REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.32 OF 2014

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

UNILEVER TEA (K) LIMITED.....RESPONDENT

RULING

This is an application dated 4th August, 2016 in which the respondent/applicant seeks the following orders of court;

1. That this application be certified urgent and be heard ex parte in the first instance.

2. That the orders granted by the Hon. Justice D.K.Njagi Marete on 1st August 2016 be set aside.

3. That the costs of this application be provided for.

It is grounded as follows;

1. The Honorable Justice D.K.Njagi Marete on 1st August 2016 issued an ex parte injunction order restraining the applicant from effecting show cause notices, disciplinary action and/or victimizing employees for the participation in the strike carried out between 12th and 23rd July in respect of the judgment delivered on 30th June 2016.

2. The court failed to consider and appreciate that the return to work formula signed by the parties on 24th July 2016 provided inter alia that the applicant would not victimize the employees who had participated in the strike when they resumed work subject to applicable law. The applicant therefore was not entitled to commence disciplinary proceedings in accordance with the law to those employees who participated in criminal acts.

3. The applicant had issued notice to show cause letters to only only those employees who had allegedly destroyed the applicant's property and carried out criminal acts during the course of the strike. The criminal acts include the burning and uprooting of tea, the burning and destruction of tea leaf sheds, stoning the applicant's headquarters and breaking windows, threatening supervisors with physical harm

and killing of their cattle.

4. It was unprocedural and unreasonable for the court to grant an ex-parte order which will last until 9th December, 2016, when the respondent's application is scheduled for hearing. The said order will lead to anarchy and disorder at the applicant's tea farm as the employees are not held accountable for their criminal and destructive actions. The employees went on another illegal and prohibited strike on 29th July 2016 and majority of them ad not returned to work as of 3rd August 2016. The applicant is suffering heavy losses as a result of these wild cat strikes.

5. The order issued by the learned judge contravenes the provisions of the Constitution, the labour relations act and court precedents which provide that employers have a right to take disciplinary action against employees who participate in criminal acts and those who destroy the employer's property. The order will lead to impunity and lawlessness by employees.

6. The order is highly partisan and gives the perception that the employees who carry out criminal acts have been granted the protection of the courts.

7. It is in the interest of justice that orders granted by Hon. Justice Marete on 1st August 2016 are set aside.

This application is founded on a chamber summons application of even date seeking that the application be allowed during the court vacation.

The claimant/respondent in a replying affidavit sworn on 15th August, 2016 opposes the application and prays that the same be dismissed with costs.

The claimant/respondent denies the applicant’s allegations in paragraph 2 to 5 of the supporting affidavit of Lucy Lelo sworn on 4th August, 2016 and particularly denies calling the purported strike as purported by the respondent. It is her further submission that the alleged strike was resolved through a Return to Work Formulae which in turn disposed off the court orders of 14th July, 2016.

It is the claimant’s further case and submission that the basis of this application is the Return to Work Formulae as set out and signed by the parties on 24th July, 2016. The Return to Work Formuale is as follows;

1. The parties do acknowledge that there are pending issues on Collective Bargaining Agreement (CBA) for the years 2014 to 2015.

Parties have agreed to consider the 2016 to 2017 CBA together.

2. Parties have agreed that normalcy shall be restored and all employees to resume duty immediately and in any case not later than 7.00am on Monday 25th July, 2016.

3. There will be no pay for work not done.

4. No victimization by either party subject to the applicable law.

5. Parties have agreed that a follow-up meeting with a view of concluding the two CBA's shall be on 26th July 2016 at the Cabinet Secretary for labour's office at Nairobi.

6. Parties have agreed on the implementation of an additional (interim), 5% for the year 2014 to make it 10% for the same year and additional 5% for 2015 to make it 10% for the same year. All implementation of the interim payments shall be done on or before 15th August 2016.

7. Parties have agreed that the pending CBA of 2016 to 2017 shall have 10% interim increase to be paid at 5% each year.

The applicable clause of this return to work formulae is clause 4 as hereunder;

4.No victimization by either party subject to the applicable law.

This clause provided for non victimisation of the union members, subject to the applicable law. And this is the crux of the matter. What is the meaning of *subject to the applicable law*" The parties are opposed on an interpretation of the last limb of this clause.

Overall, Return to Work Formulae as set out in industrial relations are a means of righting a bad or unfortunate industrial relationship or action. These mostly happen in the event of strikes, lawful or otherwise. This is more so when the parties realise the futility of any prolonged industrial action on their part. These are clearly industrial pacts for return to work by the workers.

The claimant/respondent avers and submits that under the Return to Work Formulae*, no employee would be selectively targeted and disciplined for merely participating in the strike action* and that any employee who engaged in criminal activity would be on the onset *subject to applicable law* before commencement of disciplinary proceedings. In her interpretation of clause 4 of the return to work formulae subject to applicable law applies to the penal code. The respondent/applicant is therefore out of tune in the initiation of disciplinary proceedings against the unionisable workers before pursuing the tempo of clause 4 of the return to work formulae.

It is the essence of Return to Work Formulae that the interests of the striking workers are not left to the mercy of the employer, always all powerful. The pact therefore, like in the instant case provides a safe avenue and haven for the striking workers to return to work unscathed by any intervening action prior to this arrangement. This was the case and intention here and therefore the sculpting of clause 4 of the Return to Work Formulae. The last limb on *subject to applicable law* is ambiguous and can be interpreted variously but it certainly would not have been intended to allow a situation where disciplinary proceedings would result after the Return to Work Formulae. This would not be envisioned in a Return to Work Formulae whatsoever. It would breed nonsense to the philosophy and principles of a Return to Work Formulae.

Let me beg space to agree with the respondent/applicant submission that this application and the one it seeks to diminish dated 1st August, 2016 by the claimant/applicant are intertwined and closely related. An answer to one points out to the answer in the other. I therefore find the case and submission of the respondent/applicant unsustainable and agree with the claimant/respondent.

I am therefore inclined to dismiss the application with costs to the claimant/respondent.

Delivered, dated and signed this 8th day of December 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Ng’eno holding brief for Mrs. Opiyo instructed by Kaplan & Stratton for the Respondent/Applicant.

2. Mr. Khisa for the Union.