



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 196 OF 2012**

**KENYA PLANTATION AGRICULTURAL WORKERS UNION.....CLAIMANT**

**VERSUS**

**WINDSOR FLOWERS LTD.....RESPONDENT**

**RULING**

1. The Claimant filed the suit against the Respondent seeking reliefs for its members on 10<sup>th</sup> February 2012. The cause was brought under a certificate of urgency and a Notice of Motion Application which sought injunctive relief. This was disposed of and what remains for determination is the Claim. The Memorandum of Claim filed contemporaneously sought prayers that:-
  1. The Honourable Court do find that the action unlawful and unfair and order immediate end of the lockout
  2. The Honourable Court order the Respondent not to re-engage the 300 employees on fresh contracts and maintain the permanent status.
2. The Respondent filed a response to the Notice of Motion and a Response to the Claimant's Memorandum of Claim. The Respondent's Response to the Claimant's Memorandum of Claim was filed on 22<sup>nd</sup> February 2012 and averred that the events leading to the current dispute which was "unlawful lockout, termination and dismissal of 300 employees" were wildcat strikes in August, 14<sup>th</sup> November 2011, 2<sup>nd</sup> December 2011, 20<sup>th</sup> January 2012 and 31<sup>st</sup> January 2012. The Respondent issued various notices on 31<sup>st</sup> January 2012 that any employee who would not resume work at the appointed time would be deemed to be summarily dismissed. The 186 employees affected declined to resume work and were dismissed and the Respondent asserts that the 31<sup>st</sup> January 2012 strike was a prohibited strike. In the alternative it was averred the prayers sought in the Claim cannot be granted and thus the suit should be dismissed with costs.
3. The Claimant called some of the affected employees as it witnesses. These were Amos Kamau Kariuki who used to work in the grading section and was a shop steward, Mary Andeyo Masika who was a shopsteward, Benson Ndambiri Kathigi who worked as a buncher. They all testified on the events preceding the dismissal. Amos who now works as a *boda boda* cyclist in Thika stated that he together with other shop stewards went to meet the Human Resource Manager Patrick Kariuki at 8.00am and they were advised to return at 10.00am. At 9.30am they were informed of a notice on the Notice Board which was to the effect that staff should resume work. After the attempt to meet the Managing Director who declined to meet the shop stewards the shop stewards told the staff to resume work but the staff refused. The shop stewards called Mr. Ouma the Branch

Secretary of the Claimant and he went in to see the management and did not talk to the shop stewards. This infuriated the employees who then refused to resume work. They saw the notices issued but refused to resume work and the next day when they reported to work they found G4S and security and were not allowed back into the premises. He testified that he received salary for that month and gave back the dust-coat and other company items in his possession. Mary similarly testified that she was a shop steward and the management was unwilling to meet them to discuss the CBA. The managing director who was uncouth refused to talk to them and caused the issue of notices to compel staff to resume work later called in the police who were armed and carrying tear-gas canisters. She was not allowed back in after the staff were chased out. Those who were re-engaged were asked to fill in new forms. Benson testified that he was working and saw the drama that went on between the workers representatives and management. He stated that the director had said that even Atwoli who the workers praised or Kibaki or Raila came he would not talk to them. He was upset by this as he is a Kenyan in Kenya.

4. The Respondent called Patrick Kariuki the Human Resources & Administration Manager. He testified that the Claimant is recognized by the Respondent and a recognition agreement duly signed. The negotiations for the new CBA took place over time and on management side was the witness, Pradid Kumar and Obadiah Gitige. On the part of the Claimant was Daniel Ouma, Issa Wafula, Henry Omasire and workers Rosemary Mwendia the Chief shop steward, Andrew Maslan the secretary and Frederick Wafula the Assistant Shop steward. Mary Adeyo also came in later but he could not remember when she exactly joined the negotiations. He testified that prior to the meeting on 16<sup>th</sup> December 2011 to negotiate the CBA there was unrest and 2 strikes and the December one was the third strike. There were other strikes in January 2012 and he gave notices to staff to resume work on 31<sup>st</sup> January 2012 but the staff refused to return to work leading to the summary dismissals. He denied that Mary was among the shop stewards he called to his office.
5. Parties filed their submissions and in their submissions reiterated their positions. In the Submissions filed on 10<sup>th</sup> June 2014 the Claimant reiterated that in the Claim which sought the reinstatement of employees and in the alternative an order for compensation per Section 12(3) of the Industrial Court Act and dues for the period they were not working together with their terminal dues that had accrued from the date of employment. The issues for determination as framed by the Claimant was
  1. Whether the claimants termination of services was fair
  2. Whether there was in existence a strike/lock out?
  3. Whether the Claimants are entitled to benefits as prayed

