REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO.282 OF 2010

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION ……..…….. CLAIMNAT

VERSUS

KENYA CUTTINGS LIMITED …….....
…… ..RESPONDENT

Judgement

The claimant, Kenya Plantation and Agricultural Workers Union (KPAWU) is a registered Union representing employees of the respondent, Kenya Cuttings Limited, as under the Labour Relations Act and as outlined in their Collective Bargaining agreement (CBA) for 2009/2011. This claim was filed on 19th March 2010 seeking to have the seasonal contracts of their members, the grievants, converted to permanent contracts. The respondents in their reply admitted that indeed they had seasonal contracts with the various claimant members, but these contracts lapsed hence their termination.

In the claim, KPAWU state the respondent is engaged in the business of cut flowers for export at the international market from 1998. 201 employees who are the grievants herein were employed between 2002 and 2006. In 2006 the respondent introduced two months contracts to seasonal employees with prorated leave and 21 days annual leave. In 2009 the respondent introduced the grievants to two and four months contracts and then classified employees into 3 categories of 300 employees on permanent status, 600 employees on one year renewable contract and 502 employees on seasonal contracts renewable after 2 months.

The claimant also stated that the grievants contracts of service were terminated by the respondent to deny them long term employment as under the CBA they had qualified for permanent status. That their job security was compromised by being retained under seasonal contract and that by the respondent terminating the grievant is unfair and the court should convert their contracts to permanent ones. The orders sought were for:

1. *That the honourable court find the action of the respondent unfair and award conversion of the grievants from seasonal contracts to permanent contracts in line with the Employment Act and the CBA.*
2. *The court finds the renewal of 2 months contracts unfair and illegal and nullifies the same.*
3. *That this court orders and award permanent status of the grievants from the date they were first engaged.*
4. *The court order and award the grievants to enjoy long term benefits like other permanent employees.*

5. *The court award in favour of the claimants*

The respondents on the other hand stated that they were previously owned by other entities and now has 1310 employees out of whom 820 are permanent and 490 seasonal. In 2009 the claimant recruited their employees while the respondent became a member of Agricultural Employers Association. The respondent demand for labour is dictated by market demands and production schedules as a cut flower business and as such they engage their employees when workload increases.

The 201 employees terminated had 4 months seasonal contracts with a date for commencement and termination and before the end date, they got a notice with a reason that that the peak season was to end and hence decline in production. All payments were paid before termination. That under the law the respondent is allowed to engage employees on seasonal contracts and the CBA between the parties allowed the respondent to hire seasonal labour from time to time to cover planning and harvesting seasons or other activities related to high volume of production and processing of flowers.

The respondent further stated that their hiring of the seasonal employees on permanent terms is not possible as employment is determined by the volume of work and this claim should not be allowed.

The Employment Act at section 2 defines a contract to mean;

> ***"contract of service" means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;***

This same definition is replicated by the Labour Relations Act at section 2. However the Labour Institutions Act has gone a step further on this definition and outlined a contract to mean;

> ***"contract of service" means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service made within Kenya and to be performed in full or in part outside Kenya, and any contract for service with a foreign state, except a contract for service entered with, by or on behalf of the government.***

Under these provisions of the law, parties entering an employment relationship can enter into a written contract that is permanent, fixed term, periodic or seasonal contract based on the need, purpose or the interests of both parties or the persons involved. Once there is a written contract, the court will seek to give meaning to such a written contract in determining any issue that may arise especially any dispute. The court as guided by the provisions of section 10 of the Employment Act will give the ordinary meaning to any written agreement between parties unless there is proof that there is ambiguity on the face of the contract.

Therefore, seasonal contracts as the claimant has indicated are allowed in law and the court finds that that which the grievants in this claim had agreed with the respondent was to have their contracts as seasonal. The terms were also outlined and conditions. The dispute is the conversion of these seasonal contracts to permanent contracts under the meaning of the CBA as between the claimant and the respondent at clause 27 which states at 27 (d);

> ***Where a seasonal employee is required to work beyond the maximum period of 8 years, such an employee shall be deemed to have been engaged as a permanent employee and her/his services as a seasonal worker shall be taken into consideration for purposes of calculating any long term benefit.***

The claim as outlined does not give facts as relating to the period the seasonal contracts were running to enable the court assess for how long these seasonal contracts were running. No ambiguity has been cited

with regard to the seasonal contracts. The general statement that the grievants were engaged for the period of 2004, 2006 and 2009 falls short of an outline as to exactly how long the terminated contracts were running and if this period went beyond what had been agreed as under Clause 27 of the CBA and hence allow and court to make a finding an convert these contracts within the powers granted to this court.

In this case the claimants act for their members. These members are the grievants herein. However the orders sought relate to 201 grievants who have not been listed. Even in the event the court were to grant the orders sought, the same would not be directed to any particular grievant or grievants as this remains unstated and such an order would remain ambiguous for the respondent to implement. The claimant also stated that the respondent has taken in some grievants who are now in their employ but did not indicate which or the grievants or in what capacity the new relationship has been commenced.

In assessing the claim and the orders sought, there is no evidence to support the court intervention in converting the seasonal contracts to permanent contracts. The court will respect what the parties to the CBA and the grievants in their seasonal contracts agreed on. The court will not order as the claimant has stated. I will therefore dismiss this claim in its entirely.

Each party to bear their own costs.

Delivered in open court this 24th day of September 2013.

M. Mbaru

Judge

In the presence of

Jacob Kipkirui: Court Clerk

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