



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 15 of 2012**

**PLANTATION PLANT KENYA LIMITED.....CLAIMANT**

**-VERSUS-**

**KENYA PLANTATION AND AGRICULTURAL**

**WORKERS UNION.....RESPONDENT**

**JUDGMENT**

The claimant filed the claim through the Federation of Kenya Employers on 15.07.2011 and its counsel Masese George Advocate. The respondent prayed that:

- a) the honourable court do issue an order prohibiting the respondent from proceeding with the intended strike forthwith scheduled for 19.07.2011 in terms of the 7 day notice and dated 11.07.2011;
- b) a declaration that the intended strike is illegal; and
- c) any further relief that the honourable court may deem just to grant in furtherance of the sound labour relations and economic development.

The claimant, together with the memorandum of claim filed the Notice of Motion dated 15.07.2011 supported by the affidavit of Ram Amunga as attached and sworn on 15.07.2011. Upon hearing the application ex-parte on 18.07.2011, the court ordered: **“That pending the hearing and determination of the application, the respondent be and is hereby restrained from embarking on strike action pursuant to the seven (7) days notice dated 11<sup>th</sup> July 2011.”** The application was fixed by the court’s order for *interpartes* hearing on 18.07.2011.

On 26.08.2011, the claimant filed the amended memorandum of claim praying for orders:

- a) the honourable court do issue an order prohibiting the respondent from proceeding with the intended strike forthwith scheduled for 19.07.2011 in terms of the 7 day notice and dated 11.07.2011;
- b) a declaration that the intended strike is illegal;
- c) a claim for Kshs.1,038,037.50/= being damages incurred by the claimant out of the illegal strike; and
- d) any further relief that the honourable court may deem just to grant in furtherance of the sound labour relations and economic development.

The respondent filed the memorandum of reply to the amended memorandum of claim on 7.09. 2011. The claimant made prayers that:

- a) the honourable court find that the prayers by the claimant as lacking merit and allow the respondent to proceed with the protected strike as is lawful in the meaning of section 76(b) of the Labour Relations Act read together with Article 41(d) of the Constitution of Kenya;
- b) denying the respondent the constitutional right to call the protected strike will lead to infringing on the respondent's constitutional rights.
- c) the termination and subsequent dismissal of Mark Situma ( the Chief Shop Steward at claimant's establishment) was illegal, unlawful and unfair in the meaning of sections 12, 41,43,44,45 and 49 of the Employment Act, 2007 and the court to order his unconditional reinstatement without loss of his seniority and privileges as he was not given opportunity to state his case;
- d) the court finds that the action by the claimant to fail to implement the return to work formula unfair and order full implementation of the return to work formula dated 30.06.2011;
- e) the court finds that the demand of Kshs.1,038,037.50/= being damages unreasonable and dismiss the claim; and
- f) the claimant to meet the costs of the suit.

The case came up for hearing on 9.11.2011, 14.03.2013 and 10.04.2013. The claimant called three witnesses namely Nancy Wafubwa the claimant's Human Resource Assistant (RW1), Frank Nyagaka Obwagi the claimant's Assistant Sales and Export Manager, and, Evans Odongo from the claimant's purchasing department. The summary of the witnesses' testimony was as follows:

1) CW1 testified that prior to 25.06.2011 the claimant introduced a book for the staff in the spraying department to sign on entry and exit from work. The staff came in very early before the others, sprayed, left early and returned in the evening when other staff had left. The book was a necessary control measure to monitor the spraying function and the Human Resource Manager had explained the rationale of the book to the affected staff. All staff except Mark Situma the Chief Shop Steward did not sign the book because he claimed it was intimidation for the workers to be required to sign. He was served a warn letter dated 25.06.2011 being appendix 1 on the supporting affidavit of Ram Amunga. On 28.06.2011, Mark was not at his station of work and his supervisor explained that he had informed him that he was going for the Union meeting outside the work station. There had been no official communication from the union. The witness CW1 telephoned the Branch Union Secretary who confirmed that there was no union meeting. On 29.06.2011, Mark did not report on duty. On 30.06.2011, he reported and he was summoned to a meeting at the human resource office. His supervisor was present. He failed to explain his absence for one and half days as well as the reason for his failure to sign the entry and exit book. CW1 then served him the letter of termination being appendix 1b on the memorandum of claim. The letter terminated Mark's employment with immediate effect from 29.06.2011 due to refusal to sign the warning letter in respect of failure to sign the entry and exit book. The termination letter stated that the termination was in accordance with Clauses 16(c) and 19 of the collective agreement and, section 44(4) (e) of the Employment Act, 2007. As the claimant had lost trust and confidence in Mark, the letter stated that his last working day would be 29.06.2011 and he would be paid days worked up to 29.06.2011, any overtime due and leave on prorata basis. Upon termination of Mark, the shop stewards went to the greenhouses to convey the news and workers came out on strike to protest the termination. It all happened within ten minutes of the termination of Mark. A meeting was held between the management, union officials and the labour officer. A return to work formula was drafted and concluded between the parties. It is appendix 3 on the memorandum of claim as concluded on 30.06.2011. Its salient provisions were that Mark Situma the Chief Shop Steward's termination be lifted with immediate effect without loss of benefits, that all employees return to work on Friday 31.07.2011 at 7.00 am without fail, parties to meet at the Labour Office on an agreeable date between 4<sup>th</sup> and 8<sup>th</sup> July 2011 to discuss industrial relations in the claimant's farm and there would be no victimization on the either side in view of the sit-in. Another meeting was

held on 5.07.2011 at the District Labour Office at Naivasha whose proceedings are appendix 2 on the memorandum of claim. The meeting resolved that as the claimant's Managing Director was still out of the country, the meeting was to be rescheduled to a date the claimant's management would communicate and the status quo on the 30.06.2011 return to work formula to remain. By the letter dated 8.07.2011 the claimant upheld the termination of Mark as per appendix 4 on the memorandum of claim. Consequently, the respondent issued a seven days strike notice as per appendix 5 on the memorandum of claim and the claimant moved to court to obtain the injunctive orders.

2) CW2 testified that the claimant had an order to supply by exportation 500 kg of Chives known as Allium Schnittlauch to a customer in Switzerland at the rate of 7.50 Euros per Kilogram. The order was confirmed per appendix 7 on the amended memorandum of claim. By reason of the claimant's strike on 30.06.2011, the claimant failed to honour the order to supply the Chives. CW2 stated that appendices 8 and 9 on the amended memorandum of claim showed the loss which amounted to Kshs.1,038/=, and 037.50/= as claimed by the claimant.

3) CW3 stated that he was on duty on 30.06.2011 having reported at work at 8.00 am. He did not know the reasons why the employees had gone on strike. He saw the union branch officials addressing the workers directing them not to resume work unless the Chief Shop Steward was reinstated. The strike lasted three days.

The respondent called two witnesses one Moses Muturi John, the Deputy Chief Shop Steward at the material time (RW1) and one Mark Situma Ludiali, the Chief Shop Steward whose termination is in issue (RW2). Their testimony was as follows:

1) RW1 stated that the attendance book introduced in the spraying department raised grievances by the affected staff. The Chief Shop Steward was on an off on 25.06.2011 and CW1 reported the grievance to him on 26.06.2011. The shop stewards wrote to the management to discuss the grievance but the management refused to discuss as requested. On 30.06.2011, there were noises emerging from the greenhouses and upon enquiry, RW1 learnt that the management had called in the police officers and the security personnel were escorting the Chief Shop Steward out from the claimant's premises. CW1 went to the office to find out the problem but he was not allowed in as the security personnel restrained him from entering the office. He called the union branch officials who arrived and a meeting with management culminated in the return to work formula being appendix 2 on the memorandum of reply. He did not receive any warning to be signed by Mark and did not witness any signing of the warning. On 30.06.2011, the shop stewards did not incite the workers as work resumed after the meeting with the management. On 30.06.2011, the Mark had arrived at work at 8.00 am, summoned to the office and escorted out by police officers and the claimant's security personnel. CW1 understood that the claimant business relied on orders but was not involved in processing the orders.

2) RW2 testified that he was on off duty on 25.06.2011 when he received reports that the claimant had introduced on that date the check-in check-out book in the spraying department. The Human Resource Manager had announced to staff at the introductory meeting that any staff who failed to sign the book would be fired. On 26.06.2011, he reported on duty and production manager explained the check-in book would not be in place because the master roll book was already in place. On 25.06.2011, he had not received any warning letter. On 28.06.2011, he reported the grievance to the Human Resource Manager but who failed to convene the relevant meeting. On 29.06.2011, he was on valid off duty. On 30.06.2011, the security officers denied him entry to the claimant's premises. They instead accompanied him to the human resources office. He was informed by the Human Resource Officer that the Director had directed that he be served with the termination letter. The letter was handed to RW2 and he reported to the union branch secretary. He was not aware of the strike at the work place on 30.06.2011. Since 30.06.2011, he had never gone back to the claimant's premises. After the return to work formula, he was not readmitted at work. He prayed for reinstatement as he never incited the workers. He had never seen the check-in check-out book but he had written to complain on behalf of the workers.

The parties agreed to file and rely on written submissions. The claimant's submissions were filed on 24.04.2013 and the respondent filed on 03.05.2013.

