Kenya Union of Commercial Food and Allied Workers v Koimu Limited (Cause E987 of 2023) [2024] KEELRC 1724 (KLR) (9 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1724 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E987 OF 2023

JK GAKERI, J

JULY 9, 2024

BETWEEN

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS ..... CLAIMANT

AND

KOIMU LIMITED ..... RESPONDENT

RULING

1. Before the court for determination is the Claimant/Applicant's Notice of Motion dated 30th November, 2023 filed under Certificate of Urgency seeking ORDERS THAT:

    1. Spent.

    2. Pending hearing and determination of this matter, the court do and hereby restrains the Respondent from threatening, harassing, intimidating, coercing, victimization and/or terminating the services of their employees on account of trade union membership.

    3. Pending the hearing and determination of this matter, the court do and hereby restrains the Respondent from any actions intended to for their employees who have already acknowledged their trade union membership to withdraw such membership unwillingly and involuntarily.

    4. Pending the hearing and determination of this matter, the court be pleased to issue an Order requiring the Respondent to deduct and remit union dues from employees whose names appear on the face of the checkoff form since the date of the Minister's Order following that there has been no withdrawals recorded to date.

5. Pending hearing and determination of this matter, the court be pleased to issue an Order requiring the Respondent to embark on the negotiations to achieve Terms and Conditions of service for the Applicant/Claimant's members which is long overdue.

6. The court sets this matter for hearing and determination on a priority basis.

7. Costs of this Application be in the cause.

2. The Notice of Motion is expressed under Section 12 of the *Employment and Labour Relations Court Act*, 2011, Sections 4, 48, 54, 57(1) and (2) and 62 of the *Labour Relations Act*, 2007, Section 87 of the *Employment Act*, 2007, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Articles 36 and 41 of *the Constitution* of Kenya, 2010 and is based on the grounds set out on its face and the Supporting Affidavit sworn by Gregory Mweu on 30th November, 2023 who deposes that he is the Branch Secretary of the Claimant Union.

3. The affiant deposes that the parties to this suit have a recognition agreement effective 2nd January, 2022 and elections were held and the Claimant wrote to the Respondent on 14th February, 2022 for counter proposals and a response dated 8th March, 2022 postponed a scheduled meeting for consultation with the Accounts Department and Federation of Kenya Employers (FKE).

4. That on 25th July, 2022, the Chief Industrial Relations Officer appointed Mr. Amodeo Nyaga of Thika Labour Office as Conciliator who invited the parties for a meeting slated for 12th October, 2022 but the Respondent changed the meeting to February 2023.

5. The affiant further deposes that FKE and the applicant met on 29th November, 2023 but the meeting yielded no fruit.

6. That the Claimant wrote to the Conciliator for a certificate of referral of the dispute to the court and a meeting slated for 25th January, 2023 was postponed to February, 2023 for an amicable settlement to be arrived at.

7. That by letter dated 6th September, 2023, the Conciliator released his findings and released the parties to the next level of dispute resolution.

8. The affiant deposes that the Respondent has engaged in delaying tactics thereby denying employees their right to collective bargaining.

Response

9. By a Relying Affidavit sworn by Jayesh Hana on 1st April, 2024, the Respondent deposes that the dispute between the parties is the unconcluded CBA yet the applicant is seeking an injunction on various matters.

10. That the Claimant union has not adduced evidence of non-payment of union dues by unionized employees of the Respondent and the applicant was thus using the court to vex the Respondent to pay union dues from non-unionisable employees of the Respondent.

11. That the Claimant does not have a simple majority of members to render the recognition agreement valid under Section 54 of the *Labour Relations Act* and as such does not have the required number to conclude a CBA with the Respondent.

12. That the applicant has not adduced evidence of harassment or victimization or employees being forced to withdraw membership and the applicant has been exerting unnecessary pressure on employees and inciting them to join the union against their will.

13. That the instant application does not meet the threshold for grant of injunctive orders as espoused in Giella V Cassman Brown Co. Ltd (1974).

