



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1006 OF 2012

(Before D.K.N. Marete)

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION.....CLAIMANT/APPLICANT

Versus

SOTIK HIGHLANDS TEA ESTATE LIMITED.....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 14th June 2012 brought to court vide a certificate of urgency of the same date. It seeks following orders of court;

1. **THAT** this Honourable Court be pleased to certify this application as being urgent.
2. **THAT** this Honourable Court does issue indulgatory orders restricting the Respondent from locking out, suspending, terminating services, and or dismissing about 525 employees contrary to Section 41, 43, 44, 45, 47 and 49 of the Employment Act No. 11 of 2007 Laws of Kenya.
3. **THAT** the Respondent has locked out, suspended, terminated services and or dismissed about one hundred and fifty two unprocedurally without due regard to the Labour Law, the Kenya Constitution and the International Labour Organization Conventions.

And is grounded on *inter alia*, the supporting affidavit of Wilson Basweti

Asamba and Jeremiah Nyabochwa Omwansa and the following other

grounds;

- i. **THAT** on 7th June, 2012 employees of the Respondent who are tea pluckers reported on duty at 7.00a.m. as usual and commenced duties of plucking green tea in field 25 within the Respondent Estate.
- ii. **THAT** on 7th June at around 7.30a.m the mechanical Tea plucking machines supervisor one Mr. Maeba came to where employees were plucking green tea and reported them that they should make sure that they complete the plucking of green tea in field 25 as he was about to come and

- skip the area using Tea Plucking Machines. They were further informed by Mr. Maeba that all of them will be transferred to another area and leave the area for plucking machines.
- iii. **THAT** workers were surprised with the shocking news and sought for clarification from the manager.
 - iv. **THAT** the manager was called in to clarify the use but he could not give proper and satisfactory reasons.
 - v. **THAT** on 7th June, 2012 at around 10.00a.m the deputy General Manager came and started abusing the grievants instead of clarifying the allegations made by the Supervisor.
 - vi. **THAT** it was at this point in time, the General Service Unit officers and the administration police officers were called in and sealed the Tea Estate and ordered all workers to leave the premises.
 - vii. **THAT** it was at this point that workers decided to seek audience with the General Managers of the Respondent.
 - viii. **THAT**, at around 3.45p.m, there was a meeting between the General Manager, the Claimant Branch Secretary and workers where it was agreed that workers disperse and resume the following morning at 7.00a.m.
 - ix. **THAT** workers dispersed and reported on duty on 8th June, 2012 at 7.00a.m as agreed the previous day i.e 7th June, 2012.
 - x. **THAT** workers continued plucking green tea as usual until 10.00a.m in field 25 when the General Manager Mr. Leakey and all managers of Sotik Tea Company came in the company of GSU and Administration Police Officers and ordered all workers out of the Estate.
 - xi. **THAT** 152 employees were locked out of their place of work and General Service Unit Officers deployed to guard the Estate.
 - xii. **THAT** on 9th June, 2012, the Deputy General Secretary and the Organising Secretary from the claimants Headquarters visited the Respondent premises but were again denied access.
 - xiii. **THAT** the Kisii County Labour Officer made his recommendation which included rescinding the Respondent failed and or refused to accept the recommendation.
 - xiv. **THAT** the Respondent has withheld the salaries for the month of May, 2012 thus subjecting the grievants to economic hardship and frustrations.
 - xv. **THAT** the action by the Respondent to lock out, suspend, terminate and dismiss 152 employees is unprocedural, unfair and unlawful.
 - xvi. **THAT** the action by the Respondent if not stopped will infringe on the grievants rights and cause irreparable loss to both the grievants and the claimants.
 - xvii. **THAT** it will only be fair and just if the Honourable Court grants injunctive orders restraining the Respondent from locking out, suspending, terminating services and or dismissing 152 employees.
 - xviii. **THAT** any other grounds to be advised during the hearing thereof.

The matter came for hearing before Kosgei, J. on 18th June, 2012 whereupon the court issued the following orders;

1. THAT the application is certified as urgent and be heard ex-parte in the first instance.
2. THAT the application be heard *inter partes* on 21st June, 2012 at 10.00 a.m before Justice Madzayo.

When the matter came for hearing before Madzayo, J. on 21st June, 2012, counsel for the respondent Kinyenje Opiyo prayed that the court allows a placement of the matter before another court for hearing and disposal this court having heard and ruled on other similar issues relating to the parties. Despite opposition by the applicant, the court disqualified itself and the matter was placed before another Judge.

