



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**  
**CAUSE NO. 449 OF 2014**  
**UNILEVER TEA KENYA LIMITED.....CLAIMANT**

v

**KENYA PLANTATION & AGRICULTURAL WORKERS UNIO.....RESPONDENT**

**RULING**

1. The trajectory of this Cause is regrettable to say the least. It has been application and counter application in instances where grounds of opposition to an application would have sufficed. As it is, the plethora of applications can only serve to muddle the real disputes for resolution in the main Cause.
2. Unilever Tea Kenya Limited (Claimant) filed a Memorandum of Claim against the Kenya Plantation & Agricultural Workers Union (Respondent) on 23 September 2014.
3. The cause of action related to an alleged strike by the Respondent's members on or around 22 September 2014. The Claimant sought orders that, the strike be declared illegal and prohibited, and a permanent injunction restraining the Respondent from calling a strike over failure to conclude a Collective Bargaining Agreement for 2014/2015.
4. Simultaneously with the Memorandum of Claim, the Claimant filed a motion under certificate of urgency seeking orders

*2. That the strike commenced by the Respondent, its officials, agents and/or members on 22 September 2014 is a prohibited strike.*

*3. THAT pending the hearing and determination of this application, this Honourable Court be pleased to grant an injunction restraining the Respondent, its officials and/or agents, its members and/or its representatives from continuing with the strike or inciting its members into continuing with the strike and an order prohibiting the Respondent's members and/or the Claimants employees from remaining on strike.*

*4. THAT pending the hearing and determination of this application, this Honourable Court be pleaded (sic) to order that the Claimants workers on strike do forthwith return to work.*

*5. THAT pending the hearing and determination of this application the Respondent, its officials, agents and/or members be prevented from intimidating, threatening and/or otherwise restricting the Claimants workers from returning to work.*

*6. THAT pending the hearing and determination of this cause, this Honourable Court be pleased to grant an injunction prohibiting/restraining the Respondent, its officials and/or agents, and its members and/or its representatives from causing, effecting, inciting or*

*otherwise calling for a strike by the Claimant's employees and an order restraining/prohibiting the Respondent's members and/or the Claimant's employees from remaining or continuing with the strike.*

*7. THAT pending the hearing and determination of this cause, this Honourable Court be pleaded (sic) to order that the Claimant's workers on strike do forthwith return to work.*

*8. THAT pending the hearing and determination of this cause the Respondent, its officials, agents and/or members be prevented from intimidating, threatening and/or otherwise restricting the Claimant's workers from returning to work.*

5. If there was a verbose application, this one takes pride of place at the very apex. Litigants should concisely and precisely word the orders the litigant is seeking.
6. This motion was placed before Ongaya J on 23 September 2014 *ex parte*, and he certified it as urgent and ordered the parties to comply with the agreed grievance and conflict management resolution mechanisms pending *inter partes* hearing on 24 September 2014.
7. The Respondent was served with the motion and it filed a Notice of Appearance on 24 September 2014 together with various documents indicating attempts to resolve the dispute mutually.
8. After hearing the parties *inter partes*, Ongaya J allowed prayers 3 and 4 of the motion. He also directed the parties to mutually resolve the issues in dispute and admitted the Claimant's further affidavit sworn by one Lucy Lelo. The Judge adjourned further *inter partes* hearing to 9 October 2014.
9. On 29 September 2014, the Respondent filed its own motion under certificate of urgency seeking

2. THAT the Honourable Court be pleased to grant an order to vary and set aside the order (2) and (3) issued on the 24<sup>th</sup> September 2014 to the effect that:-

a) *Pending the hearing and determination of this application, this Honourable court be and is hereby pleased to grant an order of injunction restraining the respondent, its officials and/or agents and its members and/or representatives from continuing with strike or inciting its members into continuing with the strike and an order prohibiting the Respondents members and/or claimants employees from remaining on strike.*

b) *Pending inter partes hearing of the application all the claimants members being the respondents employees to resume work immediately and not later than 25<sup>th</sup> September 2014..*

3. *THAT the Honourable Court be pleased to grant an order that the Claimant/Applicant by themselves, their agents, servants and assigns and/or representatives be restrained from terminating, suspending, locking out and or dismissing any employee on account of the strike pending hearing and determination of the application filed in Court and dated 22<sup>nd</sup> September, 2014.*

