Lochab Brothers Limited v Transport Workers Union (Civil Appeal 46 of 2020) [2024] KECA 965 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 965 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 46 OF 2020

MA WARSAME, FA OCHIENG & JM MATIVO, JJA

JULY 26, 2024

BETWEEN

LOCHAB BROTHERS LIMITED ..... APPELLANT

AND

TRANSPORT WORKERS UNION ..... RESPONDENT

(An Appeal against the Judgment of the Employment & Labour Relations Court Nakuru (Ongaya, J.) dated 28th March, 2014 in ELRC No. 414 of 2013)

JUDGMENT

1. This appeal is brought against the judgment of Byram Ongaya, J. delivered on 28th March, 2014 wherein he allowed the respondent union's claim against the appellant, Lochab Brothers and issued the following orders:

    a. The appellant to comply with sections 48,50 and 54 of the Industrial Relations Act,2007

    b. The appellant to pay accrued (unpaid) monthly union dues from their own funds in accordance with section 19(6) of the *Employment Act* 2007 effective December 2010 to end April 2014 and to pay by 1st May 2014,failing, interest be payable at court rated from the date of the judgment till full payment;

    c. the appellant to deduct and remit to the respondent, union dues with respect to all members with effect from end of May 2014

    d. The appellant to negotiate the recognition and collective agreements and to report progress to the court within 60 days.

    e. The appellant pays costs of the suit.

2. The respondent is a registered trade union to organise, represent and defend the interests of workers employed by transport companies while the appellant is a transport company which employs drivers, turn boys and artisans.

3. The claim before the trial court was precipitated by the appellant's refusal to sign a recognition agreement and deduct union dues. The respondent alleged that it had sent several demands for payments which included forms of notice authorising payments signed by the member employees, but nonetheless the appellant had refused to comply.

4. The respondent consequently escalated the matter to the Minister for Labour and reported a trade dispute. A conciliator, Mr. J. Nyaga was subsequently appointed on 27th August 2012 to resolve the dispute.

5. Both parties participated in the conciliation. The respondent maintained that it had recruited 176 of the 300 employees employed by the appellant and therefore the appellant was mandated to sign a recognition agreement and make the necessary statutory deductions. On its part, the appellant contended that it had no qualms with its workers joining the union and even acknowledged receiving the check off list. However, some of its employees had disowned and disputed signing the check off list and refused deduction of the subscription fee from their salaries.

6. Apparently, the parties failed to resolve the dispute, and in the end, the conciliator issued a certificate of unresolved dispute dated 14th November 2012 and recommended that the respondent invoke the provisions of Section 48 of the Labour Relations Act and upon recognition, the union should demonstrate truthfully that it has recruited a simple majority.

7. Adhering to the recommendations, the respondent filed a claim before the trial court. Byram, J, in the impugned judgment found that the total eligible employees recruited were 176 making the recruitment obviously above 50% plus one and held that the respondent is entitled to recognition as prayed for.

8. The court also found that the respondent had served the relevant ministerial order and the relevant form, duly signed by the recruited employees and deductions were supposed to commence within 30 days of the date of service. Consequently, the Court ordered the appellant to pay to the respondent accrued and unpaid monthly union dues from their own funds, in accordance with the provisions of section 19(6) of the *Employment Act*, 2007 effective December 2010 to end of April 2014 and to pay by 1st May 2014.

9. It is that decision which is the subject of this appeal, premised on 9 grounds listed in the Memorandum of appeal summarised as follows:

   That the learned Judge erred in law and fact by-

   a. Finding that the respondent had met the minimum threshold for recognition and that it had jurisdiction to deal with a dispute on recognition whereas no demand had been made under S 73 (2) a of the *Labour Relations Act*.

   b. Finding the respondent had duly submitted Form S as required under the Act, requiring the appellant to pay the union dues.

   c. Ordering that the appellant makes retrospective payment of the monthly union dues effective December 2010 to end April 2014.

   d. decreeing that the appellant was mandated to pay the accrued dues from its own funds in accordance with Section 19(6) of the *Employment Act*.

e. Ordering that the parties negotiate collective agreements and report to the court within 60 days yet no such relief was expressly pleaded by the respondent.

10. The appeal was disposed of by written submissions as well as oral highlights by the parties' respective counsel. Mr. Wambua who appeared for the appellant relied entirely on the written submission dated 7th May 2024. He abandoned three grounds of appeal, namely: that the respondent had failed to meet the minimum threshold for recognition, that the court lacked jurisdiction to deal with a dispute on recognition whereas no demand had been made under S 73 (2) a of the *Labour Relations Act* and that the dispute was time barred under the *Employment Act*.

