REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

INDUSTRIAL CAUSE NO. 1285 OF 2013

WALTER MOCHA ONGERI …….…… 1ST CLAIMANT

CYPRIAN SALANO ……..……. 2ND CLAIMANT

VERSUS

AIRSIDE LIMITED (SWISSPORT KENYA) ……. RESPONDENT

RULING

This is an application by the claimants Walter Mocha Ongeri and Cyprian Salano dated 8th August 2013 brought by Notice of Motion and under the provisions of section 12 of the industrial Court Act, section 46(d) of the Employment Act, section 4 and 8 of the Labour Relations Act, Article 41 of the Constitution, Article 1 of the ILO Conventions 87, 111 and 135 seeking for orders that court should stay or set aside the decision of dismissal or termination of the claimant's employment with the respondent and that the court do restrain the respondent from employing replacements for the same or similar duties as the claimant and that the claimants should be reinstated to their positions with the respondent. This application is supported by the annexed affidavit of the 1st claimant. The respondent filed their Replying Affidavit dated 19th August 2013 sworn by Maria Simiyu the Human Resource Manager.

This application is based on the grounds that the claimants are the dully registered promoters/officials of the Interested Party, Kenya Aviation Workers Union (KAWU) pursuant to section 12 of the Labour Relations Act and in that capacity, the claimants acted to promote the activities of a proposed Union which was legitimate, lawful and constitutionally guaranteed and went seeking information from the respondent which was not protected or unlawful but of public interest that the activities of the proposed Union should be known by its members and employers. That what was alleged to have been uttered to be abusive, insulting, failure to obey lawful and proper command, failing to promote the interests of the respondent is not supported and is vague. Other grounds are that the termination of the claimants on the basis of their trade union activities is a violation of their rights and that they have not breached the terms of the Collective Bargaining Agreement (CBA).

On 27th June 2013, the claimants together with promoters of KAWU went to meet the human resource manager of the respondent for a meeting pursuant to a letter dated 25th June 2013 where the claimants attended as shop stewards and proposed officials of KAWU and while at the respondent offices, the receptionist adviced them to wait to be attended, but one promoter Duncan Munuve went into the office to enquire the whereabouts of the human resource officer as the others waited for over 30 minutes to be attended to. After two hours the Chief Executive Officer, Finance Administrative Manager and Human Resource Manager came and found the claimants and other promoters at the reception but passed them and proceeded to their offices. After 30 minutes the Human resource Manager came with a letter to the KAWU interim secretary general but said nothing about the expected meeting. Not satisfied the KAWU

interim secretary general sought audience with the respondent's chief executive officer but was not listened to and chased out of his office but the human recourse officer promised to get back to the claimants. The 1st claimant was called by respondent officers who threatened him that he had jeopardised his job but later the security guards requested the claimants and promoters to leave the respondent premises which they did peacefully.

On 1st July 2013, the claimants received show cause letters to appear for disciplinary hearing on 5th July 2013 for use of abusive language, causing disturbance, insubordination and failure to obey lawful orders. The claimants gave their responses noting that the show cause letters did not disclose any material particulars of the offences committed and the CBA applicable was not made available to them. After the panel hearing, the 1st claimant was summarily dismissed and the 2nd claimant terminated.

Walter Mocha Ongeri further stated in his affidavit that the respondents, Airside Limited (Swissport Kenya) as their employer had the constitutional and statutory duty to conduct disciplinary proceedings against them in compliance with substantive and procedural fairness administered in an impartial, neutral, efficient and accurate manner.

The respondent on the other hand in reply states that the 1st claimant was employed by the respondent on 1st August 2002 as Security Agent and the 2nd claimant was employed by Cargo Service Centre East Africa BV which was trading as Swissport Cargo Services Kenya on 8th September 2008 as Warehouse Operator. The respondent had a recognition agreement with Aviation and Airport Workers Services Union Kenya (AAWSUK), dated 24th February 2010 and when they received correspondence from KAWU they declined a meeting citing existing legal and binding agreements with AAWSUK. On 25th May 2013 the respondent was holding a meeting with AAWSUK and FKE and KAWU officials turned up uninvited and were adviced to follow legal procedures before engaging respondent management. On 27th June 2013, KAWU officials together with the claimants went to the respondent offices without warning and caused disruptions forcing security officers to remove them. Later the officials returned and barricaded the respondent offices forcing visitors therein to use exit gate to access the premises. Show cause letters were issued to the claimants following these incidents, they were invited to a disciplinary hearing but their responses were found insufficient and were thus sanctioned for gross misconduct.

