



IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Civ. Appli. 1683 of 2004

BANKING INSURANCE & FINANCE UNION (K) APPLICANT

V E R S U S

KENYA REVENUE AUTHORITY.....RESPONDENT

J U D G M E N T

This is a Notice of Motion dated 15th March, 2005 filed on 16th March, 2005 by J.A. Guserwa & Company advocates on behalf of the ex-parte applicant Banking Insurance Finance Union (K). The Notice of Motion (**application**) was said to have been filed pursuant to Section 3A of the Civil Procedure Act (**Cap 21**) and Order 53 rule 3 of the Civil Procedure Rules and all enabling provisions of the Law. The orders sought in the application are that-

- 1. An order of mandamus do issue directed to the Respondent herein being the Kenya Revenue Authority to comply with section 49 of the Trade Disputes Act by effecting check off in favour of the applicant.***
- 2. The respondent be made to pay the costs of this application.***
- 3. Such other or further orders as this Honourable Court may deem just and expedient.***

There are grounds on the face of the Notice of Motion. The application was filed with an affidavit sworn on 16th March, 2005 by **ISAIAH KUBAI** described as the National Secretary General of the applicant union. The application is also grounded on the **STATEMENT OF FACTS** and **VERIFYING AFFIDAVIT** filed with the application for leave to file Judicial Review proceedings. Several documents, correspondences and forms regarding employees of the respondent who have signed that monthly deductions from their salaries be effected to the applicant, were filed.

In response to the application, the respondent (**Kenya Revenue Authority**) filed a replying affidavit sworn on 10/5/2005 by Michael A. Onyura described as Senior Deputy Commissioner – Human Resources. This affidavit depones to the core functions and relevant statutes applicable to the respondent as the Government revenue collector. The statutes referred to are the Customs and Excise Act Cap 472; the Income Tax Act Cap. 476; the Air Passenger Services Charge Act Cap. 475; the Entertainment Tax Act Cap. 479; the Standards Act Cap. 496; the Stamp Duty Act Cap. 486; the Kenya Airports Authority Act Cap. 395; the Civil Aviation Act Cap. 394; the Traffic Act Cap. 403; the Transport Licensing Act Cap. 404; and the Sugar Act Cap. 10 of 2004.

It was deponed in the affidavit that the applicant and another rival union Kenya Union of Commercial Food and Allied Workers had been pursuing the respondent for registration of its unionisable employees

as members of the respective Trade Unions. It was deponed that the respondent did not refuse to honour the directions from the Registrar of Trade Unions to comply with Section 49 of the Trade Disputes Act, but that the issue of jurisdiction and or demarcation between the two rival trade unions had to be sorted out first before entering into a recognition agreement with any of the two trade unions. It was also deponed that correspondences had been dispatched to relevant authorities by the respondent, and that the Ministry of Labour and Human Resources had appointed an investigator on the issue. It was also deponed that in light of the nature of duties and functions and services of the respondent as mandated by the Revenue Statutes, it was imperative that eligible employees who may join the trade union be vetted, as some employees who were indicated as having requested to join the trade union were not eligible.

On 6th May, 2005, M/s Kenya Union of Commercial Food and Allied Workers filed an application to be joined in the proceedings as an interested party. They appear not to have been represented by Counsel in their application. It is also not clear from the record whether, indeed, they were joined in the proceedings as interested parties. I take it that they were not joined as interested parties.

In the meantime, on 20th May, 2005, the applicant's Counsel filed written submissions. The thrust of the written submissions are that the applicant a Trade Union under rule 3 of its Constitution was mandated to recruit and represent members from the respondent, among others. It is the contention in the submissions that the applicant was given approval by the Minister for Labour and Human Resource Development to receive union deductions by way of check off system from the respondent vide a Gazette Notice of 21st November, 1997. In addition, Section 49 of the Trade Disputes Act required employers to comply with the Ministerial Order under the Trade Disputes Act. It is submitted that the existence of another Trade Union was not a bar to the deductions requested through check off system, as the law requires only 5 members for an employer to effect check off. It is also submitted that the issue pending with the Ministry of Labour and Human Resource Development for determination is not the failure to effect the check off, but the issue of recognition. Reliance was placed on the decision of Ojwang J. in the case of HCC Miscellaneous Application Nairobi No. 534 of 2002, in which it is contended, it was held that the applicant union was the right union to represent employees of the banking, insurance and financial institutions sector.

