



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT KISUMU

CAUSE NO. 167 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 6th November, 2014)

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS.....CLAIMANTS**

-VERSUS-

MEK SACCO SOCIETY LTD.....RESPONDENTS

RULING

The application in court is the one dated 11.7.2014 filed under certificate of urgency and brought through a notice of motion dated the same day.

The notice of motion is brought under Sections 3 and 12 of the Industrial Court Act 2011, Sections 41, 43, 45, 46, 50 and 87 of the Employment Act 2007, Article 41 and 50 of the Constitution of Kenya 2010, Industrial Court Procedure Rules 2010 and all inherent powers of the Court.

The applicant seeks order that:-

- 1. That the honourable court certifies this application as urgent and be heard on priority basis.**
- 2. That the application be heard *ex-parte* in the first instance and service of the same be dispensed with.**
- 3. That the honourable court be pleased to issue a conservatory order against the respondent on the grievants positions pending determination of this application.**
- 4. That the honourable court issue an order restraining/prohibiting the respondents from disciplining, terminating or dismissing the grievants pending determination of this application.**
- 5. That the honourable court do order the respondents to pay the grievants up to the month of 30th June 2014 Kshs 243,588 and Kshs 144,918 for the 1st and 2nd grievants respectively pending determination of this application.**
- 6. That the honourable court do declare the respondents action unprocedural, unfair and**

unlawful.

7. That the honourable court do issue an order reinstating the grievants unconditionally.

8. That the honourable court do issue any other order it deemed fit to address the cause of justice.

9. That the honourable court grant costs to the applicant.

Orders were granted in terms of prayers 1, 2, 3, and 4 in the interim pending determination of this application.

The application is grounded on the annexed affidavit sworn by Benard Odari and Boniface Ochieng and the grounds that:-

(i) That the parties have a valid Collective Bargaining Agreement.

(ii) That the applicant has pursued the matter within the provisions of Labour Relations Act 2007 but without success.

(iii) That the respondent failed to attend two conciliations meetings contrary to the law.

(iv) That the respondents action did not comply to the provision of Employment Act, 2007 on disciplinary matters hence unlawful.

(v) That the respondents action breached the grievants Constitutional rights.

(vi) That the respondents action contravene parties Collective Bargaining Agreement and therefore untenable.

(vii) That the grievants indefinite suspensions has denied them opportunity to enjoy fair labour practice guaranteed in the Constitution.

(viii) That the grievants did not misappropriate the respondent's funds as was alleged.

(ix) That the respondent prematurely advertised the grievants jobs on 6.12.2013 before their fate was made known to them hence want of good faith in the process.

The applicants contend that contrary to procedure and the law, they have been subjected to indefinite suspensions by the respondents. It is the applicants further contention that the dispute between the grievants and respondents had gone through a conciliation process. On 27.5.2014, the parties were invited for a conciliation meeting by the conciliator but the meeting didn't take off as the respondents didn't attend. The conciliator then issued a certificate referring the matter to court as per **Annex 17**. It is the applicants contention that, since the grievants were suspended, it is over one year and that this fact has not been disputed by the respondents. That this is contrary to Article 36(1) of the parties Collective Bargaining Agreement (pg 35) which forbids suspension of an employee for a period exceeding 90 days. The applicants aver that the Collective Bargaining Agreement is a legally binding document protected by Article 41 of the Constitution and Section 26 of Employment Act and should not be overlooked. The applicants further contend that the indefinite suspension of the grievants violates the grievants rights under Article 159(2) of Constitution which states that justice should not be delayed and Article 50(2)(e) which forbids unreasonable delay in any trial. It is the applicants contention that the respondents have violated ILO Convention 98 and they have no valid reasons to suspend the grievants.

On issue of allegations by respondents that the matter is under investigation by their auditors whereby the grievants were asked to answer an audit query, the applicants aver that this is a matter which did not exist when the grievants were suspended and cannot form the basis of any disciplinary action.

The respondents filed their replying affidavit on 11.10.2014 through the firm of Nyawiri Osero Carilus and Co. Advocates. It is the respondents position that this application and the entire claim is a *non starter* and premature and there is no evidence that the Collective Bargaining Agreement the applicants are relying on is still valid having lapsed in 2011. They also contend that there is no evidence that this dispute was submitted to the Minister and service made to respondents on **Annexures 10, 13, 15, 16 and 17**. They also argue that the suspension meted on the grievants is reasonable and fair and that the court should not unnecessarily interfere with the disciplinary process against an employee unless the law is contravened. The respondents also submitted that the grievants were invited for a disciplinary hearing and they refused to answer to an audit query.

The applicants insist that they are rightly before court and that the validity of the Collective Bargaining Agreement cannot be raised at this point the same having not been raised in the replying affidavit. It is their submission that a Collective Bargaining Agreement remains valid unless there is need to amend it.

Having heard both parties, the issues for determination are as follows:-

- 1. Whether the Collective Bargaining Agreement the applicants are relying on is valid.**
- 2. Whether the respondents have violated grievants rights by placing them on suspension for a period of over 1 year.**
- 3. What remedies this court can grant.**

On validity of the Collective Bargaining Agreement, a Collective Bargaining Agreement binds for the period of the agreement as provided for under S. 59(1) of Labour Relations Act 2007. The Collective Bargaining Agreement referred to by the applicants expired on 31.12.2011 as per Clause 43 of the Collective Bargaining Agreement. That notwithstanding, can a suspension remain in force for over 1 year. Under Article 41 of Constitution, every person has a right to fair labour practices. Fair labour practices will include according an employee fair administrative procedures as provided for under Article 47 of the Constitution which provides:-

“47.(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall —

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

Coupled with fair administrative action is the right to be heard without unreasonable delay as provided for under Article 50(2)(e) of the Constitution. To subject an employee to suspension for over 1 year with the pretext of investigation is to flout the Constitution with impunity. Suspension should be for a reasonable period of time.

It is therefore this court's finding that the respondents have violated the grievants rights by placing them on suspension for over 1 year.

I therefore order the suspension lifted. I order that the grievants be paid the arrears of ½ salary unpaid since the suspension was imposed on them. I also direct that any disciplinary process that has to be meted

on the grievants should be fair, expeditious whilst following due process.

HELLEN S. WASILWA

JUDGE

6/11/2014

Appearances:-

Atela for claimants present

Nyawiri for respondents present

CC. Wamache