



Public Transport Operators' Union v Sacco; National Transport and Safety Authority (Interested Party) (Employment and Labour Relations Cause E143 of 2022) [2023] KEELRC 1179 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1179 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E143 OF 2022**

**K OCHARO, J
MAY 18, 2023**

BETWEEN

PUBLIC TRANSPORT OPERATORS' UNION CLAIMANT

AND

KARIOBANGI MATATU OWNERS SACCO RESPONDENT

AND

NATIONAL TRANSPORT AND SAFETY AUTHORITY . INTERESTED PARTY

RULING

1. Through a Notice of Motion Application dated the March 2, 2022 the Applicant seeks the following reliefs:
 1. THAT the mater be certified urgent and the same be heard urgently and ex-parte in the first instance.
 2. THAT the Application be served upon the parties and an earlier inter-parties hearing date be set.
 3. THAT the Respondent be and is hereby prohibited from victimizing, intimidating or threatening the Applicant members in any way or manner on the basis of the said workers electing to freely associate themselves with the lawful activities of the Applicant Trade Union herein including and not limited to the facilitation, processing and issuing of their Public Service Licenses (PSV) and Badges.
 4. THAT the Respondent be and is hereby compelled to regularize the remittance of the statutory deductions with respect to the NSSF and NHIF as being recovered from the members of the Applicant Trade Union herein.



5. THAT the Respondent be and is hereby directed to forthwith commence deducting and remitting the Trade Union dues for the 209 members in accordance to the submitted and acknowledged Check-Off Forms from the members who have subscribed to become members of the Applicant Trade Union.
6. THAT the Respondent be and is hereby directed to within 14 days commence negotiating the Collective Bargaining Agreement with the Applicant herein, both having signed the Recognition Agreement on the same condition thereto.
7. THAT the Costs of this Application be provided for.

The Applicant's Application

2. The Application is premised on the grounds obtaining at the face of it and those in the supporting affidavit sworn on March 2, 2022 by Fenus Okonji, its Secretary General. It is contended that 209 of the Respondent's employees subscribed to be members of the Applicant Trade Union and are still members. The Applicant union has never been served with any resignation letter by any of the members. The Respondent has not notified it that any has resigned.
3. It is further contended that the Applicant successfully recruited a simple majority of the Respondent's employees, who elected to join the membership of the Applicant. The number recruited was therefore sufficient to enable execution of a Recognition Agreement, to pave way for signing of a Collective Bargaining Agreement. The Recognition has not been honoured for the purposes of signing the Collective Bargaining Agreement.
4. The Applicant argued that the law obligates an employer who has received instructions from its employees to deduct and remit to a trade union, monies over which he or she has no interest, to adhere to the instructions and dutifully remit. The law further provides that a default in honouring such instruction, shall render the employer liable to statutory punitive consequences, including a jail term or a fine.
5. The Applicant claims that though the members instructed the Respondent by signing the necessary forms to deduct and remit subscriptions to the it, the Respondent has without any reasonable reason failed to.
6. Following the Respondent's failure, a dispute was lodged with the Ministry. Subsequently, a memorandum of understanding was executed on the July 2, 2015, agreement which was witnessed by the conciliator, in respect of the issues that were subjected to the conciliation process.
7. It is the Applicant 's case that the necessity of including the Interested Party herein is informed by the fact that it is the said agency that formulates the Regulations governing the operations within the Road Transport sector and has the responsibility of ensuring that the Respondent and other stakeholders strictly adhere to the said regulations.

The Respondent's response

8. The Respondent opposed the Applicant's Application through a replying affidavit sworn on March 24, 2022 by Benard Njoroge Chuaga its Chairman. In it he avers that the Application is frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs at the first instance.
9. The Respondent contends that it is not aware that the 209 of its employees are members of the Applicant Union as alleged. It is too not aware if the purported members were procedurally recruited



