



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1041 OF 2013

*(Before D.K.N. Marete)*

**KENYA UNION OF HAIR & BEAUTY SALON WORKERS.....CLAIMANT**

Versus

**BLACK & BEAUTY PRODUCTS LIMITED.....RESPONDENT**

### **RULING**

This is an application by way of Notice of Motion dated 9th July, 2013 a filed on the same date under a certificate of urgency. It seeks the following orders of court;

1. **THAT** the Honourable Court be pleased to certify this application as extremely urgent, services be dispensed with and it be heard *ex parte* in the first instance.
2. **THAT** the Honourable Court be pleased direct and order the Respondent to enter the Respondent's premises to talk, organize and recruit workers as union members.
3. **THAT** the Honourable Court be pleased direct and order the respondent to allow workers be organized, engage in union activities and join a trade union of their choice.
4. **THAT** the Honourable Court be pleased direct and order the respondent not to intimidate, victimize, harass and or sack any worker involve union activity during the exercise and thereafter.
5. **THAT** the Honourable Court be pleased direct and order the respondent to deduct union dues and sign Recognition agreement immediately the claimant/applicant attain/meet the requirement in law.

And is grounded on the following;

- i. **THAT** the Applicant union made several efforts to talk, organize and recruit workers during the employees time fail because the employees were given half hour time lunch in which fifteen minutes ends an queue for security check ups and at late hours the employees are tired as a result of high target of production needed by the respondent.
- ii. **THAT** the workers fear to be seen talking or engaging in any union activity in the premises and outside the premises.

- iii. **THAT** the applicant union made the first approaches by writing to the respondent on 7<sup>th</sup> March 2013 and a reminder dated on 26/3/2013 and when the Applicant officials tried to request the Respondent to allow the officials talk to workers declined by saying that the workers do not need a trade union.

The application is further grounded on the Supporting Affidavit of Cecily N. Mwangi sworn on the 9th July, 2013. The applicant in the said Supporting Affidavit avers that the union has made several attempts at organizing and recruiting workers as union members but this is frustrated by the busy and tedious working schedules for the respondents workers which leaves them with little time to involve in trade union activities. Attempts at approaching the respondent in writing and even verbally were met with hostility and a rider that the workers do not need a trade union and therefore this application seeking to effect the law and earnestwhile industrial relations practices by the parties.

The matter came to court on 9th July, 2013 whereby the court certified the same as urgent and ordered service thereof and a hearing on 17th July, 2013. This was not to be and the matter variously came to court until the 3rd October, 2013 when parties agreed to dispose of the matter by way of written submissions.

It must be noted and is on record that by a Notice dated 15th July, 2013 the Interested Party made this notice and application to be joined as an Interested Party on grounds that she had been involved in recruitment in the respondents industry and had a membership and even potentially interested membership. She also submitted that rule 4 of the interested parties constitution incorporated this industry and that the interested party was in the process of signing a recognition agreement having recruited a majority of the members.

The respondent, vide a replying affidavit sworn on 10th September, 2011 opposes the application on grounds that it is based on falsity and therefore cannot stand. That the applicant has not attempted to talk, organize or recruit as alleged and that even the alleged correspondence to the respondent is a lie. Secondly, the respondent submits and avers that there is the presence of a rival union, the Interested Party and therefore the need for clarity of who is the actual union for the members. She also prays that industrial relations be estopped in the industry until this issue is resolved.

The respondent further submits that having moved on to the extent of signing a recognition agreement with the rival union, he should not be subjected to the same issue and process by another union. She prays and submits that this court should clarify as to which union is entitled to deal with him on the subject and that she, in the meantime be allowed to abey all union activities until this is resolved.

The claimant vide a supporting affidavit dated 3rd December, 2013 refers to the late entry of the Interested Party into these proceedings and avers as follows;

3. **THAT** the present issue in court is about access to the Respondent's premises for Recruitment purposes. **"We therefore believe that there is no written law bars an employer from according relevant trade union access for recruiting employees for Collective Bargaining unit purposes"**. Further the freedom of an employee joining a trade union is limited to meaning of labour relations Act 2007 Section 33(a).