14. That Prayer 4 cannot be granted at this stage as the Claimant does not have simple majority of unionsable employees.

15. That if the court is satisfied as to the validity of the Recognition Agreement, the Respondent be granted time to complete consultations on the CBA with the Claimant.

Claimant/Applicant submissions

16. The Claimant's submissions dated 15th March, 2024 are more or less about prayers sought in the main suit as opposed to the interim reliefs the subject matter of the instant Notice of Motion.

17. Pages 2 – 9 of the submission comprise what clauses of the draft CBA have been agreed upon or not agreed or the offers made.

18. In sum, the submissions do not capture the interim reliefs sought or justify their necessity having filed the suit under Certificate of Urgency.

19. The Respondent did not file submissions.

20. The Claimant/Applicant seeks injunctive Orders and Orders on deduction and remission of union dues from employees and negotiations between the parties to continue.

21. The singular issue for determination is whether the Claimant/Applicant's Notice of Motion is merited.

22. The principles that govern the grant of injunctive orders are well settled.

23. First, as held in Abel Salim & others V Okong'o and others (1976) KLR 42, whether or not to grant an interlocutory injunction involves the exercise of judicial discretion which is exercisable under the aegis of the principles enunciated in Giella V Cassman Brown Co. Ltd (1973) EA 358 as follows;

> " First, an applicant must show a prima facie case with a probability of success.
>
> Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.
>
> Thirdly, if the court is in doubt, it will decide the application on a balance of convenience (E.A Industries Ltd V Trufoods (1972) EA 420."

24. The Respondent's case is principally that the Claimant/Applicant's Notice of Motion does not meet the threshold for the grant to injunctive orders.

25. As regards prima facie case, the sentiments of the Court of Appeal in Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003) eKLR are instructive;

> " A Prima facie case in a civil application includes but is not confined to "genuine and arguable case." It is a case in which on the material presented to the court, a tribunal properly directing

itself will conclude that there exists a right which has apparently have been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

26. The pith and substance of the instant application is that the Respondent should be restrained from threatening, intimidating, coercing, victimizing and/or terminating employment of employees of the Respondent on account of union membership as well as restrain it from forcing its employees who have professed union member to withdraw against their will.

27. Strangely, in its Supporting Affidavit sworn by Mr. Gregory Mweu, the Claimant/Applicant union has not alleged or averred or availed evidence to show that the Respondent has expressly or impliedly, harassed, victimized, threatened, intimidated or terminated or threatened any employee with termination on account of union membership.

28. Similarly, the affidavit is reticent on who or when the Respondent coerced to withdraw from the union.

29. In the absence of any indication of the actions or activities sought to be restrained or any threat thereof and in the absence of any shred of evidence to suggest that the Respondent has threatened to act in the manner sought to be restrained, the court is not persuaded that the applicant has shown that it has a prima facie case with probability of success.

30. The concept of probability of success was explained in Habib Bank AG Zurich V Eugene Marion Yakob CA No. 43 of 1982.

31. On irreparable injury, the court is guided by the sentiments of the Court of Appeal in Nguruman Ltd V Jan Bonde Nielsen & 2 others (2014) eKLR as follows;

> "On the second factor that the Applicant must establish he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold required and the burden is on the applicant to demonstrate, prima facie the nature of the injury.

32. According to Halsbury's Laws of England (3rd Edition) Vol. 21 paragraph 739 at 352,

> ". . . By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not which cannot possibly be repaired . . .
>
> In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured."

33. The Claimant/Applicant Union's Supporting Affidavit makes no reference to the loss it stands to suffer if injunctive relief is not granted. The Affidavit is equally silent in the nature of loss the applicant fears and absence of an injunction will occasion in this instance.

34. The allegation that the Respondent is engaged in delaying tactics is unrelated to the conduct or acts sought to be injuncted.

35. In sum, as the applicant has not alluded to the loss it stands to suffer or that it is irreparable. The court is satisfied that the second requirement for the grant of injunctive relief has not been met.

