



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 272 OF 2014

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

-VERSUS-

JAMES FINLAYS KENYA LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th July, 2014)

RULING

The claimant filed a notice of motion on 03.07.2014 brought under section 12 of the Industrial Court Act, and under Rules 16 and 27 of the Industrial Court (Procedure) Rules. The claimant prayed for orders:

1. That the application is certified as urgent and service thereof dispensed with in the first instance.
2. That the honourable court is pleased to prohibit or restrain the respondent from evicting and or continuing with the eviction of twenty two (22) of its dismissed employees or any number thereof from houses they occupy or occupied before dismissal pending the hearing and determination of the application or cause.
3. That the court be pleased to refer the parties to conciliation regarding the dismissal of the twenty two (22) of the dismissed employees.
4. That pending the hearing and determination of the application or the cause the dismissals of the 22 employees of the respondent be halted or lifted.

The grounds in support of the application were as follows:

1. The parties to the suit are bound by relevant recognition and collective agreements.
2. On diverse dates between 10.02.1998 and 15.08.2011 the respondent employed the 22 employees in issue and assigned the employees diverse tasks within the respondent's establishment. The employees were deployed in the respondent's Marinyan, Simotwet and Kaproret estates.
3. Five of the employees were dismissed on 17.06.2014 following the respondent's unilateral introduction of devices for plucking tea in place of hand plucking of the tea and without relevant training of the affected staff. The termination was on account of failure by the five employees to use the devices.
4. Six of the employees were dismissed after or about 19.06.2014 on account of unilateral respondent's decision to reduce the daily pay rate and on account of the affected employees'

grievances in that regard which were characterized with job stoppage and arrest of the employees before their termination.

5. Eleven of the employees were ordered to vacate the housing accommodation allocated by the respondent following their grievances about daily payment rates.
6. Parties met on 20.06.2014 to resolve the dispute but were unable to arrive at a compromise.
7. Unless the respondent is restrained the employees will be evicted from the assigned housing accommodation and they will suffer irreparable loss and mental anguish.
8. The respondent will suffer no prejudice if the orders are granted.

The claimant's application was supported with the affidavit of the claimant's deputy general secretary Thomas Kipkemboi filed together with the application and the attached exhibits.

The respondent opposed the application by filing on 14.07.2014 the replying affidavit of Peter Biwott, the respondent's human resource manager. The respondent urged the following grounds to oppose the application:

1. Issue whether the termination was unfair, unlawful or illegal is an issue to be determined at the full hearing of the suit.
2. The initial 5 employees in the claimant's grounds were dismissed on account of refusal to perform allocated duties as assigned and not grounds as suggested by the claimant.
3. For the subsequent 6 employees, the respondent notified about the changes and did not suddenly change the daily tasks and payment rate. That the employees failed to complete assigned duties and were absent without leave or good reason. They also incited other employees.
4. The 3rd lot of 11 employees refused to perform duties as allocated by the supervisor and were summarily dismissed by the respondent.
5. The claimant's prayers are belated as the disciplinary procedure has concluded including the appeal procedure.
6. Halting the dismissals would amount to reinstatement which should be a final order in the suit. Dismissals should not be lifted at the interlocutory stage.
7. Clause 17 (b) of the CBA provides that where an employee is dismissed other than for gross misconduct and his dismissal becomes a subject of a dispute, such an employee will not be required to leave the house allotted to him until the dispute is finalized; and 18 of the employees continue to occupy the housing accommodation contrary to that clause.
8. As the employment has ended, the obligation to provide housing accommodation ended.

The court has considered the parties' respective positions and submissions and makes findings as follows:

1. As submitted for the respondent, in absence of a common position by the parties and in view of opposing pleadings, it will be necessary to take evidence at a full hearing to make a determination on the issue whether the termination was unfair or unlawful. In the circumstances of this case, it would be premature at the interlocutory stage to make a finding on that contested issue of fact and in absence of the relevant parties' evidence to guide the court.
2. The court finds that the parties are bound by their agreement in clause 17 (b) of the collective agreement that where an employee is dismissed other than for gross misconduct and the dismissal becomes a subject of a dispute, such employee will not be required to leave the house allotted to him until the dispute is finalized. The court holds that the dispute as filed in court is such dispute as envisaged under the clause. So were the employees terminated on account of gross misconduct? The court has considered the termination letters filed in the suit. The termination letters show that the employees were terminated summarily on account of reasons that the respondent said amounted to or were gross misconduct. In the circumstances, the court finds that the parties are bound by clause 17 (a) which in this case does not entitle the grievants to continued occupation of the allotted housing accommodation.

In view of the court's findings, the court further finds that the applicant has not in the circumstances of this case established a *prima facie* case with a high probability of success.

In conclusion, the application is dismissed with costs and parties are invited to take directions on the hearing of the main suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 25th July, 2014**.

BYRAM ONGAYA

JUDGE