The matter ultimately came for hearing before Paul K. Kosgei, J on 5th July, 2012 where the issues in dispute were thrashed *inter partes*. Mr. Wafula for the applicant opened his case and sought to rely on the application and affidavits of Wilson Basweti, Jeremiah Nyongesa as filed. His case is that on 7th June, 2012, employees of the respondent who were tea pluckers reported on duty. At 730 hours, one of the respondents supervisors, a Mr. Maeba went to the ground and informed the workers that they were to be transferred to another field as tea plucking machine would replace them in that field. The workers were taken aback and sought clarification but the same was not forthcoming from the respondent's supervisor. This issue had been communicated earlier via the workers representatives. At 1000 hours, the Deputy General Manager of the respondent came and started abusing the workers without addressing the issue and the workers thereupon sought the audience of the General Manager.

A meeting was held and it was agreed that because it was getting late, the workers should resume the following day. On 8th June, 2012, they reported and worked up to 1000 hours when the General Manager came with management staff and armed police officers and ordered staff to move from there area of plucking. The following day on 9th June, 2012, the Deputy Secretary General of the claimant union and two other officials sought audience with the management on the matter but were denied access to the premises now sealed by armed police officers. The Kisii County Labour Officer tried to intervene together with the union officials but only the labour officer was allowed in. This, it is, submitted was after the employees had been issued with dismissal letters unilaterally by the company/respondent.

The labour officer made a report but this was dishonoured by the management who also refused dialogue.

Another meeting was held between the Branch secretary of the claimant and the Officer Commanding Station (OCS) at the farm where the union officials requested for a return to work formula but this was declined on grounds that it was not necessary and that employees were to return to work without a return to work formula. The Officer Commanding Division (OCPD) later ruled out a return to work formula, a tool necessary in a strike situation.

252 employees are on out of employment and the respondent has engaged casuals to take over their jobs. The applicant therefore prays for immediate reinstatement of the 252 workers without loss of privilege or security as the procedure for dismissal was unlawful.

Mrs. Opiyo for the respondent opposed the application and relied on the affidavits of Stephen Okun, Silas Juma Njibwakale and Doreen Kituku, it would appear that from the onset, the facts of the claim are highly disputed. It is the respondents submission that the affidavits of the claimant are mere falsehoods and that the deponents have perjured themselves.

The actual position as submitted by the respondents is that there was an illegal strike on 7th June, 2012 and members downed tools and refused to work despite repeated pleas from the management to the claimant union. No report of dispute or conciliation was had with the labour office. The management on the said 7th June, 2012 issued four warnings and clarified that if they did not return to work, they would be dismissed. Other meetings were called on 7th June, 2012 but no return to work formula was made as the strike was indeed illegal.

On 8th June, 2012, there was no lock out and the employees were served with notices to show cause why they should not be dismissed. Some turned up for disciplinary proceedings but others stayed away. Some

of those who attended were reinstated while others were dismissed. The entire lot of defiants was dismissed under clause 25 of the Collective Bargaining Agreement (CBA). Their dues were processed but they declined to collect the same from the respondent's offices. Only one has collected the same. After these dismissals, 175 casual employees were recruited to replace the sacked employees and remain in place therefore rendering their application for reinstatement out of place. Too, the relationship *inter parties* has broken down irretrievably and there is no longer trust because of the illegal strike action.

The respondent submits that an application of this nature has to await the full hearing due to the disputed nature of the facts. The workers breached the law and therefore should not seek protection. She prays that the application be further disallowed on grounds that in the circumstances of the case, damages would be an adequate remedy for compensation should issues arise on non granting of this application.

At completion of hearing, the court ordered that the ruling would issue on notice. The matter came for hearing on 27th September, 2012, 19th December, 2012 and 15th April, 2013 where various issues on the proceedings were had and culminated in an agreement that the matter be disposed off by way of written submissions.

The issue for determination is whether the applicant is entitled to the orders sought bearing the circumstances of the case.

The claimant/applicant in his submissions articulates and reiterates his case as per his earlier pleadings and affidavits in such support. The respondents do likewise and submit that the claimant's members went on an illegal and prohibited strike on 7th June, 2012. Subsequently, the applicant brought in this application seeking an injunction to restrain the respondent for terminating the services of the employees and preventing a lock out.

It is clearly discernable from the facts of this case that on 7th June, 2012, an industrial dispute and commotion arose between the employee's and unionisable workers and the respondent's management. This was managed sizably but did not come out clearly due to emotional stress and malhandling of the situation by both parties. The claimant/applicant does not come out clean about the workers going on strike but this is discernible from the pleadings filed herein. The respondent on the other hand rubbishes the applicants version and submits that it is not truthful and that the supporting affidavits border on perjury. To the respondent, the correct version is that the workers indulged in an illegal and unprotected strike and despite indulgence by the respondent/employer, they refused to yield to disciplinary process and were therefore dismissed from employment.