After the disciplinary hearing the 1st respondent was summarily dismissed and the 2nd claimant was terminated.

Under the Labour Relations Act, no person shall recruit members for the purpose of establishing a trade union unless that person has obtained a certificate from the Registrar of Trade Unions; that certificate;

a. *[Shall] be signed by two persons who are promoting the establishment of the trade union.…*
b. *Specify the name of the proposed trade union …*
c. *Contain any other prescribed information*

Therefore, in law, employees who are in the process of seeking registration of a trade union can undertake certain function of *promoting the establishment of the trade union* that they propose to have registered. This 'promotion' is meant to advance the interests of a proposed trade union as outlined in Section 12 (4) and (5) thus;

… The promoters may undertake lawful activities in order to establish a trade union; and (b) an application for the registration of the trade union or employers' organisation shall be made to the Registrar within six months of the date of issue of the certificate –

(5) The Registrar may withdraw a certificate issued under this section if the Registrar has reason to believe that –

a. *The certificate was obtained by fraud, misrepresentation or as a result of a mistake, or*

b. *Any person has undertaken an unlawful activity, whether in contravention of this Act or any other law, on behalf of the propose trade union or employee organisation.*

Therefore, as promoters of a proposed trade union, KAWU interim officials, having been granted that interim certification, the law requires that they comply with the provisions of section 12 of the Labour Relations Act and undertake lawful activities. Lawful activities of a trade union or in this case the lawful activities of a proposed union like KAWU entail what would apply and that which is lawful with regard to the provisions of section 4 of the Labour Relations Act, which require that in the exercise of the right to association and forming a trade union, members should participate in its lawful activities. Employees will only be protected in law when they participate in union activities only where these activities are found to be lawful.

For a proposed union to be effective, the promoters must ensure that they work within the realms of the law to avoid having their activities being termed as unlawful. Promoters being such need access to the targeted employees and thus must work closely with an employer to have this access. In this regard, just like what a registered trade union is expected to do, the proposed union officials or promoters must seek reasonable access and follow what a trade union should as under the provisions of section 56 of the Labour Relations Act. In any event they desire to be registered as a trade union and the practice of due process to access would be members and to promote their proposed union would require the promoters to hold their meetings or activities without disruption of the work of employees or disruption of their work hours.

To have this access by the promoters, an employer may impose reasonable conditions as to the time and place to enable a proposed union exercise their rights to avoid undue disruption of operations or in the interest of safety; and require officials or trade union representatives Requesting access to provide proof of their identity and credentials. This is as set out under the provisions of section 56(2);

(2) An employer may-

a. *Impose reasonable conditions as to the time and place of any rights granted in this section to avoid undue disruption of operations or in the interest of safety; and*

(b) Require officials or trade union representatives requesting access to provide proof of their identity and credentials.

These are reasonable measures applicable to a registered trade union as well as a proposed Union with promoters and interim officials. in this case, I find from the affidavit of Walter Mocha Ongeri at paragraph 6 that they went to the respondent premises, were adviced to wait, one Duncan Kihinga went to the office of the human resource officer, a letter was issued to the interim officials but not being satisfied, proceeded to the office of the chief executive officer for more explanations.

Promoters of KAWU and the interim officials are bound by the law. An employer may impose reasonable conditions on access to their premises to avoid disruption of operations and to ensure safety and where in doubt as to the identity of the promoters, require proof. It would therefore be a reasonable expectation on the part of the claimants as well as KAWU promoters and interim officials to write to the respondents who would take time to make verifications before getting back to them the fact that the claimants were aware that there was another Union representing employees of the respondent and with a recognition agreement and a CBA in itself implied that with the proposed new union, KAWU, the respondent needed to take precaution.