The respondent on 15th June, 2005 filed a Notice of Preliminary Objections. The Objections are that-

- 1. *The entire application is bad in law, misconceived, and an abuse of time and process of this Honourable court in terms of Order 53 rule (2).***
- 2. *This application is prematurely brought in court in light of the clear provisions of the Trade Disputes Act, Cap. 234 Section 4, 5, 6, and 7.***
- 3. *In light of the above provisions of the Trade Disputes Act, this court lacks the jurisdiction to entertain this application or grant the order of mandamus the applicant is seeking at this juncture and this Honourable court should dismiss the application.***

At the hearing of the application at 9 am, Ms Guserwa appeared for the applicant, while Mr. Mwangi appeared for the respondent, holding brief for Mr. Wambugu. Mr. Mwangi indicated that Mr. Wambugu was held up at Milimani High Court, and would be available at 10 am. I put the matter off for hearing at 10.30 am. At 10.40 am, only Ms Guserwa for the applicant was present. Nobody appeared for the respondent. I decided to hear the matter since it was Counsel for the respondent who had sent Mr. Mwangi to request that the matter be put off to 10 am, and I gave them indulgence.

Ms Guserwa made submissions before me. Ms Guserwa submitted that the applicant was seeking for orders that the respondent complies with the provisions of Section 49 of the Trade Disputes Act (**now repealed**) by effecting check off system deductions from members of the union. Counsel contended that the applicant was entitled to recruit members from financial institutions such as the Kenya Revenue Authority. It had in fact recruited 904 members, but the respondent had refused to effect the check off system payments in spite of the Registrar of Trade Unions directing the respondent to effect the check off system deductions by a letter dated 22/7/2004 among other correspondences. Counsel contented that the

issue of recognition of the union (**applicant**) and deductions were different issues. Counsel submitted that section 46 of the Trade Disputes Act provided that where a union had recruited more than 10 employees, the employer was required to implement deductions, without considering the issue of recognition. Counsel asked me to grant the orders prayed for.

I have considered the application, documents filed, as well as the submissions (**both written and oral**), as well as the objections of the respondent, which were filed in written form.

I do not think that the technical objections of the respondent hold water. There is nothing demonstrated that would make the application misconceived and an abuse of the time and process of the court. Nothing has also been demonstrated that could make this application premature. There is also nothing demonstrated that would make this court lack jurisdiction. I dismiss the above objections of the respondent. There remains the replying affidavit of the respondent sworn on 10/5/2005 to be considered.

There is a directive from the Registrar of Trade Unions vide a letter dated 22nd July, 2004 requiring the respondent to implement the deductions through check off system within 14 days pursuant to section 49 (1) of the Trade Disputes Act. That directive has not been complied with by the respondent.

The respondent seems to argue that the Kenya Union of Commercial Food and Allied Workers (**KUCFAW**) has a dispute with the applicant on representing the unionisable employees of the respondent. It appears that the respondent considers that the proper union should be **KUCFAW**.

Indeed, **KUCFAW** purported to amend its Constitution which amendment was registered by the Registrar of Trade Unions on 30th November, 2001. The amendment was, inter alia, meant to cover union membership from the respondent herein. The amendment was to expand membership and was intended to cover-

“all employees in warehouses and merchandise, flour mills, food and fruit processing industries, cereals and seed companies, banks, insurance, financial institutions, dairy workers, dairy cooperative societies, pyrethrum cooperatives, rice millers, slaughter houses and meat processing plants, cooking oil refineries, watchmen organizations, data companies, mineral water and national water conservation, farmers cooperative societies, saving and credit societies, coffee factories, coffee research employees, Fosa building societies, statutory boards, National Hospital Insurance Funds, National Social Security Funds, Kenya Revenue Authority, Kenya Bureau of Standards, Duty Free Shops Horticultural Exporter’s, property management and cleaning services, general distributors, beer, soda, tobacco, cinema, show grounds, shop grounds, shop workers, wholesalers and retailers and supermarkets.”