The Claimant submitted that the termination was unfair as the Respondent refused to reschedule the meeting of 28<sup>th</sup> February to 30<sup>th</sup> and 31<sup>st</sup> January as sought by the Claimant to negotiate on the Collective Bargaining Agreement. The Claimant submitted that the CBA was negotiated after the Claimant successfully moved Court in Industrial Cause No. 1496 of 2010 as the Respondent was unwilling to negotiate. The employees anxiety shown on 31<sup>st</sup> January emanated from that history. It was submitted that the provisions of Section 45(5) and 41(2) of the Employment Act were not adhered to by the Respondent. Reliance was placed on the case of **Kenya Plantation and Agricultural Workers Union v. Roseto Flowers [2013] eKLR** and **Walter Ogal Anuro v. Teachers Service Commission [2013] eKLR**. A distinction should be made between a strike instigated by the union and a strike that is at the instigation of employees themselves. For this submission the Claimant relied on the case of **Plantation Plants Kenya Ltd v. Kenya Plantation and Agricultural Workers Union [2013] eKLR** for a proposition that where it is established that the union did not instigate the unprotected strike and upon learning about it the union moves to intervene the employer is precluded from holding the union liable. It was submitted that the Respondent used the alleged strike as a smoke screen to avoid paying the 185 employees their terminal benefits. The Claimant relied on the case of **Frankline Mureithi Mwaniki v Equitorial Nut Processors [2013] eKLR** for the compensation of 12 months salary as compensation.

6. The Respondent in its submissions filed on 20<sup>th</sup> June 2014 submitted that the evidence of the three

Claimant's witnesses confirmed that the Claimant's members participated in an illegal and unprotected strike and despite warnings and notices to resume work they all failed to resume work. The Respondent submitted that even the offer for re-engagement was not taken up by the Claimants. It was submitted that the law is clear that an employee who engages in an unprotected and unlawful strike invites a dismissal if they persist without cause and the employee is in breach of Section 80 of the Labour Relations Act. Participating in such a strike falls under Section 44(3) of the Employment Act and in participating in such a strike an employee is in fundamental breach of their contractual obligations. It was submitted that payments were made as admitted by the Claimant's witnesses and they were additionally offered an employment opportunity and they failed to take that up the offer as did their colleagues who were re-engaged. The Respondent thus urged the claim be dismissed for lacking in merit.

7. The issues for determination are

1. Whether the strike on 31<sup>st</sup> January was a protected strike
2. Whether there was a lock out
3. Whether the Claimant's members are entitled to any remedies in respect of the summary dismissals

8. According to the evidence adduced and the law, the strike on 31<sup>st</sup> January 2012 was not a strike within the meaning of Section 76 and 79 of the Labour Relations Act 2007. The staff who went on strike took part in an exercise which was not protected by law. In the premises the strike was not protected. Was there a lock out? Under the Labour Relations Act, a employer is allowed to have a lockout if adherence to the law is made. There was no lockout in terms of the law. The employees were dismissed on 31<sup>st</sup> January 2012 and on the following morning those who were willing to apply were permitted to be re-engaged. In the premises the Court finds there was no lockout as the action on 31<sup>st</sup> January 2012 was in consequence of an illegal unprotected strike.

9. Are the Claimant's members entitled to reliefs? In order to qualify for compensation the Claimant's members termination would have to have been unfair or unlawful. The Claimant's witnesses all testified that the staff refused to resume work and though there is no indication that the union made efforts to call off the strike there is no basis for finding in favour of the former employees of the Respondent. The claim is unproved and thus dismissed with costs to the Respondent.

Orders accordingly.

**Dated and Delivered at Nairobi this 31<sup>st</sup> day of July 2014**

**NZIOKI WA MAKAU**

**JUDGE**