4. **THAT** the court should first consider and determine the interested party's legitimate position in Hair and Beauty Sector.

**"Question" Is the interested party Relevant Trade Union to Hair and Beauty Sector?**

(a)i the interested party (KSRITIWU) was registered at around 1975 strictly on Scientific Research Institutions/Centres. Since then the interested party has corruptly changed its constitution secretly to cross over to another sector without mentioning any of the provisions in law that permit trade unions to draw memberships from the other sectors. The example to this point is in Cause 639 of 2012 herein attached on paragraph 1 where the interested party is membership is drawn from the Employees

**working in Scientific Research Institutions.**

ii) *The interested party's purported constitution which we interpret in the meaning of International Secretariat organization, i.e. Hair Style Salon and Hair Salon Style manufacturers.*

*On our side the Respondent is Hair and Beauty Product Processor who process Hair products in Number of styles. The Hair Style Salon are shops which displays Hair in Style and Hair Salon Style Manufacturers are those shops displays the Heads of human being, being styled. Therefore the Respondent is a local company processing Hair and Beauty products.*

(b) *the Interested Party to be enjoined to this case is abuse of the right of workers because we agree with the your Bro Judge on cause 639/2012 where the interested party had sought Access to where already the rival trade union had already accorded Access to the interested party. The interested party could borrow the same idea and ceased to waste time for court as recruitment is a continue process. On paragraph 8 of the said award states clearly that only the employees have a right of joining and leaving a trade union freely but not a trade union like the interested party (KSRITIWU) try to put it. Trade union is roll is to mediate good relations between the Employer and employees within the sector but not crossing over to another sector.*

(c) **What the law says on membership?**

The interested party failed to Recognise the law. "Labour Relations Act 2007 33(a) which states "No person shall be a voting member of a trade union unless that person is employed in the sector for which the trade union is Registered"(end of the Quote).

*This means all trade unions are Registered according to a sector but NOT Sectors or otherwise such a person cannot enjoy all the rights of being a member (Section 32 (a) of Labour Relations Act 2007).*

*Furthermore the Hon. Court shall promote the traditional disputes solutions mechanism as required by the law Article 159 (e) of Kenya Constitution.*

5. **THAT** *the interested party to attach the check of forms showing the Number of Recruited employees is in a bad faith against Democracy we are enjoying in the country.(sic)*

The claimant denies that authority of the Interested Party and particularly their monopoly of unionization and argue that this is against ILO Convention No. 87 of 1948 which ousts such monopoly. This, she avers is an encroachment into an area alien to the Interested Parties mandate and frustrates workers right to join a trade union of their choice.

The interested party, in her replying submissions dated 13th November, 2013 avers that it has enrolled three quarters of unionisable employees of the respondent and is having a trade dispute with the respondent relating to the signing of a recognition agreement. She covers this industry in accordance with her rule 4 of the constitution – annexure 111. He submits that the claimant has not recruited any workers of the respondent and that this is sabotage of industrial relations facilitated by other external forces.

The respondent objects and opposes this application but supports that of the Interested Party dated 23rd July, 2017. The respondent cites three issues that arise in this application and also seeks to answer the same;

1. *Whether the Claimant has previously approached the Respondent for access to conduct unionisable activities and whether the Respondent has denied the Claimant the same??*
2. *Whether the Respondent is entitled to grant the Claimant/Applicant access in view of the fact that there exists another union in the name of the interested party already possessing a similar order from the Honourable Court and is at present engaged in similar unionisable activity???*