It is clear that the amendment was meant to cover employees of the respondent Kenya Revenue Authority to be eligible members of **KUCFAW**.

In the judgment delivered by Ojwang J. on 4th February, 2005 in Nairobi HC Civil Miscellaneous Application No. 534 of 2004, it was held that that amendment to the Constitution of **KUCFAW** was null and void because the Registrar acted in bad faith, irregularly and in contravention of the decision in Industrial Court’s award in Cause No. 75 of 1999. Probably this explains why **KUCFAW** did not pursue the quest to be joined herein as an interested party. It cannot therefore be said that **KUCFAW** were the trade union that had the right to get members from the respondent.

The respondent, in the filed documents also claims to be an essential service and also that some of the so called members of the applicant were high ranking officials and some have died. No particulars were given on the said management employees involved and the deceased ones. In any event, the fact that some of the applicants employees are not eligible cannot prevent deductions for the genuine employees. On the argument that the respondent is an essential service, the correspondence from the Ministry of Labour, especially the letter from the Labour Commissioner dated 11th May, 2004 clearly shows that the respondent was not listed in the first schedule of the Trade Disputes Act. The respondent was therefore not an essential service provider as alleged. I dismiss this contention by the respondent.

I now turn to the merits of the claim by the applicant. The applicant claims to be the Trade Union entitled to recruit unionisable employees of the respondent as its members. This claim is supported by the Ministry of Labour, through various correspondences filed. This seems to be based, from the documents filed, on the contention that the respondent is a financial institution, and the applicant is a trade union which has jurisdiction to register members from financial institution, and the applicant is a trade union which has jurisdiction to register members from financial institutions. It is grounded on rule 3 of the applicant's Constitution, which defines eligible members as being-

“All employees of any bank, insurance, building society, savings and credit society (sacco) and financial institution carrying on business in the Republic of Kenya, provided such employee is above the apparent age of 16, shall be eligible for membership of the union.”

The definition of eligible members goes to the jurisdiction of the applicant with regard to recruiting members. By definition, the respondent is neither a bank, insurance company, building society, or savings and credit society. It has been assumed by the applicant and the Ministry of Labour, and the Registrar of Trade Unions that the respondent is a financial institution. This issue of whether the respondent falls within the definition of a financial institution has not been argued by the applicant, and regrettably by the respondent. The definition of a financial institution, and whether the respondent is a financial institution is so crucial case. The Ministry of Labour and the Labour Commissioner have not shed light on the issue either. If the respondent is a financial institution, then clearly the applicant has jurisdiction and a mandate to recruit unionisable employees of the respondent to be its members. If the respondent is not a financial institution, the applicant has no mandate or basis of recruiting its members from the respondent, because its Constitution is restrictive on the eligible membership. The applicant can only recruit members from the respondent, if the respondent falls within the definition of a financial institution.

Is the respondent a financial institution? The definition of a financial institution is found in the Banking Act (**Cap. 488**) Section 2. It reads as follows-

“financial institution” means a company, other than a bank, which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of this Act.”

The respondent is certainly not a company. It does not, to my understanding, carry on financial business. The Minister has also not declared it to be a financial institution. It is the Government Revenue Authority established by an Act of Parliament, the Kenya Revenue Authority Act (**Cap. 469**) for, inter alia, assessment and collection of government revenue. As the Constitution of the applicant stands currently, it has no jurisdiction or mandate to recruit its members from the respondent on the pretext that the respondent is a financial institution. The respondent is not such a financial institution. The officials from the Ministry of Labour and the Registrar of Trade Unions cannot change the position of the law by directing that check off system be implemented, contrary to the law.

I find that the applicant's application lacks merits, on the basis of the above legal technicality. I have to dismiss the same. I will however, not award the respondent any costs, as they appear to have treated this case casually and did not even appear at the hearing of the application.

Consequently, and for the above reasons, I find no merits in the application and dismiss the same. Each party will bear their own costs.

Dated and delivered at Nairobi this 22nd day of September, 2008.

GEORGE DULU

JUDGE.

In the presence of-

Mrs. Keya holding brief for Ms. Guserwa for applicant.