IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MURGOR, JJ,A)

CIVIL APPEAL NO. 255 OF 2010

BETWEEN

BANKING INSURANCE FINANCE UNION (K).....APPELLANT

AND

KENYA REVENUE AUTHORITY..... RESPONDENT

(Appeal from the judgment and order of the High Court of Kenya at Nairobi (Dulu, J.) delivered 22nd September 2008 in

HCC Misc Application No. 1683 of 2004)

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JUDGMENT OF THE COURT

In a Notice of Motion dated 16th March, 2005 the appellant, ***Banking Insurance and Finance Union (Kenya)*** sought an order of mandamus to compel ***the respondent, the Kenya Revenue Authority*** to implement the check off system and deduct the union dues of its members who are employees of the respondent.

The grounds on which the orders were premised were that the appellant having recruited the respondent's employees, was entitled to have the check off system implemented; that the respondent had failed to honour the directions of the Registrar of Trade Unions, of which it is bound to comply; and that the respondent could not continue to deny the appellant its rights to its members' union dues.

In opposition to the application, the respondent stated that its core duties and functions as set out under ***section 5*** of the ***Kenya Revenue Authority Act Cap 469*** included *inter alia*, the assessment and collection of all government revenue, the administration and enforcement of laws relating to revenue, as well as, the administration of revenue of other Government institutions.

The respondent contended that it was opposed to implementing the check off system because of an existing rivalry between, the appellant and the Kenya Union of Commercial Food And Allied Workers *(KUCFAW*) which had also been pursuing the recruitment of its employees as members of their union; that furthermore the appellant has not recruited the requisite number of employees to its memberships as stipulated under the repealed Trade Dispute Act; and that those who had been recruited required to be authenticated for eligibility, as there are employees who have left the respondent's employment through dismissal, retirement or death, whilst others were part of management and therefore not eligible to join.

The learned Judge (*Dulu, J*) declined to grant the orders sought for reasons that the respondent was not a financial institution that fell within the ambit of the appellant's mandate.

The appellant was dissatisfied with the decision of the trial court and has appealed to this Court on the grounds which in summary were that though the learned judge appreciated that the respondent had not complied with the directive from the Registrar of Trade Unions which required it to implement the deductions through the check off system under *section 49 (1)* of the Trade Disputes Act (now repealed), he failed to evaluate the record the pleadings and the appellant's submissions, and in so doing, arrived at the wrong conclusion that was based on extraneous matters that were not properly before the court.

When the appeal came up for hearing, ***Ms. J. Guserwa***, learned counsel for the appellant had filed written submissions which were relied upon. In highlighting the submissions, counsel contended that the appellant was a trade union, and had served the respondent with the notice to implement union deductions through a check off system for 904 employees; that a notice from the Registrar of Trade Unions had been issued but the respondent had refused to implement the system, which forced the appellant to file an application seeking to obtain a court

order to compel the respondent to implement it.

Counsel further submitted that the learned judge dwelt on the question of whether or not the respondent was a financial institution, instead of determining whether the respondent was duty bound to comply with the notices. Counsel went on to assert that the appellant's constitution, entitled it to source for members from financial institutions and that the learned judge misdirected himself in arriving at a decision that was not before the court. The issue was whether the respondent had members in its union, and if so, whether the respondent should implement the check off system for their benefit, and that it was not whether the respondent was a financial institution.

Mr. J K. Mwangi, learned counsel for the respondent, submitted that the learned judge rightly defined the term financial institution, and found that the respondent is not a financial institution that would fall within the remit of the institutions whose members were unionizable. It was counsel's assertion that the issue of the respondent's status was material, and that since it was not a financial institution that was unionisable by the appellant, the respondent was under no duty to comply with the Registrar's orders.

We have considered the pleadings, the parties' submissions and the law and are of the view that the central issue for determination is whether the learned judge rightly addressed the question of whether the respondent was a financial institution or whether the issue for determination was whether the appellant had recruited the requisite number of the respondent's employees, and so was duty bound to implement the check off system.

Among the reliefs sought was an order of mandamus to compel the respondent to effect the check off deductions from the appellant's members as set out in the check off forms and to remit the sums to the appellant as required by *section 49* of the Trade Unions Act (repealed).

In determining the issue, the learned judge (Dulu, J) relied on the definition of financial institution specified in *section 2* of the Banking Act to conclude that;

> ***"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 a 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 a financial institution. The officials 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."***

This notwithstanding, the appellant's complaint is that the learned judge misdirected himself by addressing the wrong issue; that, the court ought to have established whether the appellant had recruited the respondent's employees and therefore was entitled to an order to compel the respondent to implement the check off system in accordance with *section 49* of the repealed Trade Disputes Act.

So what was the issue for determination? To enable us determine this question, a brief outline of the facts will be important.

