REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 208 OF 2013

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS AND ALLIED WORKERS.....CLAIMANT

-VERSUS-

EGERTON UNIVERSITY..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th July, 2013)

RULING

The claimant is a union having concluded recognition and collective agreements with the respondent with respect to the respondent's employees in grades I to IV.

The respondent is a public university whose core business is teaching and research. In 2006 to 2007 financial year, the respondent decided to out-source security services as a non-core undertaking of the respondent. A security services provider was sourced in accordance with the provisions of the Public Procurement and Disposal Act, 2005 and the successful bidder was contracted to provide the services for one year. Before the lapsing of the one year, the respondent invited bidders for provision of the services for the following one year term and an unsuccessful bidder challenged the award at the Public Procurement Review Board. Consequently, the out-sourcing project was disrupted compelling the respondent to make alternative measures for security services pending the outcome of the proceedings challenging the award to the successful bidder.

The alternative measures entailed the employment of 106 security personnel on fixed term contracts as per the letters of fixed term contract being appendix 2 on the verifying affidavit filed on 5.07.2013 together with the memorandum of claim commencing this cause. Fifty five (55) of the employees who were hired on the fixed term contracts and being members of the respondent are the grievants in this case.

The grievants' fixed term contracts were initially from 1.09.2009 to 31.08.2010, and then renewed for one year from 30.09.2010 to 30.09.2011, then renewed from 1.10.2011 to 30.09.2012, renewed for three months to 31.12.2012 and finally renewed for six months from 1.01.2013 to 30.06.2013.

In the meantime, the dispute challenging the out-sourcing of the security services was determined and the respondent on 14.03.2003 awarded Intercity Secure Homes Limited to provide security services to the respondent at Kshs.2,566,500.00 per month. Thus, upon lapsing of the grievants' six months fixed contracts on 30.06.2013, their respective contracts were not renewed to pave way for the out-sourced provider to take over as contracted by the respondent. The provider started providing the services on 1.07.2013 and this fact is not disputed. The grievants were dissatisfied and aggrieved by the turn of

events.

Thus, on 5.07.2013 the claimant on behalf of the grievants filed a certificate of urgency, the memorandum of claim and the notice of motion brought under section 74 (b) (ii) and (c) of the Labour Relations Act, 2007, section 40 of the Employment Act, 2007, section 12(2) and (3) (i) of the Industrial Court Act and the Industrial Court Procedure Rules. The claimant urged that the grievants were employed to provide essential services as per section 74 (b) (ii) and (c) of the Labour Relations Act, 2007. The claimant in the notice of motion prayed for orders to the effect that:

1. **The application be certified as urgent and be heard ex-parte in the first instance.**
2. **The honourable court be pleased to issue summons to the Human Resources to show cause why he or she should not be cited for failure to comply with the provisions of the collective bargaining agreement (CBA) and with section 40 of the Employment Act, 2007.**
3. **The honourable court be pleased to cite the Human Resources to stop forthwith the intended redundancy of 55 employees, the grievants in this case.**
4. **The honourable court be pleased to give interim orders to the applicant for stopping the intended outsourcing of the grievants' services.**
5. **The 55 employees to remain in employment until hearing and determination of the main claim.**

The application was supported by the affidavit of Albert Njeru sworn on 5.07.2013, the secretary general of the applicant and Mr. Hezron Onwong'a appeared for the claimant.

The application was certified urgent and on 10.07.2013 both parties attended court and the application by order of the court was fixed for hearing on 11.07.2013 at 2.30 pm. The respondent opposed the application by filing the affidavit of Professor James K. Tuitoek, the respondent's Vice-Chancellor sworn on 11.07.2013. Gekong'a & Company Advocates appeared for the respondent. The parties argued the application as scheduled.

The court has considered the pleadings; the affidavits together with the attached documents; as well as the submissions made and make the following findings on the issues in dispute:

1. The first issue in dispute is whether the respondent terminated the grievants' respective contracts of service. For the claimant, it was submitted that clause 3 of the CBA being appendix 1 on the bundle of the certificate of urgency provided for temporary employment under which temporary employment was to be for a term not exceeding three months. The grievants had been engaged for a term exceeding three months and therefore, the respondent had breached the CBA. The claimant also submitted that clause 4 of the CBA provided for contract employment for three or more months for performance of a specific work which could not be reasonably expected to be performed in an aggregate period of less than three months. The grievants had been engaged to perform a permanent job of providing security and therefore, they were entitled to permanent employment.

For the respondent, it was submitted that temporary service under clause 3 of the CBA referred to casual service and it did not apply to the grievants. The grievants were clearly engaged on a fixed term contract which lapsed by effluxion of time for the agreed tenure. Thus, the respondent did not terminate the grievants as their respective contracts lapsed by operation of the agreement, namely, effluxion of the agreed time. For the respondent, it was further submitted that only casual employment could convert to permanent terms of service and not a clear fixed term contract like that enjoyed by the grievants. The respondent submitted that the only action available to the grievants was to claim, if any, their respective unpaid dues accrued and evolving from the lapsed contracts of service.

The court has considered the opposing submissions. First, the court finds that the grievants were clearly emplaced on a more than three months fixed term contract as envisaged in clause 4 of the CBA. The court finds that they were not on temporary service, essentially, casual service, within the effect of clause 3 of the CBA. Section 37 of the Employment Act, 2007 makes elaborate provisions for conversion of

casual employment, in specified circumstances, to a service subject to the minimum terms and conditions of employment as stipulated in the Act. The court holds that fixed term contracts are automatically subject to the minimum terms and conditions of service provided for in the Act and fixed term contracts are therefore not subject to conversion as it applies to casual employment under section 37 of the Act.

In **Ruth Gathoni Ngotho-Kariuki –Versus- Presbyterian Church of East Africa and Presbyterian Foundation Industrial Cause No. 509 of 2010 at Nairobi at page 16** of the judgment, this court upheld the opinion that employers are not under any obligation to give employees reasons for non-renewal of fixed term contracts unless there is such an obligation created in the expiring contract. In the instant case, the court finds that the fixed term contracts did not create such an obligation and the court further finds that the contracts were not terminated by the respondent but were automatically terminable by effluxion of the agreed time defining the tenure of the contracts as it did pass to happen.

2. The next issue in dispute is whether the respondent breached the obligation to consult the claimant before engaging the services of the out-sourced security services. The claimant has not established any basis and justification of such consultation and the court finds that there was no such duty for consultations before the respondent moved to implement the out-sourced services.

3. The final issue for determination is whether the claimant is entitled to the remedies as prayed for in the notice of motion. The claimant has prayed for interim orders in the nature of an interlocutory injunction. In **Giella –Versus- Cassman Brown & Company Limited (1973) E.A 358**, the court held that an applicant for such orders must show a *prima facie* case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and when the court is in doubt, it will decide the application on a balance of convenience. In view of the findings of the court in issues 1 and 2 above, the court finds that the applicant in this case has failed to establish a *prima facie* case for grant of the interlocutory orders in the nature of injunction as prayed for and all the prayers shall fail

In conclusion, the court dismisses the claimant's notice of motion dated 5.07.2013 with costs and invites the parties to agree on the convenient mention date for directions on the hearing of the main suit.

Signed, dated and **delivered** in court at **Nakuru** this **Friday, 12th July, 2013.**

BYRAM ONGAYA

JUDGE