11. The appellant faulted the learned Judge for ordering the parties to negotiate collective agreements and report to the court within 60 days. Citing the decision in Caltex Oil (Kenya) Limited vs Rono Limited [2016] eKLR it was submitted that the court has no jurisdiction to whimsically grant orders not specifically pleaded.

12. It was further contended that the Court erred in directing the respondent to collect union dues retrospectively given that they had not complied with the provisions of Section 48(2) of the *Labour Relations Act*, since there was no proof that the respondent made a request to the Cabinet Secretary to make an order directing the employer to deduct union dues from employee wages. Furthermore, the respondent's pleadings were predicated on Gazette No 3220 published on 16th March 2012 ordering employers with more than 5 employees and who have acknowledged union deductions to remit the said monies. However, the check off forms submitted by the respondent were pursuant to an unknown 1997 order directing deductions.

13. The appellant therefore contended that the order alluded to in the forms submitted could not be the basis for demanding payment of union dues as it was made before the enactment of the *Labour Relations Act*, which was the basis of the claim and consequently no decree could arise from it. Citing Section 28 of the *Interpretation and General Provisions Act*, which provides that:

> " No person shall become liable to any penalty in respect of an act committed or of the failure to do anything before the day which that subsidiary legislation is published in the Gazette"

the appellant maintained that the learned Judge erred by decreeing the retrospective payment of union dues as the same could not become due for collection before a request had been made to the Cabinet Secretary if indeed the order mentioned in Section 48(2) of the *Labour Relations Act* was to be the one in Kenya Gazette notice no. 3220 of 2012.

14. Lastly, the appellant relied on High court decision in Bakery, confectionery, Food Manufacturing and Allied Workers' Union (K) vs Milly Fruit Processors Limited (2014) eKLR and and submitted that the Court's direction that it pays the union dues from its own funds under Section 19(6) of the *Employment Act*, was untenable because it had not been demonstrated that it had deducted and failed to remit the amounts specified in Section 19(4) of the *Employment Act* and no criminal proceedings had been brought against it under Section 19(5) of the *Employment Act* to enable the court to invoke the jurisdiction under Section 19(6) of the *Employment Act*.

15. Opposing the appeal, Mr. Rakoro, who appeared for the respondent similarly relied on his submissions dated 23rd April 2024.

16. On the issue of jurisdiction, it was contended that the court had jurisdiction which was conferred by Section 73(2) of the *Labour Relations Act* given that the trade dispute was not resolved after conciliation.

17. The respondent added that it was entitled to recognition as it had demonstrated that it had recruited a majority of the appellant's unionisable employees as required under Section 54(1) of the LRA and it had issued the requisite form S as required under Section 48 of the *Labour Relations Act*. It was asserted that the appellant's suggestion that some of its employees declined deductions from their salaries were unfounded and unsubstantiated. Consequently, the appellant was obligated to deduct the union dues once the check-of forms had been served upon them (Kenya Union of Hair and Beauty Salon Workers v Style Industries Limited & another [2020] eKLR was cited.)

18. It was also submitted that the appellant was correctly compelled to pay from its own funds, because such uncollected funds cannot be received from the employee given that the employer was at fault. The appellant clearly admitted to not deducting or remitting the union dues hence the operation of Section 19(6) of the *Employment Act* was justified.

19. Lastly, the respondent maintained that it had produced Legal Notice No. 161 of 2021 by which the Minister of Labour had authorised the deduction of union dues on behalf of the respondent, and that Kenya Gazette notice no. 3220 of 2012 which the claim was founded on, revoked the earlier order published under Gazette notice no. 835 of 1997.

20. We have considered the record, submission made on behalf of the respective parties and the law. In doing so, we are aware of our power under Rule 29 (1)(a) of the Court of Appeal Rules to re-appraise the evidence and to draw our own inferences of fact, on a first appeal.

21. In our view the appeal turns on two issues; whether the appellant was liable to pay the requisite union dues as directed by Gazette Notice 3220 of 2012 and whether the appellant was required to pay the union dues retrospectively from its own funds.

22. The Primary purpose of a trade union is collective bargaining and only a recognised union can properly wield the necessary authority and influence as the authorised bargaining agent and representative of its members. There is no doubt that the respondent had achieved the statutory threshold for recognition. This issue is not in contention and the appellant has rightly abandoned this ground of appeal given that recognition or the signing of a recognition agreement is independent from deductions of union dues which is the issue at the heart of this appeal.

23. The purpose or consequence of signing a recognition agreement is to give the union a right to negotiate a collective bargaining agreement while deduction and remittance of union dues by an employer is founded on two things; first is a directive order issued by the minister and second, is service of Form S which contains the signatures of employees authorising deductions of union dues from their salaries.

24. The relevant section of the LRA provides:

> " 48.
>
> (2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to——
>
> a. deduct trade union dues from the wages of its members;
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> b. pay monies so deducted –
>
> i. into a specified account of the trade union; or

ii. in specified proportions into specified accounts of a trade union and a federation of trade unions.