36. Having failed to satisfy the two key requirements of a interlocutory injunction, the court is unpersuaded that the balance of convenience or inconvenience as captured in Byran Chebii Kipkoech V Barnabas Tuitoek Bargoria & another (2019) eKLR is tilted in favour of the Claimant/Applicant.

37. More significantly, the applicant has not demonstrated the comparative inconvenience would be greater on it than the Respondent.

38. Flowing from the foregoing, it is the finding of the court that the applicant has failed to prove that a temporary injunction is merited in this instance.

39. As regards deduction and remission of union dues from employees who are members of the applicant union, it is common ground that the Applicant union and the Respondent have a Recognition Agreement dated 29th November, 2021 and effective 2nd January, 2022.

40. Evidently, the parties were at 29th November, 2021 satisfied that the Claimant/Applicant union had the requisite simple majority under Section 54(1) of the *Labour Relations Act*, 2007 which pegs recognition of a trade union by an employer to a simple majority of unionisable employees.

41. The Respondent admits that the parties have a Recognition Agreement but avers that it is not valid as the Claimant union lacks the requisite simple majority.

42. The Claimant on the other hand argues that none of its members had withdrawn membership.

43. The Respondent attaches copies of termination letters of Martin Mwangi Kabochi dated 5th December, 2023, Michael Mwania dated 18th January, 2024 and that of Boniface Otieno which has no date.

44. It has also attached a handwritten note containing names of 3 persons under the heading 'current employees', February" 2024. The note lacks authentication by the Respondent and lacks probative value. Who for instance wrote down the names and on what basis?

45. Even assuming that the names belong to bona fide employees of the Respondent, if out of the 12 names on the Claimant's checkoff form only three had left, the Claimant still retains a simple majority in light of the number of unionisable employees.

46. More significantly, however, the question as to whether a Recognition Agreement is valid or not is one for determination by a court of law, whenever a dispute arises as there are recognized ways of revoking a Recognition Agreement and a Recognition Agreement remains in force until revoked by the National Labour Board at the instance of one of the parties or by mutual consent or by an Order of the court should need arise.

47. Since the Respondent has not tendered any evidence to prove that the Recognition Agreement dated 29th November, 2021 is invalid or when it became invalid.

48. After all, the purpose of a Recognition Agreement between a trade union and an employer is to facilitate collective bargaining as opposed to union membership.

49. The Respondent was obligated to deduct and remit union dues of employees whose names were on the checkoff form submitted by the Claimant union.

50. However, in this application, although the union makes reference to the Cabinet Secretary's Order through the Kenya Gazette, authorising the deductions, the same was not attached for perusal by the court.

51. On that account alone, the applicant's prayer for deduction and remission of union dues from employees whose names appear on the checkoff form is declined.

52. Finally, as regards negotiations pending the hearing and determination of the suit, parties are encouraged to do so and proceed in good faith.

53. Section 2 of the *Labour Relations Act*, 2007 defines a Collective agreement as; "a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organization of employers".

54. From the documents on record and in particular the conciliator's report dated 6th September, 2023, it is clear that out of 32 areas, the parties have agreed on 21 leaving balance of 11 areas including; Safari allowance, redundancy, provident fund, commuter allowance, Annual leave, leave travelling allowance, Acting allowance, Agency fee, staff cards, wage increment and effective date.

55. Regrettably, the Conciliator's Report lacks necessarily details on the areas the parties could not agree, for instance was it the amount suggested or demanded as Safari allowance or the number of days for which severance pay is payable in a redundancy or leave travelling allowance? What could the parties not agree on annual leave or staff cards?

56. Flowing from the foregoing, it is discernible that the Claimant/Applicant's Notice of Motion dated 30th November, 2023 is unmerited and is accordingly dismissed.

57. Parties are however encouraged to write to the Cabinet Secretary, Ministry of Labour and Social Protection for the appointment of a Conciliator to assist them navigate through the outstanding 11 Clauses of the draft CBA within 60 days from the date hereof.

58. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the ***Civil Procedure Act*** **(Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE