Kenya Engineering Workers Union v Garage and Industry Limited (Cause E040 of 2023) [2023] KEELRC 2199 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2199 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E040 OF 2023

AN MWAURE, J

SEPTEMBER 22, 2023

BETWEEN

KENYA ENGINEERING WORKERS UNION ..... APPLICANT

AND

GARAGE AND INDUSTRY LIMITED ..... RESPONDENT

RULING

1. The Applicant vide a Notice of Motion dated January 16, 2023 sought the following orders: -

    a. That this matter be heard ex parte in the first instance, certified urgent and heard on priority basis.

    b. That, the Honourable Court be pleased and issue an interim order against the Respondent to continue with the deduction and remittance of union dues from all Claimant/ Applicant members and or agency fee from those alleged to have withdrawn pending the hearing and determination of this suit.

    c. That the Honourable Court do issue interim orders against the Respondent from victimization of the Claimant members on account of Trade Union and or suit by way of salary reduction, redundancy, termination and or dismissal.

    d. That the Honourable Court be pleased and issue interim orders against the Respondent to reinstate the deducted salaries of all the unionizable employees in their service.

    e. The parties be allowed to proceed by way of written submission of the main claim.

    f. Any other orders the Honourable Court may deem fit to grant

    g. The cost of this application be provided for to the Claimant/ Applicant by the Respondent.

Applicant's Case

2. The Applicant's application was supported by an affidavit sworn by its General Secretary, Wycliffee A Nyamwata who averred that the parties have a duly signed and valid Recognition Agreement.

3. The Applicant stated there is a registered Collective Bargaining Agreement ('CBA') in place that establishes the terms and conditions of service for all unionizable employees of the Respondent. Further upon registration of the CBA the Appellant expected the salary increment of the Respondent's unionizable employee, however, the Respondent reduced their salaries and the Respondent's employees who declined the reduction were declared redundant unfairly and/or unlawfully without taking into account the Recognition, CBA, the *Constitution* and the *Employment Act*.

4. The Applicant avers it has initiated dialogue but the Respondent has declined the same prompting the Applicant to invoke section 62 of the *Labour Relations Act* by reporting the dispute to the Ministry of Labour.

5. The Applicant further avers the Conciliator failed to convene any conciliatory meeting within the time frame stipulated under section 69 and 74 of the *Labour Relations Act*, 2007, therefore the suit has been properly instituted.

Respondent's Case

6. The Respondent's responded to the application vide a replying affidavit dated March 10, 2023 sworn by its director, Patrick Mwamba.

7. The Respondent admitted that there is a Recognition Agreement and CBA between them in respect to the unionizable employees and further averred that it has consistently been deducting union dues from the unionizable employees and remitting them to the Applicant.

8. The Respondent admitted that sometime in 2020, six of its employees withdrew from the Applicant's union and as a consequence none of its employees is a member of the Applicant.

9. The Respondent denied its employees were coerced by the Respondent or its officials to withdraw its membership and it averred the same was voluntary.

10. The Respondent averred the reduction of salaries and redundancy of employees was occasioned by the covid 19 pandemic and the same was carried out in strict conformity of the law and with prior discussion with the affected employees.

11. The Respondent denied of being aware of any negotiations invoked by the Applicant or any attempt made to invoke the conciliation process.

Analysis and determination

12. Having considered the motion, supporting affidavit and replying affidavit made by the parties, the issue for determination by this court is whether the motion herein has met the threshold for grant of the interlocutory orders sought by the Applicant pending the hearing and determination of the main suit.

13. The law in relation to grant of interlocutory orders is set out in the decision by the Court of Appeal in CACA No 51 of 1972 *Giella vs Cassman Brown & Co Ltd [1975] EA 358* at page 360 which established the prerequisite conditions to be considered by the court as follows:

    a. The applicant must show a prima face case with a probability of success.

b. Applicant must prove that he will suffer irreparable injury unless interlocutory injunction is granted.

c. If the court is in doubt, it will decide the application on a balance of probability

14. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR* delved deeper to the principles set out in Giella vs Cassman Brown & Co Ltd and stated as follows:-

> There is no scope to confuse between an interlocutory and permanent orders of injunction and since the fundamentals about the implications of the interlocutory orders of injunction are settled, at least for over four decades, since Giella case (supra) they could neither be questioned nor be elaborated in detailed research. Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

a. establish his case only at a prima facie level,

b. demonstrate irreparable injury if a temporary injunction is not granted, and

c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.

15 These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd V Afraha Education Society [2001] Vol 1 EA 86* where it was held: If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

16. On the second factor, that the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.'

17. The court has noted that both the applicant and the respondent are in agreement that there is a collective bargaining agreement between them over its unionisable employees. The respondent aver

that they have been deducting the union dues and remitting to the applicant until their members resigned from being members of the union.

18. There are letters on record that the members resigned from the union. The applicant did not proffer any evidence to demonstrate that the respondent coerced the said members to resigning from the union. The said members did not retract their resignation letters. The court finds the applicant has not established a prima facie case that their members were coerced to resign from the union.

19. The evidence on record having shown the said employees resigned from the union on their own volution the court has no right to order the respondent to continue deducting and remitting union dues to the applicant. The members are the only ones who can confirm if they wish to rejoin the union. As the evidence stands the court is obliged to find the applicant failed to establish a prima facie case against the respondent.

20. As for the other leg as to whether the applicant will suffer irreparable injury if the orders are not granted similarly the court finds the applicant did not prove how so herein. The applicant has not demonstrated that the respondent deducted its members salary and as things stand the members already resigned from the union and so the union has no locus standi to receive their dues.

21. The way the court sees it there will be no injury that the applicant has proved it is bound to suffer that cannot be rectified. The prayers sought in the notice of motion are in tandem with the prayers in the claim. The court would rather direct the case goes for full hearing so that evidence can be adduced to clarify the grey areas that cannot be clarified in an application.

22. So the upshot of the foregoing is that the prayers in the application dated January 15, 2023 are not merited and the court orders the cause to proceed for hearing. Case to proceed for full hearing on November 15, 2023.

23. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2023.

ANNA NGIBUINI MWAURE

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.

ANNA NGIBUINI MWAURE

JUDGE