3. An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

4. The Minister may vary an order issued under this section on application by the trade union.

5. An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer".

25. A bare reading of Section 48 of the LRA indicates that service of Form S authorising deductions and remittance by an employer must be preceded by an order from the Minister directing the employer to make such payment.

26. What was the issue for determination before the trial court? A perusal of the respondent's statement of claim indicates that the cause of action arose from the appellant's failure to comply with Gazette Notice No. 3220 published on 16th March 2012 and its failure to deduct and remit the union dues despite being served with requisite member authorisations contained in Form S.

27. It is common ground that the check-off forms served on the applicant between 2010 and 2012 were pursuant to "an order made with effect from 1997 by the Minister for Labour under Section 45 of the Trade Disputes Act 1991(repealed)." The respondent contends that by the time, it filed suit on 28th November 2013, the earlier order published under Gazette Notice No. 3220 of 2012 had been revoked.

28. The simple question raised by the appellant is whether the respondent can demand payment of union dues for the period preceding 29th February 2012 based on the ministerial order published on 16th March 2012 when the order of 1997 was in effect. Put differently, can the appellant's case succeed based on a Ministerial order which was not pleaded?

29. We think not. It is settled law and practice that a party is bound by its pleadings. A party cannot succeed in a claim he has not set up save by way of amendment of pleadings and unless amended, the evidence adduced cannot not deviate from the pleadings. This legal position was reaffirmed by the Court of Appeal in the case of David Sironga Ole Tukai vs Francis Arap Muge & 2 others Civil Appeal No. 76 of 2014 [2014] eKLR thus;

> " In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is

also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."

30. In our view, a claimant's pleaded case must be supported by evidence adduced during the trial. Pleadings give the architecture of the case and the evidence at trial gives the detail and texture. It is obvious that the evidence on record is inconsistent with the respondent's cause of action and does not support the contention that the appellant failed and refused to comply with Legal notice 3220 of 2012.Regardless of revocation, the effective order at the time the respondent recruited the appellant's employees, was the 1997 order. Failure to comply with Gazette notice no. 835 of 1997 was not part of the respondent's pleaded case and no amendment was made to include such a challenge.

31. Again, the court has no business pronouncing itself on a claim not made. It is not open for the court to undo the laces of the straitjacket into which a claimant has bound himself. The court cannot decide a case that was not pleaded or enter into an enquiry of the merits of matters that have not been raised before it or deduce in this case that the appellant also intended to base his case on the appellant's failure to comply with the ministerial order contained in Gazette notice no. 835 of 1997.The same would amount to speculation and tantamount to raising a different or fresh case which the appellant had not prepared for and would thus be a denial of justice. Consequently, this Court cannot, based on the evidence adduced, find that the appellant failed or refused to deduct union dues pursuant to Gazette Notice 3220 of 2012.

32. As for the second issue, which is whether the appellant could be compelled to pay the employees' union dues retrospectively from its own funds pursuant to Section 19(6) of the *Employment Act*, an examination of the said section is crucial before we make a determination. Section 19 provided the following:

> " 19. Deduction of Wages
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> 4. An employer who deducts an amount from an employee's remuneration in accordance with subsection (1)(a), (f), (g) and (h) shall pay the amount so deducted in accordance with the time period and other requirements specified in the law, agreement court order or arbitration as the case may be.
>
> 5. An employer who fails to comply with the provisions of subsection (4) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.
>
> 6. Where proceedings are brought under subsection (5) in respect of failure by the employer to remit deductions from an employee's remuneration, the court may, in addition to fining the employer order the employer to refund to the employee the amount deducted from the employees wages, and pay the intended beneficiary on behalf of the employee with the employer's own funds".

33. The provisions above clearly indicate that section 19(6) only kicks in where proceedings have been brought against the employer for failing to remit deductions and has been convicted and fined for the offence.

34. In the instant case, the appellant was not convicted for failing to pay the deducted wages nor was it liable to remit any deductions. The evidence on record reveals that the appellant did not deduct a cent from his employees. Therefore, to retrospectively order payments for amounts that have not been deducted is unjust, unfair and wholly inexcusable. In our view an employer cannot be saddled with the liability to pay the employees' contribution from its own funds for the retrospective period, since they have no corresponding right to deduct the same from the future wages payable to the employees.

35. In the end, we are compelled to find merit in the appeal and hold that the learned Judge had no basis granting the orders sought. We therefore set aside in entirety the Judgment of the Employment and Labour Relations Court dated 28th March 2014 delivered in ELRC Cause No. 414 of 2013 and all consequential orders and decree ensuing therefrom with costs to the appellant.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024.

M. WARSAME

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original.

Signed

DEPUTY REGISTRAR.