The claimants have also not indicated that they were the promoters of KAWU so as to be expected to be at the proposed meeting and not at their work place. The letter requiting for a meeting was written by Moss Ndiema, it does not indicate that he would be accompanied by the claimants and other promoters or officials and for them to all appear at the reception of the respondent and some like Duncan Kihinga to proceed and enter the office of the human resource officer despite being adviced by the receptionist to wait would appear disruptive and contrary to protocol required of a reasonable person keen to promote

their interests. The claimants here do not show why they were at this meeting instead of being at their work place or other place apart from the offices of the respondent. The claimants, in their efforts to exercise their rights should not stumble on the rights of others. All rights should be exercised in a free and democratic manner without offending the rights of others. The claimants have the right to associate and undertake union activities but these right must be exercised in a reasonable manner with due cognisance that the employer too has the right to require reusable access to their offices within a free and democratic environment.

Therefore the proposed meeting by the claimants and the promoters of the proposed union should not have been held in manner as described by Walter Mocha Ongeri in his affidavit at paragraph 6. Once a request for a meeting is proposed, the promoters should have acted reasonably by allowing the respondent officers to get back to them as to the time and place of their meeting. To appear in the premises as the claimants together with promoters and officials of the proposed union was to create tension, and the outcome was as described by Walter Mocha Ongeri in his affidavit at paragraph 6 and 7. The circumstance and event following what transpired at the reception of the respondent on 27th June 2013 could only be ascertained through an internal process, and thus the notice to show cause as issued tot eh claimants. This was an internal process that is investigative to establish whether a sanction can follow. Disciplinary procedures have constitutional basis for a fair hearing founded upon the right to fair labour practices in Article 41 of the Constitution and section 41 of the Employment Act, 2007 which provides for hearing of employees in termination cases. It is therefore not lost that the disciplinary process is investigative to verify the allegations made against the employee for punishment to be imposed if the allegations are proved and for the employee to be exculpated if the allegations are not proved.

With that outline, I find the disciplinary process undertaken by the respondent as against the claimants being procedural and fair in the circumstances of this case. The Industrial Court Act, under subsection 12(3) (i) empower the court to make interim preservation orders including injunctions in cases of urgency. The possible interim orders would include the preservation of a status quo or rights and obligations in the employment relationship as may emerge in an administrative disciplinary procedure. Where the court decides to make preservative orders, the court does not thereby usurp or participate in the right of the employer to discipline the concerned employee nor does the court thereby become part of the administrative disciplinary process. The court in exercising the jurisdiction to intervene in an administrative disciplinary procedure must proceed with caution so as to protect the employer's right to fairly discipline or terminate the employment relationship. The employer is entitled to commence disciplinary proceedings against any employee and where this is done, the duty rests on an employee to justify in the administrative disciplinary process the continuation of his employment.

Where the court finds that such a disciplinary process is commenced with ulterior motive or one based on outright illegality, the court should stop such a process as it would be found to be an illegality or one which is defective *ab initio*. On the other hand it would be futile for the court to involve itself in the day to day running of an employer/employee relationship which has its own governing rules. Thus, similarly this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in an appropriate case it is established that the disciplinary process has been commenced or is continuing unfairly.

Before the claimants and the promoters of the proposed union get recognition, there exists a CBA as between the parties, the claimants are shop steward and cannot be found to say that at the time of their disciplinary hearing they were not aware of the existing CBA. Its terms and conditions were applicable to them. In any event, the union they were seeking to promote with the respondent is still under promotion without recognition. In the present case the applicants have already been subjected to a disciplinary hearing and decision made. To stop the respondent from continuing with work on this account would be imposing a sanction to a party without due regard to their application of internal disciplinary procedures hence giving an undue orders reversing their decision. To direct that the respondent not to hire in replacement or filling the vacant positions left by the sanctions given to the claimants would be to ground their operations. As an interim measure, this would amount to brining the work of the respondent to a halt. This is not industrial peace entails.

From the letters of employment, the letters of dismissal and termination it is clear that the 1st claimant was an employee of the respondent while the employees of a third entity not a party herein. The orders sought by the 2nd claimant against the respondent cannot be enforced in the interim as the proceedings here do not relate to his employer. To give orders as sought would be a misapplication of the very principle of due process and giving a party wrongly sued a fair chance to defend themselves.

There are however substantive issues herein that can be addressed through going into the main claim. To grant the orders herein as sought by the claimants would be to deal with the claim at an interlocutory stage.

I will therefore dismiss the current application as filed; the 2nd claimant is at liberty to enjoin his employer herein and parties to set the main claim for hearing at their earliest.

Delivered in open court this 17th day September of 2013.

M. Mbaru

Judge

In the presence of

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