- and had voluntarily consented to union membership by filing and signing the necessary check-off forms thus giving authority to the Applicant to demand the deduction and the remittance of the union dues.
10. The Respondent aver that if any negotiations were done leading to the signing of the Memorandum of Agreement dated July 12, 2015, the same were done without consultations with the Respondent's officials. It was done outside the law and laid down procedures. As per the Respondent's by-laws, all the documents are to be signed by either the chairman, vice-chairman, treasurer or the Secretary which is not the case here. The Memorandum is purported to be signed by one Mwangi Karano for Secretary, who has since denied that he signed as such or at all.
 11. It is averred that the Respondent has a legal duty to do due diligence before deducting any funds from salaries of its employees. It doubts the validity of the submitted check-off forms. Further the Respondent denies that the Applicant attained a simple majority because many of the check-off lists purporting to contain the names of the union members are inconsistent with the requirements under the law in terms of the format and information required by Form S, Specifically lacking membership numbers.
 12. It is the Respondent's position that the allegations by the Applicant of victimization, intimidation and threats to the alleged Applicant's members are entirely unfounded and are meant to soil the Respondent's positive reputation in the public service vehicles sector.
 13. The Respondent contended that it does not offer employment to the Applicant's alleged members and neither does it exercise control or direction over the motor vehicles' owners, drivers and conductors. The motor vehicles' owners pay their respective drivers and conductors according to the specific arrangement they have.
 14. The Respondent averred that the drivers and conductors might be engaged on a daily basis terminable at the end of the day upon receipt of the funds agreed with the respective owners. The arrangement is dynamic as the numbers keep changing with the drivers and conductors coming on board and others leaving day in day out. The Respondent further stated that it is mainly focused on the facilitation, processing and issuing of their public service licenses and badges in conjunction with the National Transport and Safety Authority.
 15. The Respondent further contended that the drivers and conductors whose names are appearing on the list provided by the applicant, are different from those on the list currently maintained by the owners of the motor vehicles, that the Respondent manages. The list provided by the Applicant is not an updated one.
 16. To demand back dated deductions over the drivers and the conductors temporarily engaged by the owners of the motor vehicle and who have disengaged with these owners would be unjust and unfair and especially to the SACCO that does not act as an employer in this particular case.
 17. It is contended that the orders sought on recognition and negotiation of the Collective Bargaining Agreement are normally considered upon trial of the main Claim and cannot be issued at an interlocutory stage.
 18. Finally, the Respondent contends that the drivers and conductors on the Applicant's list are currently not in any engagement with the Respondent or owners of the subject PSV motor vehicles and to grant an order for entry of a Recognition Agreement and finally signing of a Collective Bargaining Agreement would be unfair and highly prejudicial to the Respondent and its members.



The Applicant's Reply to the Respondent's replying Affidavit

19. The Applicant filed a replying Affidavit to the Respondent's Affidavit on April 11, 2022 which this Court will consider in the determination of this Application.

The Claimant/Applicant's submissions

20. The Claimant/Applicant has not filed any submissions in support of its application but has chosen to rely on the affidavit on record.

The Respondent's submissions

21. The Respondent filed its written submissions on July 19, 2022 with two issues for determination:

- i. Whether the Respondent is an employer
- ii. Whether the Respondent ought to deduct union dues.

Submissions which I have duly read and considered.

Analysis and determination

22. I have keenly considered the Application herein, the affidavits in support thereof and the Respondent's submissions and, I am of a considered view that the orders sought are one that this Court cannot give for the reasons hereunder;

- I. The Applicant seeks for an order of temporary injunction, restraining the Respondent from victimizing, intimidating, and threatening its members in any way or manner on the basis of the said workers electing to freely associate themselves with its lawful activities. Orders sought in an interlocutory application must find basis in Applicant's pleadings. I have carefully considered the material placed before this court by the Applicant, I am unable to discern any allegation[s] regarding the acts complained of.
- II. The orders sought concerning regularization and remittance of statutory deductions, deduction and remittance of trade union dues for the 209 employees, and commencement of negotiations in regard to the Collective Bargaining Agreement, and signing of the Recognition Agreement, are sought word by word as sought in the Memorandum of Claim. They are orders that can only be granted upon taking of evidence in the substantive suit.

23. Consequently, the application is dismissed.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MAY 2023

OCHARO KEBIRA

JUDGE

In the presence of

Mr. Botany for the Claimant.

Mr. Nderitu for the Respondent.

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 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.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE

