered postal address of the corporate body; or*

*(iv) Leaving the pleadings at the place where the corporate body carries out business; or*

*(v) sending the pleadings by registered post to the last known postal address of the corporate body if the corporate body does not have a registered office or postal address.*

20. In view of the provisions of the Act and the Rules, once the Registrar of the Court has certified summons, orders or other directions of the Court, these may be served upon the secretary of the body subject of the proceeding before court or a principal officer and in the absence of these officers, an employee thereof or the same may be left at the registered offices. The application of *may* with regard to who is to be served is important here as any of the noted officers can accept service and be deemed to have been notified of such summons, orders or directions of the court for purposes of the Act and the Rules of the Court.

21. On the first issue raised herein with regard to service, the claimant obtained orders on 5th May 2014 and served Henry Omasire the National Organising Secretary of the respondent. this is not disputed by the respondent, what they contest is that Henry Omasire was not the respondent principal officer, the chairman, General Secretary or Treasurer to accept service and even though he could accept service, he

was at Ruiru when he was served and only made it to the Respondent head office in Nakuru on 7th of May 2014 by which time the respondent had already filed IC 140 of 2014.

22. In addressing the 1st and 4th issues, Service of summons and court orders or directions as per the applicable law and the Rules of the Industrial Court is well outlined, an officer of the rank held by Henry Omasire as the National Organising Secretary of the respondent is a person deemed to be principal and part and parcel of the Union that he cannot extricate himself from the provisions of Rule 12 of the industrial Court Rules. Service on Henry Omasire on 6th May 2014 with court orders issued on 5th May 2014 was properly so done by the claimant, and the respondents cannot say they were not aware as of 6th May 2014 that there was a matter and orders issued against them giving restraining orders which prohibited unprotected industrial action. The filing of IC 140 of 2014 in Nakuru was in utter disregard to the orders already issued on the same subject matter in IC 715 of 2014 in Nairobi. I find the orders made in IC 140 of 2014 were so obtained without disclosing to the Court material facts and the respondent cannot say they are apologetic for the multiplicity of suits as with notice of existing orders, they went ahead and moved the court in Nakuru and obtained advance orders against the claimant without bringing to the attention of the Court that they were in possession of orders stopping them from engaging in an unprotected industrial action. These orders must be vacated as a result.

23. With regard to the question as to whether there was a lock out or a strike, the history outlined by each party is important to revisit as outlined in the affidavit of Isabelle Spindler, Thomas Kipkemboi and Magdalene Kamunya. Both parties agree that on the following;

- Two employees of the claimant had a fight at the place of work which involved a Mr Makhoha and Oiriri and Makhoha was suspended;
- On 23rd April 2014 the Agricultural Employers Association (AEA) wrote to the claimant on the subject of mistreatment of workers;
- On 26th April 2014 the claimant wrote to the AEA and to the respondents shop Steward to inviting them to attend a meeting on 5th May 2014 to discuss the issue;
- On 27th April 2014 the respondents wrote to the claimant on the suspension of Makhoha noting that he had been injured by Oiriri who remained at work after Makhoha was suspended and being aggrieved asked the claimant to reinstate Makhoha within 7 days without which all employees *are hereby adviced to assemble at the Company-entrance on 5th May 2014 at 8.00a.m for purposes of holding peaceful demonstrations in accordance with Article 37 of the Constitution to protest against your biased action against Mr Makhoha and this processions will continue every day until this unfair labour practice is stopped;*
- On 30th April 2014 the claimant wrote to the respondent noting that the proposal of a peaceful demonstration was a call for an illegal strike and proposed to have a meeting on 2nd May 2014 to discuss the issue;
- On 5th May 2014, Henry Omasire the respondent National Organising Secretary went for a meeting at the claimant's premises;
- At 1200 hours the participants of at the meeting took a break; and
- Workers assembled

24. Things get hazy here where the claimant state that the employees never reported to work and converged at the gate and continued to prevent those who wanted to enter and work from doing so. The respondent on their part state that the workers were at their paces of work until 1200 hours when there was agitation and the workers converged and when the police came they were dispersed and the claimant's premises barricaded and the workers remained locked-out.

25. What is apparent is that on the morning of 5th May 2014 there was a meeting at the Claimant's premises where the respondent's official was in attendance; as the meeting was ongoing, the claimant's advocates were in court to stop an unlawful action taking place at the respondent's premises and from the Affidavit of Magdalene Kamunya, she notes that when the employees reported to work on 5th May 2014 they downed their tools and did not work but remained at the gate and when Mr Spindler sought to know

the reason, the shop steward indicated that they were holding a peaceful demonstration; the police came and dispersed the employees upon establishing that there was no permit to hold the peaceful demonstrations; Henry Omasire was arrested and later released; on 6th May 2014 meeting between the claimant and the respondent resumed but the employees remained out of work; at 2.10p.m Martin Kuria served Henry Omasire with court orders issued on 5th May 2014 and dated 6th May 2014; also served was Allex Wafula the respondent Thika branch Secretary; after this service, the employees resumed work.

26. This summary gathered from the affidavits and the submissions of both parties as such do not give a clear picture at to exactly what took place as each party dispute the assertions of the other. Was there a strike? Or was it a lock-out?

27.= A strike defined under section 2 of the Employment Act as;

*"strike" means the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work, for the purpose of compelling their employer or an employers' organization of which their employer is a member, to accede to any demand in respect of a trade dispute;*

28. This is replicated word for word by the Labour Relations Act, section 2, which also goes on to define a lock-out to mean;

*… The closing of a place of employment, the suspension of work, or the refusal by an employer to continue to employ any number of employees.*

29. These processes, a strike or a lock-out do not stand on their own. They are both dependent on a process that must be put in place before each can commence and be found to be lawful. In this case, the respondent dispute that there was a strike and that what they did was to hold a peaceful demonstration as governed by Article 37 of the Constitution, which the claimant disputes as they Are not a public authority and even if they were, the respondent had not obtained a permit as the police established and hence forced the peaceful demonstration to disperse.

30. There is good reason here to seek and have more evidence, either of people who participated at these events or those who observed them unfold or as the claimant stated the employees who were prevented from entering their work places by the respondent members. To decide on this arguments and counter-arguments would be to lose a key element of materials necessary to arrive at a just and fair decision on the matter.

31. On the third issue, the practice and the law as between employees and employers where there is a Trade Union representing the interests of the employees, is to formulate a Recognition Agreement and outline various interests and further register a Collective Bargaining Agreement (CBA) setting out the duties and responsibilities of each party and do recognise the applicable procedures and processes for various mandates especially in disputes resolution mechanisms to be applicable as between themselves. Further to the Recognition Agreement and CBA, employers do make provisions for work place regulations by putting in place policies and guidelines or Manuals as to govern relations at the work place. The parties herein have a valid Recognition Agreement and a CBA that should be followed and allowed to operate where disputes arise. Of concern is what is stated in the affidavit of Thomas Kipkemboi in replying affidavit at paragraph 6 he states;

*that in a nutshell what the respondent was protesting against was the application of unfair labour practices to* ***its workers*** *which was evident from the said assault. In the letter dated 27th April 2014, the respondent indicated that it was considering peaceful demonstrations to express its disgust at the actions of the claimant.* [Emphasis added]

32. This was a strongly worded averment similar to what was stated in the letter sent to the claimant and dated 27th May 2014. The respondent was *disgusted* by the action taken by the claimant and from this

*disgust;* they had planned a peaceful demonstration. This cannot be! The kind of *disgust* expressed in the letter dated 27th May 2014 and reiterated in the affidavit of Thomas Kipkemboi as above quoted is apparent that the respondent was geared toward undertaking an action that was to have the impact of what is defined as withdrawal of labour. This was not *peaceful demonstration* as the result of the *peaceful demonstration* was disruption of work at the claimant business on 5th and 6th of May 2014. I take it; the claimant here is the employer while the respondents are the Union with members from the claimant's employees. The respondents therefore has no *its workers* within the employment of the claimant. if this paragraph is to be taken in its literal meaning, then the respondent has *its workers* also employed by the respondent which will cause constant friction and ought to decide where *Its workers* ought to be situate. Similarly at paragraphs *11, 13* and *14* of the same affidavit has averments indicating the claimants official was arrested, the respondent is noted as the claimant does not give a clear picture of what the respondent wish to communicate to the court with these averments. This raises great concern that the respondent verify what went into the affidavit of Thomas Kipkemboi or the same is based on facts that were not real or simply did not take place!

33. That aside, I find the parties herein had a Recognition Agreement made on and a registered CBA. The respondent where they found an issue that required investigation or disciplinary action to be commenced hold this right unless the same is shown to be to have been in breach of a fundamental provision and or procedure as under the Recognition Agreement, the CBA or the law as well the Constitution. Beyond these provisions as to how employees and employers are to be guided in their relationship, there are also laws that outline the fundamental protections due to both employer and employee in matters of disputes resolution. I take cognisance of the Employment Act and the Labour Relations Act that protect the fundamental rights of an employee and the fundamental principles on unionisation of employees for the collective good as outlined in both these laws. Beyond the statutes, the Constitution now create as part of the rights and fundamental freedoms, the right to fair labour relations outlined under Article 41(1) of the Constitution.