10. In effect, the Respondent was seeking the vacation of orders issued after *inter partes* hearing only about 4 days earlier and seeking its own injunctive relief.
11. This motion by the Respondent was placed before me on 1 October 2014 *ex parte* and I certified it urgent and directed that it be served for *inter partes* hearing on 9 October 2014.
12. On 3 October 2014, the Respondent filed a certificate of urgency supported by the affidavit of Thomas Kemboi seeking order 3 of the motion filed on 29 September 2014.
13. I heard the motion on 6 October 2014 and granted prayer 3 as sought and directed that the *inter partes* hearing be on 9 October 2014 together with the Claimant's motion filed on 29 September 2014.
14. On 9 October 2014, the parties could not agree as to which motion should be heard and I directed the parties to appear on 15 October 2014 for housekeeping and directions.
15. The Respondent on the same day filed a Replying Affidavit sworn by Thomas Kipkemboi in

- response to Lucy Lelo's supporting affidavit and a further affidavit filed in Court on 24 September 2014.
16. The Claimant on its part filed a Replying Affidavit sworn Lucy Lelo, on 9 October 2014, in response to the Respondent's motion filed on 29 September 2014.
  17. Not to be outdone, the Claimant filed another motion on 9 October 2014, seeking that certain named former employees be ordered to vacate the Claimant's premises.
  18. Not to overburden this ruling, on 15 October 2014, I directed that the motion dated 22 September 2014 by the Claimant and the motion dated 29 September 2014 by the Respondent would be urged together, and I further directed the Respondent to respond to the motion of 9 October 2014 within 14 days.

### **Claimant's motion dated 22 September 2014**

#### ***Submissions by Claimant***

19. Mrs. Opiyo for the Claimant submitted that the Claimant was seeking confirmation of the orders 2, 6, 7 and 8 issued on 24 September 2014.
20. Counsel submitted that it was not denied that a strike had taken place on 22 September 2014 and that the Respondent had not complied with clause 3(d) of the Recognition Agreement between the parties.
21. She further submitted that a strike should be a last resort and that because of the strike tea bushes had been uprooted and the Claimant had suffered loss of about Kshs 15,000,000/-.

#### ***Submissions by Respondent***

22. Mr. Khisa, Organising Secretary of the Respondent opposed the motion. He submitted that there was no strike and no evidence of strike had been placed before the Court and that the Respondent had not issued any strike notice. He further submitted that if there was a strike, there would have been a return to work formula.
23. He further submitted that the Claimant's employees had genuine grievances as confirmed by the Claimant's letter dated 22 September 2014 relating to an unconcluded Collective Bargaining Agreement and that conciliation had commenced as ordered by the Court on 24 September 2014.

#### **Reply by Claimant**

24. The Claimant in brief reply submitted that indeed a strike had taken place and that this was confirmed through the photographs and a company statement issued by the Claimant on 22 and 23 September 2014 as exhibited in the further affidavit of Lucy Lelo.

#### **Evaluation**

25. Among the documents filed by the Respondent with its Notice of Appearance on 24 September 2014, was a letter dated 23 September 2014 from the County Labour Officer, Kericho to the Claimant. The letter made reference to a letter from the Claimant on 22 September 2014 in which the Labour Officer had called for a meeting at which the Rift Valley Manager of the Federation of Kenya Employers and the Respondent were present.
26. On the basis of the correspondence filed in Court by the Respondent, I am satisfied that as a matter of fact there was work disruption on 22 September 2014.
27. But whether that disruption was an illegal strike or not is not for determination at this stage. This is because there are already allegations that some employees were dismissed and my making a conclusive determination would likely fetter the hand of the trial judge in cases of claims of unfair termination.
28. Prayer 2 of the motion though couched as an order is to all intents a declaration of finality and it is therefore declined.
29. Before discussing the other prayers, a word or two about 2 of the authorities relied on by the Claimant.