The court has considered the pleadings, the evidence and the submissions on record and makes the following findings:

1. On 30.06.2011, the claimant dismissed the Chief Shop Steward which led to spontaneous strike of the workers on that date. The return to work formula concluded later that date is evidence that the employees were on strike that day. The main issue to be resolved by the court is whether the strike was initiated by the respondent. The court has carefully considered the evidence on record and finds that the workers strike on 30.06.2011 was not initiated and approved by the respondent. First, it has not been established that the Chief Shop Steward or any other steward incited the workers to go on strike on 30.06.2011. Secondly, the respondent's branch officials arrived at the claimant's premises long after the employees had stopped to work and it is impossible that the officials had instigated the strike. The evidence available shows that the officials came in to intervene and a return to work formula was concluded that afternoon. The union officials' responsive intervention on that date was a positive initiative and the court finds that the workers' activities on 30.06.2011 were not sanctioned by the respondent. The court finds that by concluding the return to work formula, the respondent's officials acted in accordance with the Industrial Charter which provides in clause IV that a union shall discourage any breach of peace and commotion by union members. The evidence on record as per CW3 is that the respondent's officials addressed the employees after the return to work formula had been concluded and asked them not to return to work unless the Chief Steward was reinstated. The court has taken into account that evidence and takes the view that such communication was substantially the content of the return to work formula and the officials were engaged in a genuine remedial measure on 30.06.2011, the employees having stopped to work of their own volition.

2. On 30.06.2011, the Chief Shop Steward was terminated from employment. The reasons for the termination were that he failed to sign the entry and exit attendance book and the failure to sign the ensuing warning letter. The evidence on record is clear that the claimant has not proved that the Chief Shop Steward failed to sign the book as alleged. CW1 told the court that all staff had complied except the Chief Shop Steward. Nevertheless, the claimant did not produce the book or extracts from the book to prove the allegations. The court finds that the claimant has failed to show that the alleged reason for termination was real and genuine as envisaged under section 43 of the Employment Act, 2007. It is also obvious that the claimant did not accord the Chief Shop Steward the requisite notice and a hearing as envisaged under section 41 of the Employment Act, 2007. The evidence on record also shows that the employees had a grievance relating to the newly introduced entry and exit book. The claimant appears to have neglected its obligation to amicably discuss and resolve the grievance. Instead, the claimant chose to victimize the Chief Shop Steward, the respondent's floor representative the claimant was required and expected to engage in resolving the grievance. The termination was sudden and the involvement of the police and the claimant's security personnel is not rebutted. The court's view is that the evidence shows that on 30.06.2011 the claimant did not allow the Chief Shop Steward any interaction with the employees. It is notable that in contravention of the return to work formula, the respondent refused to allow the Chief Shop Steward back at work. In view of the narrated circumstances of the case, the court finds that the claimant's termination was unfair.

3. The claimant has prayed for Kshs.1,038,037.50/= being damages incurred by the claimant out of the illegal strike of 30.06.2011. To support the claim, the claimant has cited the decision of the South Africa Labour Court in **Rustenburg Platinum Mines Limited –Versus- The Mouthpeace Workers Union Case No. J5099/99**. At page 17, the Honourable G.Farber, Acting Judge stated as follows:

**“In my view, the strike in question was a serious one. So much so appears from my analysis of the facts already addressed. The Respondent was the instigator thereof and, to be sure, its conduct was highly irresponsible and totally erosive of orderly collective bargaining. It seems to me that the Respondent requires reminder that the interests of security in the workplace are best promoted by stable and ordered action in terms of procedures sanctioned by law. Recourse to other stratagems can only serve to bedevil sound labour relations to the prejudice, not only of the parties involved, but to the economy as a whole. A loss of R15, 000.00 is no trifling matter.”** The court then ordered the respondent to pay the claimant a sum of R.100,000.00. The claimant also cited the decision by the South Africa Labour Court in **Mangaung Local Municipality –Versus- South African Municipal Workers**

**Union** for the position that the union would share the resulting loss if the strike is not protected and the union fails to intervene.

The court has considered the citations and finds that the circumstances of the present case are distinguishable. First, in this case it has not been established that the respondent instigated the strike. Secondly, the respondent intervened and negotiated the return to work formula but which the claimant neglected and did not implement. The court holds that where it is established that the union did not instigate the unprotected strike and upon learning about it the union moves to intervene, like in this case, the employer is precluded from holding the union liable for the loss attributable to the unprotected strike initiated by the workers independent of the union. It could be, in such instances, the employer may recover the loss directly from the employees who are shown to have engaged in such unprotected strike of their own volition and provided that the recovery is pursuant to administrative disciplinary action undertaken by the employer in accordance with the relevant statutory and agreed procedures. Accordingly, the court finds that the claimant is not entitled to recover the sum of Kshs.1,038,037.50/= from the respondent as claimed.

4. The court has found that Mark Situma, the Chief Shop Steward, was unfairly terminated by the claimant. He urged for a reinstatement. However, the court has considered the strained relationship between him and the claimant and considers that reinstatement would not be convenient to both the employer and the employee. The court finds that an award of **Kshs.173,821.08/=** as compensation at the rate of his last gross salary of Kshs.14,485.09/= for twelve months will be fair in this case.

In conclusion, the court makes the following orders:

- a) the respondent shall not engage in unprotected strike as to result in to the claimant's economic and financial loss;
- b) the claimant to pay the respondent's member one Mark Situma, **Kshs. 173,821.08/=** within 30 days from the date of this judgment failing which, to pay the sum plus interest at court rates from the date of judgment till full payment;
- c) each party to bear own costs of the case.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 10<sup>th</sup> May, 2013.**

**BYRAM ONGAYA**  
**JUDGE**