34. As I have stated in the case of *Elizabeth Washeke and 62 Others versus Airtel Networks (K) Ltd et al, Industrial Cause No. 1972 of 2012, 24;*

*By having Article 41 of the Constitution, 2010 protecting labour relations/practices, it was a constitutional declaration with the purpose of ensuring that the legislative framework governing labour relations in Kenya was in accordance with the Bill of Rights. This sets the right to fair labour practices in the equity jurisdiction of the Industrial Court, in a changed constitutional dispensation.*

35. Fair labour practice entail each party treating the other is a manner that is just, legitimate and reasonable as fundamental practices envisaged in a society that is open and democratic where transparency and accountability must be guaranteed. Therefore, in my reading of all these provisions, the respondent Union and its officials, are by law entitled to carry out lawful activities, follow out agreed-upon regulations as outlined in their CBA and other policy manuals regulating their relationship as well as the laws relating to labour relations within a fair and equitable environment that respect fair labour practices.

36. Within this conceptual framework of things, there remains a fundamental position that an employer retains the right to discipline any employee who has a case of misconduct, that employee being unionised or not, that employee being an official of a union or not, the duty to discipline remain with the employer at all material times. In this respect, where an employee, went ahead and committed acts that were established to warrant a disciplinary action, then such an employee cannot be found to find support from the sanctuary of the Article 37 and 41 of the Constitution, or the statutes applicable being the LRA and the Employment Act to bar an administrative disciplinary process rights commenced by an employer to address such misconduct. It is not for the respondents union to say who is to face such disciplinary action, this right is for the employer to exploit and where there are allegation that there was a fight between Makhoha and Oiriri and the claimant opts to commence proceeding against one and not the other, the role of the Union as the respondent herein is to ensure their member is represented once the disciplinary action is commenced and not to interfere with the rights bestowed upon the claimant as the employer and direct as to which of their employees is to be subjected to disciplinary action. Where disciplinary action is

commenced and disregards due process or failure to adhere to fair procedure and substantive justice, the employee so affected can file his claim which claim therefrom is not multiplicity of suits but a move to protect that employee's individual rights. This is what the Constitution and the law entail by requiring all parties to act in good faith and to ensure they undertake their mandate as an employee or employer in the spirit of fair labour practices.

37. On the other hand, an employer who commences disciplinary proceedings must ensure due process, fair hearing and due regard to natural justice within the context of fair labour practices. These principles must be exercised in a reasonable and fair manner.

38. The employer is allowed to have any further documents as policy or regulations to address internal disciplinary procedures. Where these internal procedures are put in motion, this cannot be found to be an unfair labour practice as this is the expectation as under section 8 of the Employment Act where an employer is required to formulate policy with regard to various processes at the work place – recruitment, human resource, training or disciplinary policy. A CBA can also expound on how the Union is to be involved in the implementation of such policy. To call for industrial action whether by strike, peaceful demonstration, agitated gatherings or under any other name would be to defeat the very principles of good industrial relations and the same tantamount to unfair labour practice.

39. I find no ambiguity in the orders sought by the claimant with regard to stopping unlawful industrial action by the respondent. The procedure to give an employee the opportunity to be heard at this first instance before the disciplinary panel constituted is commensurate with the constitutional provisions as under Article 51 on fair hearing and the tenets of natural justice. Where one is alleged to have committed an act that warrants disciplinary action, the first step is to apply the mechanism as agreed between the parties. However nothing stops any such party, being aggrieved by that mechanism as applied against them to challenge the fairness of it before this Court which has the jurisdiction to hear labour disputes. Parties are encouraged to undertake all means possible to resolve disputes at the shop floor as the disciplinary process is investigative and meant to verify the allegations made against the employee and for punishment to be imposed if the allegations are proved and for the employee to be exculpated if the allegations are not proved. These internal mechanisms are the core of ILO Convention 153, where an employee should be heard by the employer before employing external disputes resolution mechanism.

**For the fair determination of the main claim herein and a fair and just conclusion of the matters before court at this point with regard to the two application dated 5th may 2014 and 12th May 2014, I make the following orders and directions;**

a. **The orders issued under IC 140 of 2014, Nakuru are hereby set aside and time extended from today the 4th day of June 2014 with regard to the action taken by the claimant against Christopher Makhoha;**
b. **The respondent is hereby restrained either by themselves, their agents, members or servants from causing, effecting or otherwise calling for any industrial action by peaceful demonstrations or strike by the claimant's employees [members of the respondent] with regard to matters outlined by the respondent in their letter dated 27th April 2014 with regard to the Suspension of Christopher Makhoha pending the hearing and determination of the cause herein;**
c. **The issue of whether there was an illegal strike or a lock-out will be addressed after a full hearing;**
d. **With regard to orders made under (a) above; any party who wishes to make any amendments to their pleadings has 7 days within which to bring this to the notice of the other party and the party so served to reply within 7 days after which time, the registry will allocate a hearing date for the main cause on priority basis; and**
e. **Costs in the cause.**

These are the orders of the court

Delivered in open Court at Nairobi and dated this 4th Day of June 2014

**Mbaru**

**JUDGE**

In the presence of

Court Assistant: Lilian Njenga

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