



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 48 OF 2017

BETWEEN

**KHETIA DRAPERS LIMITED..... APPELLANT**

**AND**

**KENYA UNION OF COMMERCIAL FOOD**

**AND ALLIED WORKERS..... RESPONDENT**

*(Appeal from the ruling and order of the Employment And Labour Relations Court at Kisumu (Onyango, J) dated 29<sup>th</sup> March, 2017*

in

**CAUSE NO. 66 OF 2017)**

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**JUDGMENT OF THE COURT**

[1] This is an appeal from the ruling and order of the Employment & Labour Relations Court (ELRC) (Court) dated 29<sup>th</sup> March, 2017 in the following terms:

**“Court**

**The respondent is directed to commence deductions of union dues of all employees in the check off forms whose names are in the respondent’s payroll of the respondent (sic) as at 30/3/2017 with effect from April, 2017.**

**The issue of recognition agreement will be canvassed by way of written submissions which parties will highlight in Court. The claimant will file written submissions within 30 days from date of service. Highlighting of submissions will be on 15<sup>th</sup> June, 2017.”**

[2] The Kenya Union of Commercial Food and Allied Workers (Union) had on 23<sup>rd</sup> February, 2017 filed a claim in the ELRC seeking the following two main reliefs:

*(i) an order against the respondent, now the appellant, to recognize the union with immediate effect or in the other alternative orders for ballot.*

*(ii) the respondent pays Kshs.3,986,400/= with interest of 20% from its own sources and to deduct and continue deducting and remitting, Trade Union dues as per the law.*

[3] The claim was accompanied by a notice of motion seeking interlocutory orders *inter alia*, that, the Court:

**“do issue interim orders to the respondent to commence deductions and remittance of union dues for all the employees who have acknowledged membership pending hearing and determination of the main suit”.**

The application was placed before the court for ex parte hearing on the same day, 23<sup>rd</sup> February, 2017. The date is erroneously recorded in the proceedings as 23<sup>rd</sup> March, 2017.

However, the court only certified the application as urgent and fixed it for hearing for 8<sup>th</sup> March, 2017 but declined to grant ex parte orders.

On 8<sup>th</sup> March, 2017, the application was adjourned to 29<sup>th</sup> March, 2017, on the application of the appellant's counsel on the ground that he had only recently been instructed. The appellant had filed a replying affidavit on the previous day - 28<sup>th</sup> March, 2017. On 29<sup>th</sup> March, 2017, the Union's representative informed the court that he had just been served with a replying affidavit and applied for adjournment.

The appellant's counsel informed the court in essence that delay was due to the fact that appellant had to look for necessary documents. The court thereupon made the impugned order reproduced at paragraph 1 above.

[4] The appellant aver in the memorandum of appeal that the learned judge erred in law in making orders without jurisdiction, in outright violation of the right to fair trial; in making orders that had not been sought, and in condemning the appellant without it being heard. The appellant further avers that the orders made are a demonstration of bias and partiality and that the learned judge failed to appreciate that the order for deductions and remittance of union dues could only have been made after hearing the application and determination of whether the respondent had attained the simple majority requirement to justify a recognition agreement.

Both Mr. Kiarie, learned counsel for the appellant and Mr. Owiyo, Secretary General of the Union filed written submissions which they highlighted at the hearing of the appeal.

[5] It is apparent from the grounds of the appeal, that the appeal is restricted to the legality of the order and not to the substance or merit of the order.

Firstly, it is the respondent's application dated 21<sup>st</sup> February, 2017 which was listed for hearing on 29<sup>th</sup> March, 2017. The respondent had filed the supporting affidavit and documents. The appellant had also filed a replying affidavit although a day before the hearing date. It is evident that the application was contested and that when the respondent's representative indicated that he would apply for adjournment on the ground of late service of the replying affidavit, it is then that the learned judge made the impugned order. The respondent's representative did not at that stage ask the Court to make any orders and no reasons were assigned for granting the order. These were adversarial proceedings. The appellant was entitled to a fair hearing of the application. The order made without hearing the parties was in breach of the appellant's right to fair hearing as enshrined in **Article 50(1) of the Constitution**.

[6] Secondly, the order not only effectively determined the main prayer in the application but also the claim for arrears of union dues in the statement of the claim.

The case of **Olive Mwihaki Mugenda & Another vs Okiya Omtata Okiiti & 4 Others [2014] eKLR** illustrates the broad principle of law that it is irregular to grant orders at an interlocutory stage which have the effect of granting a major relief in the suit before the parties are heard. The appellant contends in essence that the claim for deduction of union dues cannot be separated from the dispute regarding the recognition of the Union which is still pending.

The respondent is of a contrary view and contends that the dispute on deduction of Union dues is independent in law from the recognition dispute. That is an issue of law which should have been determined after full hearing of the parties. The order of the court is preemptory and prejudiced the appellant.

[7] Lastly, the learned judge did not give any reasons for the order which was not even sought by the respondent. In the absence of any reasons, it cannot be said that the learned judge exercised her discretion judicially.

[8] For the above reasons, we are satisfied that the order appealed from was irregular and made in excess of jurisdiction. The respondent has opposed this appeal and supported the decision of the court. For that reason, the appellant is entitled to the costs of the appeal.

[9] In the premises, the appeal is allowed, with costs to the appellant. The order of the court dated 29<sup>th</sup> March, 2017 is set aside. The application is remitted to the trial court for hearing interparties if the Union is still interested in prosecuting the application.

**DATED and delivered at Eldoret this 1<sup>st</sup> day of March, 2018.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**