



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 128 OF 2013

**KENYA PLANTATIONS AND AGRICULTURAL WORKERS
UNION.....CLAIMANT**

-VERSUS-

**KERIO VALLEY DEVELOPMENT
AUTHORITY.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 20th September, 2013)

JUDGMENT

The Claimant is Kenya Plantations and Agricultural Workers Union. It filed the memorandum of claim on 15.05.2013 and an amended memorandum of claim on 24.06.2013. The claimant made the following prayers in the amended memorandum of claim:

1. **A declaration that the mass transfers of employees is in breach of clause 21 of the CBA.**
2. **The court to order the respondent to stay the immediate transfers of 100 employees pending making of investigations and consulting employees on their individual cases and circumstances pending the transfers.**
3. **The court to order the respondent to set aside the transfers of the elected shop stewards namely Patrick Kangogo, Jane Chebet Koskei, Esther Sugut, Maria Viola Chemwetich, Selin Chepkorir, Salina Chumba, Christine Koech, Malena Itok, Wilson Kiprono Butit and Rhoda Kimalel.**
4. **The respondent be ordered to reinstate the shop stewards to their respective positions before the letters of transfer were issued.**
5. **The respondent be ordered to comply with the provisions of clause 21 of the CBA in effecting the transfers of its employees.**
6. **The court to order the respondent to pay its employees their house allowance as is payable to them.**
7. **The court to order the respondent to pay its employees the accumulated medical allowances as from August 2012 to the date of determination of the suit.**
8. **The respondent to pay costs of the suit.**

The respondent **Kerio Valley Development Authority** filed the statement of defence on 24.06.2013 through the Federation of Kenya Employers. The respondent prayed that the suit be dismissed with costs.

On 23.07.2013, the parties agreed to proceed on the basis of the pleadings, documents on record and the affidavit of Patrick Kiptoo Kangogo filed on 01.08.2013 together with the attached exhibits.

The respondent is a state corporation whose functions include planning and coordinating the

implementation of development projects in the Kerio and Turkwel Rivers' catchment areas and their tributaries. The respondent undertakes work in the sectors of agriculture, forestry, wildlife, tourism, electric power generation, mining and fishing. The projects are carried out in the Counties of Samburu managed from Mararal, Baringo from Marigat, Turkana from Lodwar, West Pokot from Kapenguria and Elgeyo Marakwet from Iten.

The headquarters of the respondent is at Eldoret within the Uasin Gishu County and which falls outside the respondent's Counties of operation. The respondent did not offer any explanation why its head office has continued to be housed outside its counties of operation. The respondent's employees are assigned work in any of the respondent's projects upon permanent deployment to the field projects or temporary visits where the concerned employee is permanently deployed at the head office in Eldoret. The claimant's case is that it has suffered deficits in the wage bill and to manage that deficit it had to deploy more staff from the head office to the field projects on permanent basis.

The claimant held election of the shop stewards on 25.04.2013. Patrick Kiptoo Kangongo was elected as the Chief shop steward and Gilbert Muguongo, Esther Sugut, Jane Chebet and Joel Byegon as stewards. By the internal memorandum dated 26.04.2013, the respondent posted 100 employees to different field stations including the chief shop steward Patrick Kiptoo Kangongo. It is the claimant's case that such deployment undermined the effective functioning of the claimant as it is unfair labour practice.

The respondent has submitted that the memorandum of transfer was on 26.04.2013 and the letter dated 29.04.2013 conveying to the respondent the names of the new shop stewards as elected was received after the transfer decision had been made. The respondent has submitted that it is aware that there must be consultations before effecting transfers that affect shop stewards but in the instant situation the newly elected shop stewards had not been communicated. As the known shop stewards were not affected by the transfers, the respondent had not breached the CBA.

The court has considered the submissions made and finds that there is no dispute that the parties must consult before the respondent makes a transfer decision affecting the shop stewards. In the circumstances, the court finds that the claimant is entitled to the declaration that the decision by the respondent on 26.04.2013 to transfer any of the shop stewards elected on 25.04.2013 is stayed pending the consultations between the parties and which shall be concluded by 1.10.2013.