In the replying affidavit of Doreen Kituku sworn on 13th June, 2012, it is deponed that the workers went on premeditated illegal strike and ignored all appeals by the respondent to return to work. This, in addition to the attempted a four stage return to work formula but this too was sizably a failure. The respondent issued dismissal letters and prepared terminal dues for the employees but most of these remain uncollected. The grievants have not therefore come to court with clean hands and this application should be dismissed. The position is further expressed in the further supporting affidavits of Stephen Okun and Silas Juma Njibwakale, the General Manager of the respondent respectively.

The issues for determination are therefore whether the claimant applicant is entitled to the relief sought as follows;

“THAT, this Honourable Court does issue indulgatory orders restricting the Respondent from locking out, suspending, terminating services, and or dismissing about 525 employees contrary to Section 41, 43, 44, 45, 47 and 49 of the Employment Act No. 11 of 2007 Laws of Kenya”.

What in the first place is an indulgatory order? I have made vast research and do not seem to get an answer to this. Perhaps the applicant can or should move shed light on this but chose not to.

The facts of this matter as expressed by the parties are contrasting if not contradictory. One has to make a choice as to which of the parties to believe as their positions are totally incongruent. It is a sad case of

your word against mine.

Under such circumstances, such matters are decided on the principle of a balance of probabilities. What was the probable scenario in the circumstances? This has never been easy but has to be constructed one way or the other. In the circumstances, the case for the respondent takes sway and I find for her position. It is unlikely that the respondent would have enticed and entertained industrial confusion of such magnitude without taking into account the imminent loss. She would most likely suffer as a consequence of a departure of 252 tea pluckers, even if this lasted a single day. Paragraph 18 of this (Doreen's) affidavit is indicative of the mammoth loss incurred by the respondent as a consequence of the illegal strike.

Paragraph 18;

“THAT the Respondent has suffered financial losses to the tune of approximately Ksh.1,318,390/= per day as a result of the illegal strike by the dismissed employees and if such strike continues, the losses are likely to accumulate to the Respondent's detriment.”

This agrees with the respondent's submissions and authority in **Kakuzi Limited Vs Kenya Plantation & Agricultural Workers Union, Industrial Cause No. 1450 of 2011** where Kosgey, J., (as he then was) observed as follows;

“...Since the strike was not protected, it was a prohibited strike as defined under section 79(1). Under section 80(1) of the Labour Relations Act 2007 the grievants breached their contract of service by participating in a prohibited strike and were liable to disciplinary action. Consequently, the respondent's decision to dismiss them was right and in accordance with the law. A go slow strike is a strike that disrupts normal operations and there is no distinction between a go slow and a full strike. They are both strikes aimed at impeding normal performance of work at the work place.”

Further, in **Kenya Long Distance Truck Drivers & Allied Workers Union**

Vs Akamba Public Road Services Limited, Industrial Cause No. 813 of

2010;

“...The claimants are seeking orders which have been overtaken by events. The grievants have been dismissed and reinstating them will go against public policy. They engaged in an unlawful strike without following the procedures for a lawful strike set out in the Labour Relations Act. Furthermore, the grievances raised by the grievants were matters touching on management and amounted to interfering with the management's rights to manage.”

Again,

“...It is not denied that the strike is the ultimate weapon of the employees in the eternal struggle between labour and capital and this is universally acknowledged phenomenon. But it is a weapon of the last resort. It must be reserved for major grievances and only after all other avenues of dispute resolution have failed to resolve the grievance. Strikes should not be resorted to for any grievance that arises at the workplace.”

The learned Judge's observations and articulation on the place of strikes in

labour disputes and industrial relations is worthy of note to employees and

employee agencies. Strikes must at all times be managed within the

dictates of the law and practice so as to embed a viable relationship between

labour and capital. Anything less that this would ebb out confrontation which be detrimental to industrial relations and productivity. This would be a recipe for chaos and impoverish society. A very sad situation.

The circumstances of this case therefore do not warrant an issue of the orders sought by applicant/claimant. These would not be an aid but would disastrously fetter good industrial relations and peace. I would opt for and recommend an expedient hearing of the memorandum of claim launched with this application and dated 14th June, 2012 and filed thereon in order to come out clear on this contested matter by way of taking *viva voce* evidence or otherwise. I therefore feel inclined to decline an issue of the orders sought and order as follows;

1. **THAT** this application is dismissed with no orders as to costs.
2. **THAT** the memorandum of claim in respect to the issues in dispute be heard on a priority basis.
3. **THAT** the parties in the mean time do and are hereby ordered to maintain industrial peace pending determination of the issues in dispute.

Dated, delivered and signed the 1st day of July, 2013.

D.K. Njagi Marete,

JUDGE.

Appearances:

1. Issa Weruga Wafula instructed by Kenya Plantation & Agricultural Workers Union for the claimant/applicant.
2. Mrs. Opiyo instructed by Kaplan & Straton for the respondent.