30. These are firstly, the decision by Nzioki wa Makau J in Nairobi Cause No. 992 of 2012, *Kakuzi Ltd v Kenya Plantation & Agricultural Workers Union*. In this decision, I note that wa Makau J made a declaration that the strike as illegal after hearing of the Cause on the merits and not at interlocutory stage.
31. The second decision is the one by Kosgei J in Nairobi Cause No. 1450 of 2011, *Kakuzi Ltd v Kenya Plantation & Agricultural Workers Union*. In this case, the Court confirmed an injunction at the interlocutory stage but did not issue a declaration or order that the strike was illegal. These decisions do not further the Claimant's case at the interlocutory stage.
32. I now proceed to consider prayers 6, 7 and 8 of the motion.
33. What prayer 6 of the motion is seeking is an injunctive relief of what took place on or around 22 September 2013. The prayer sought has been overtaken by events and the Court would be acting in vain were it to confirm the injunctive order.
34. Prayers 7 and 8 sought orders directing the employees to resume work and the Respondent from preventing its members from resuming work.
35. The replying affidavit of Lucy Lelo filed on 9 October 2014 is clear that the employees resumed work on 29 September 2014. A backward looking injunctive relief may serve no purpose at this juncture.
36. In my view the orders 6, 7 and 8 sought would serve no practical purpose at this point in time.
37. I therefore order the motion dismissed with no order as to costs.

### **Respondent's motion dated 29 September 2014**

38. The Respondent had not filed any Response to the Memorandum of Claim by the time of the hearing of the two motions. It filed the instant motion seeking certain injunctive relief instead.
39. Injunctive relief should issue depending on the nature of the suit and satisfaction of the applicable legal principles as set out in the case of *Giella v Cassman Brown & Brothers Ltd*. The facts at present are those asserted by the Claimant.
40. The competency of the Respondent's motion therefore needs to be examined to confirm whether it is sound in law.
41. The injunctive relief sought by the Respondent is not anchored on a substantive suit, or a counterclaim in which the Respondent would have placed facts as understood by it, before the Court.
42. It is therefore appropriate to examine whether the Respondent is deserving of the injunctive relief it is seeking.
43. The competency of applications for injunctive relief appears to lost jurisprudence. It is rarely cited. The issue has been the subject of discourse in a few cases.
44. The Courts which have had occasion to address the issue appear to have been given either a restrictive interpretation or generous interpretation as to the power of a Court to grant injunctive relief.
45. Ringera J (as he then was) gave the rules a restrictive interpretation while Harris J and Odunga J have generously interpreted the powers of the Court to grant injunctive relief.
46. Ringera J in *Kihara v Barclays Bank of (K) Ltd* (2001) 2 EA 420 (CAK) and *Morris and Co. Ltd v Kenya Commercial Bank Ltd* held that an application for interim injunction which was not supported by a permanent injunction in the main suit was incompetent.
47. However in an earlier case of *Njoroge Kironyo and others v Kironyo Njoroge* (1976) KLR 109, Harris J was of the view that the powers of the High Court to grant injunctive relief are very wide and the issue of substantive suit is not primary.
48. This view was approved by Odunga J in *Alfred Mwai Kariuki v Kenya Commercial Bank Ltd & Another* (2012) eKLR.
49. In my view, although the authorities I have mentioned dealt with injunctive relief under the Civil Procedure Rules, similar principles are applicable to injunctions sought pursuant to the Industrial Court Act and the rules of this Court.
50. In the case under consideration, the Respondent has not even filed a Response to place before Court any contrary facts to those presented by the Claimant.
51. I do not see how the facts as asserted by the Claimant can be the basis of granting injunctive relief against the Respondent, and at the same time being the basis of granting an injunction against the

- Claimant, at the behest of the Respondent.
52. Further, I do not understand why the Respondent would want orders granted after it had been heard only 4 days earlier should be varied or set aside when it could have simply filed grounds of opposition or replying affidavit giving reasons why the orders should not be confirmed.
53. The practice adopted by the Respondent herein of counter application did not augur well with the objective of the Industrial Court Act of expeditious and proportionate determination of disputes before the Industrial Court.
54. In my view, the Respondent's motion is incompetent, an abuse of the Court process and lacks merit and stands to be dismissed.
55. I therefore order it dismissed with no order as to costs.

**Delivered, dated and signed in open Court in Nakuru on this 21<sup>st</sup> day of November 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Opiyo instructed by Kaplan & Stratton Advocates

For Respondent Mr. Meshack Khisa, Organising Secretary, Kenya Plantation & Agricultural Workers Union