3. *Whether he Claimant/Applicant as a consequence of the aforesaid is therefore entitled to the orders it is seeking in its application.*
2. *Whether the Respondent is entitled to grant the Claimant/Applicant access in view of the fact that there exists another union in the name of the interested party already possessing a similar order from the Honourable Court and is at present engaged in similar unionisable activity???*
2. *Your Honour, from the Respondent's reply, it is clear that there exists another union on the ground already conducting unionisable activity within its premises in the form of the interested party.*
2. *It is also clear that the interested property was granted access by an Order of the Honourable Court vide Industrial Court Cause Number 1363 of 2012 by the Honourable Lady Justice Mbaru. This in itself entails that the presence of the interested party at the Respondent's premises is not by design but by a lawful court order after similar proceedings were undertaken before your sister, the learned Lady Judge. **Refer to annexure RKC annexed to the Respondent's replying Affidavit sworn on the 10<sup>th</sup> day of September 2013**)*
2. *To prevent duplicity in filing claims, it is important to note that a Court cannot issue an order in vain.*
2. *It therefore follows that since the Respondent is already engaged in union activity and negotiations with a lawful union, it cannot be gainsaid that another union being involved therein by an order of a court of concurrent jurisdiction would only suffer confusion and turmoil to an already fluid situation.*
2. *From the aforesaid, it becomes abundantly clear that the claimant is seeking to forestall the negotiations between the Claimant and the interested Party by filing the present claim.*
2. *The Claimant is therefore not entitled to an order for access since even the Respondent's own employees are unaware of its existence contrary to what had been alleged in the Claimant's Application.*
3. ***Whether the Claimant/Applicant as a consequence of the aforesaid is therefore entitled to the orders it is seeking in its Application.***
3. *Your Honour, the principles that guide the allowing of access are clear to our minds.*
3. *The present scenario does not fit any of those guiding principles more so with the existence of another union already conducting the same activity at the Respondent's premises.*
3. *From the submissions herein stated and the aforesaid, we hereby submit that as a result of the Claimant's own malfeasance and deliberate concealment of facts, the Claimant is not deserving of the protection of the Honourable Court and as a result the orders as sought in its present applicant ought not be granted as sought.*

The respondent denies being approached by the claimant on the subject and further denies that the claimant can locate her premises, this suit having been served through registered post. The presence and activities of another trade union ousts the jurisdiction of the claimant and that the Interested Party's intervention was vide orders of this court granted in Cause No. 1363 of 2012. An order to access is not therefore feasible in the circumstances. He prays for a dismissal of the application with costs to herself.

The submissions and pleadings of the claimant put in her case whereas the respondent and the Interested Party deny the same and pray that this application be dismissed with costs. They both deny the claimant's participation or activity in the affairs of the respondent. The positions of the respondent and Interested Party resonate except on the issue of their smooth sailing, particularly on the signing of the Recognition

Agreement. This is suspect.

Article 41 of the Constitution of Kenya, 2010 allows workers to join a trade union of their choice.

*Article 41 on Labour relations;*

41. (1) *Every person has the right to fair labour practices.*
- (2) *Every worker has the right –*
- (a) *to fair remuneration*
- (b) *to reasonable working conditions*
- (c) *to form, join or participate in the activities and programmes of a trade union;*
- (d) *to go on strike*
- (3) *Every employer has the right-*
- (e) *to form and join an employers organization; and*
- (f) *to participate in the activities and programmes of an employers organization*
- (4) *Every trade union and every employers' organization has the right-*
- (a) *to determine its own administration, programmes and activities;*
- (b) *to organize; and*
- (c) *to form and join a federation.*
- (5) *Every trade union, employers' organisation and employer has the right to engage in collective bargaining.*

This is also buttressed by the law and International Conventions as cited by the claimant. It therefore behoves that this should be respected and upheld to allow free and prudent industrial relations exercises by all the parties involved. The active participation and involvement of the Interested Party, if at all, cannot be seen to oust the legitimacy of the claimant or even the respondent's workers from their choice of a trade union.

I am therefore inclined to allow this application as prayed and also order costs the claimant. These costs shall equally be borne by the Respondent and Interested Party.

Dated, delivered and signed the 4th day of March, 2014.

**D.K. Njagi Marete**

**JUDGE**

Appearances:

1. Mr. James Tong'i instructed by Kenya Union of Hair & Beauty Salon Workers for the union.
2. Mr. Martin Oduor instructed by Kenya Scientific Research International Technical Institutions Workers Union for the Interested Party.

3. Mr. Kandere instructed by S.K. Opiyo & Co. Advocates for the Respondent.