Clause 21 of the CBA on transfers provides as follows:

“Transfer

- a. **All employees undertake as a condition of their employment to work anywhere in Kenya for the employing Authority or its associates/subsidiaries. Management will take individual circumstances into account both before and after transfer so far as it is not inconsistent with the interest of the authority.**
- b. **Where a union representative is to be transferred, the union head office shall be consulted prior to the transfer.**
- c. **Upon transfer an employee shall be provided with one month's basic salary and on request transport of vehicle up to five tones”**

Parties have not disputed the provisions of the clause and the respondent has submitted that it is willing to comply in event of any transfer. The court finds that the claimant is entitled to the declaration that the respondent shall comply with clause 21 of the CBA in effecting any transfer.

The next issue for determination is whether the claimant is entitled to the prayer that the respondent be ordered to pay the employees the accumulated medical allowances. The claimant has submitted that there were no consultations between the parties before the respondent withdrew the medical allowance. The claimant further submitted that the respondent could not vary such terms of service without consultation because clause 32 of the CBA provides that where a party intends to vary or amend the terms and conditions it shall notify the other within three months of its intention to do so.

The respondent has submitted that the medical allowance due to each employee per month is Kshs.1245 to Shs.2490 and was found meager to cover the family needs. In the circumstances, the respondent stopped the payment of the allowances effective August 2012 with a view of securing a medical scheme for employees and negotiations have been on-going with the National Hospital Insurance Fund to have the scheme running. Further, the respondent submitted that it hoped the scheme to be in place by January 2014. The respondent further admitted that for the period the scheme had not been rendered, the respondent will pay the employees the accrued arrears for the medical allowances.

The court has considered the submissions and finds that the respondent could not withdraw the medical allowance without consultation. In addition, the court finds that the payment could not be withheld in absence of agreed or more favourable medical scheme. In the circumstances, the court finds that the claimant is entitled to the prayer that the respondent be ordered to pay the employees the accumulated medical allowances.

The respondent has submitted that the tax payers provide for the respondent's wage bill and no valid reason has been advanced for failure to pay the agreed medical allowance as provided for by the tax payers. The court finds that in view of the material on record, the tax payers provided for the medical allowance but the respondent for unexplained or unreasonable cause decided not to pay. In the circumstances, the court finds that the members of the respondent's board of directors and the Managing Director at all material time and not the tax payers would be liable to pay the interest on the accumulated medical allowances if the same is not paid promptly and in any event by 1.11.2013. Thus, it is the opinion of the court that where the tax payer has provided through the Government the relevant funds to pay and the concerned public officer charged with effecting the payment in issue fails to pay on the due date attributable to unlawful, unreasonable, reckless, negligent or unjustified cause on the part of the public officer, the officer is personally liable for the resulting liability for that failure to pay. The court's further opinion is that it would be unfair to visit the tax payer with such liabilities as the concerned public officer is personally liable in such circumstances. In this case, it was not submitted that the tax payers through the Government have failed to provide the funds for payment of the unpaid medical allowances in issue and the court finds that it will be fair for the respondent's managing director and board members to personally pay the resultant interest if the allowances are not promptly paid to the concerned employees. In making the finding, the court holds that the respondent's leadership and management are bound to uphold Article 10 (2) (c) of the Constitution that requires them to uphold good governance, integrity, transparency and accountability.

As the claimant did not make any submissions on the claim for house allowance, the court finds that the same was abandoned by the claimant.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. **A declaration that the decision by the respondent on 26.04.2013 to transfer any of the shop stewards elected on 25.04.2013 is stayed pending the consultations between the parties on the transfers and which consultations shall be concluded by 1.11.2013.**
- b. **A declaration that the respondent shall comply with clause 21 of the CBA in effecting any transfer and with respect to the transfers of 26.04.2013, the respondent to file in court an affidavit and to serve the claimant by 1.11.2011 showing its report of strict compliance with provisions on request for transport, allowances and individual employees' concerns.**
- c. **The respondent to pay the employees by 1.11.2013 the accumulated medical allowances from August 2012 and to continue paying subject to cessation of the payment if a more favourable medical scheme is instituted or agreed upon between the parties.**
- d. **If the accumulated medical allowances in (c) are not paid by 1.11.2013, interest at court rates to be payable on the principal amount from the date of the judgment; and members of the respondent's board of directors and the managing director at all material time to be severally, jointly and personally liable to pay the interest.**
- e. **The respondent to pay costs of the suit.**
- f. **The parties to agree upon the convenient mention date to confirm compliance with this judgment.**

Signed, dated and delivered in court at Nakuru this Friday, 20th September, 2013.

BYRAM ONGAYA

JUDGE