The appellant is a registered trade union which is mandated by its constitution to recruit and represent employees of the respondent, amongst other bodies. Pursuant to its mandate, it had recruited over 900 employees of the respondent's members of staff, and had been provided with approval by the Minister for Labour and Human Resource Development to receive deductions through the check off system from their members. The gazette notice in respect of the check off payment was published in the Kenya Gazette of 21 st November 1997. *Section 49* of the repealed Trade Disputes Act requires an employer to comply with the Registrar's notice. The respondent has yet to comply for reasons that KUCFAW was also pursuing the registration of its employees; and that the appellant has not recruited the requisite number of members for deduction to be effected.

Section 49 of the Trade Unions Act provides;

> ***"(1) where any employer fails to comply with a notice (in this section referred to as the union's notice) served on him on behalf of a Trade Union under section 46, the general secretary of that trade union may report such non-compliance to the Registrar, and the Registrar may by notice in writing require the employer to comply with such of the provisions of the union's notice, and within such a period (being not less than 7 days) as the Registrar may specify.***
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> ***(2) Any employer who fails to comply with the requirement of a notice given by the Registrar under this section within the period specified in the notice shall, unless he satisfies the court that he was not bound to comply with the provisions of the union's notice specified in the Registrar's notice, or that his failure to comply with the Registrar's notice was due to causes beyond his control, be guilty of an offence and liable to a fine…*** (emphasis ours)***"***

Essentially, *section 49 (1)* is clear. It specifies that where an employer fails to comply with a trade union' notice under *section 46*, the general secretary of that trade union may report such non-compliance to the Registrar of Trade Unions who may by notice in writing require the employer to comply with the provisions of the union's notice within a specified period.

Sub-section (2) further states that where an employer fails to comply with the Registrar's notice, he must satisfy the court that he was not bound to comply with the provisions of the union's notice or be liable to imprisonment or a fine. In effect, the provision allows the respondent a final opportunity to convince the court why it is not duty bound to comply with the union or the Registrar's notice.

In this case, the notice in question concerned the trade union's notice to implement the check off system and the Registrar' notice to comply of 22nd July 2004, both notices of which had been issued to the respondent. On its part, the respondent has yet to accede to the notices.

Therefore, having regard to the facts and the saving in *section 49 (2),* we consider that the question that was before the court turned, not on whether the court was compelled to issue the order of compliance, but on whether the court was satisfied with the reasons advanced by the respondent for failing to comply.

At the outset, it is observed that the learned judge analysed and properly addressed all the respondent's various complaints against implementing the check off system. On the complaint that there was a dispute between, KUFAW and the appellant on who would be the union representative of the respondent's members, the learned judge concluded that following the decision of Ojwang, J (as he then was) in *HCC Misc. Application No. 534 of 2002* involving the appellant and the rival KUFAW, the issue of which of the two unions was eligible to represent the respondent's members, had been settled.

In relation to the objection that the respondent is an essential service provider, and also that some of the members of the applicant were high ranking officials, and others were dead, the learned judge found that no particulars were given of the members of management or the deceased officials were provided. And concerning whether the respondent was an essential service provider, the learned judge observed that since the respondent was not included in the Ministry of Labour's list specified in a letter dated 11th May 2004 list, it was not an essential service provider. The respondent has not controverted these findings. This means that, the respondent's reasons for declining to comply, were insufficient and did not convince the learned judge that the respondent was not bound to comply. Which begs the question as to whether the learned judge was right to decline to issue the order on the basis that the respondent is not a financial institution.

An analysis of the pleadings, the affidavits, and in particular the replying affidavit of Mr. Micheal Onyura, Senior Deputy Commissioner – Human Resources, does not disclose that the respondent raised this complaint as one of the reasons for the declining to implement the check off system. *Section 49 (2)* specifically provides that the employer must satisfy the court that he is not bound to comply with the union's notice. The reason that the respondent was not a financial institution that fell within the remit of the appellant's mandate was not set out anywhere in the respondent's affidavit, and the respondent did not advance it as a reason for refusal to comply. The provision required the learned judge to be satisfied with the employer's reasons, but it was not for the court, out of creativity and craft, to establish a reason upon which to decline to grant the order sought, even though the reason relied upon may well be correct. Accordingly, we find that there was nothing that was presented to the court, and there was no material upon which the court could rely to satisfy itself that the respondent ought not to comply with the Registrar's notice. We are satisfied that the learned judge took into account matters that he ought not to have considered, and in so doing arrived at the wrong conclusion ***Mbogo & Another vs Shah** [1968] EA 93*.

Consequently we find that we must interfere with that decision.

As such, the appeal is allowed with costs to the appellant.

We make the following orders;

a) The Judgment in HCCC Misc. Application No. 1683 of 2004 delivered on 22nd September, 2008 is hereby set aside and substituted with a Judgment in favour of the appellant as prayed for in its Notice of Motion dated 15th March, 2005.

b) The appellant be awarded the costs of and incidental to this appeal as well as costs in HCCC Misc. application No. 1683 of 2004.

Dated and Delivered at Nairobi this 9th day of November, 2018.

P.N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR