



Transport Workers Union (K) v Kenya Civil Aviation Authority; Kenya Aviation Workers Union (Interested Party) (Cause E248 of 2022) [2023] KEELRC 2806 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2806 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E248 OF 2022
MA ONYANGO, J
NOVEMBER 2, 2023**

BETWEEN

TRANSPORT WORKERS UNION (K) CLAIMANT

AND

KENYA CIVIL AVIATION AUTHORITY RESPONDENT

AND

KENYA AVIATION WORKERS UNION INTERESTED PARTY

RULING

1. In its application dated 20th April 2022, the Claimant seeks the following orders which I quote *verbatim*: -
 - a. Spent
 - b. That pending the hearing and determination of the Application, the Hon court issue an order directing the Respondent to comply with the provisions of Section 48 & 50 of the Labour Relations Act-2007 L.K. by implementing the deduction of Trade union monthly dues from Two hundred and seventy-one (271) of its employees who are the Claimant union members and any other member that may be recruited thereafter.
 - c. That an ORDER for enforcement of section 19(6) of the Employment Act-2007 L.K. be issued directing the Respondent to pay all unremitted trade union monthly dues from its own funds from February, 2022 until full implementation of the check off forms



- d. That, “An injunctive order” be and is hereby issued restraining the Respondent from intimidating and/or harassing its employees on account of union membership.
 - e. That this Honourable court do issue any other appropriate relief deemed fit to meet the end of justice.
2. The application is supported by the Affidavit of Dan Mihadi, the Claimant’s General Secretary sworn on 20th April 2022. In summary, he deposes that the Claimant in January and March 2022 recruited a total of Two hundred and seventy one (271) of the Respondent’s employees as its members and forwarded the signed check off forms to the Respondent for deduction of monthly trade union dues; that upon receipt of the Check off forms, the Respondent requested to be supplied with the Claimant’s Registration certificate and a copy of the Constitution which documents were supplied to them; that the Respondent has refused to implement the deductions of the trade union monthly dues from recruited employees in accordance with section 48 & 50 of the Labour Relations Act.
3. According to Mr. Mihadi, pursuant to Section 17(11) of the Employment Act, the Respondent is only an agent in the implementation/deduction of the trade union monthly dues and that as such, it cannot limit or attempt to limit the right of an employee to dispose of his wages in a manner which the employee deems fit.
4. The application is opposed. The Respondent filed a Replying Affidavit sworn on 10th May 2022 by Stephen Rangar Osino, its Chief Human Resources Officer. The Respondent’s reply is that the Claimant submitted 271 names out of which the Respondent confirmed 246 to be the Respondent’s staff members recruited by the Claimant; that out of that number, 151 staff members hold management grades on scales 6,7 and 8; 74 staff members fall within the unionsable grades save that 7 comprise of staff whose nature of work do not allow them to join a union and that out of the remaining 67 staff members, 58 are members of the Kenya Aviation Workers Union who have not resigned from the membership of Kenya Aviation Workers Union.
5. The Respondent further avers that there is no recognition agreement between the parties to this suit and that the Respondent has a recognition agreement with Kenya Aviation Workers’ Union; that the Claimant has not achieved the mandatory threshold to be recognized as a trade union in a case where another Trade Union namely the Kenya Aviation Workers’ Union preceded the Claimant.
6. According to the Respondent, it’s employees who are members of the Kenya Aviation Workers Union have not formally resigned from the said union to be eligible to join the Claimant or another union of their choice.
7. The Interested Party also filed its Replying Affidavit of Moss K. Ndiema, its Secretary General sworn on 28th November 2022 in opposition of the instant application. According to Moss K. Ndiema, the application before court is devoid of merit, a misrepresentation, distortion or suppression of material facts, frivolous and otherwise an abuse of the court process.
8. The Interested Party avers that it has a Recognition Agreement executed on 7th January 2015 with the Respondent and a Collective Bargaining Agreement (CBA) with the Respondent duly registered by this Court on 21st August 2015 for the period 2013-2015 and that Clause 42 of the CBA provides that the said CBA is binding upon the parties until a new CBA is executed by both parties; that the said recognition of the Interested Party with the Respondent is still binding on the Respondent to date.
9. The Interested Party contends that on 27th January, 2016, the Interested Party forwarded a CBA proposal covering 2015-2017 period to the Respondent and that the Respondent refused to submit



their Collective Bargaining Agreement counter proposal despite several reminders by the Interested party; that consequently, the Interested Party lodged a complaint to the relevant cabinet Secretary of Labor in accordance with the relevant law vide a letter dated 6th July 2016; that unfortunately, in the midst of negotiations, on 2nd December 2016, the Interested Party was deregistered vide a judgment of Hon. Nduma Nderi; that on 3rd February 2017, the Interested Party obtained stay orders against the execution of the said judgment from the Court of Appeal; that the orders of the Court of Appeal were appealed against in the Supreme Court which resulted in a consent order by parties dated 7th April 2017 to the effect that the Interested Party could continue operating and the orders were forwarded to the Respondent to enable negotiations proceed to conclusion.

10. It is further averred that despite the Supreme Court orders dated 7th April 2017, the Respondent has refused to continue with the negotiations relying on erroneous interpretation of the law that the aforesaid orders did not stop the deregistration.
11. It was the Interested Party's contention that Clause 42 of the Collective Bargaining Agreement registered on 21st August 2015 for the period 2013-2015 provides that the Collective Bargaining Agreement is binding upon parties until a new Collective Bargaining Agreement is executed by both parties and that as such, it is therefore not true that the Respondent's employees are not members or do not subscribe to any other union or that they do not enjoy any negotiated terms and conditions of employment of a Collective Bargaining Agreement.
12. The application was disposed of by way of written submissions. The Claimant and the Interested Party's submissions are on record. The Respondent's submissions are not on record.
13. From the application before me, the rival affidavits and the submissions on record, the issue that falls for the court's determination is whether the Claimant is entitled to the orders sought.
14. The Claimant has anchored the application on sections 48 and 50 of the Labour Relations Act and section 19 of the Employment Act. The relevant provisions are as follows:

Section 48 of Labour Relations Act

- (1) In this Part, "trade union dues" means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.
- (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— The Labour Relations Act, 2007 44
 - (a) deduct trade union dues from the wages of its members; and
 - (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.

Section 50 of *Labour Relations Act*

50.

- (1) Any amount deducted in accordance with the provisions of this Part shall be paid into the designated trade union, or employers' organisation account within ten days of the deduction being made.
- (2) ...
- (3) ...
- (4) ...
- (5) ...
- (6) No employer shall make a deduction from the wages of an employee for the purposes of making a payment to any trade union, except in accordance with the provisions of this Part.

Section 19 of *Employment Act*

1. .
2. ...
3. ...
4. ...
5. ...
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 employee's wages and pay the intended beneficiary on behalf of the employee with the employer's own funds.

15. It is common ground that the Claimant sent to the Respondent a list of the Respondent's employees whom it stated it had recruited into its membership for the purpose of deduction of trade union dues



as provided under section 48 of the Act. It is further common ground that by letter dated 6th April 2022 the Respondent informed the Claimant that it was unable to comply because out of the 246 names in the list of recruited employees from the Claimant, 151 were in grades 8,7 and 6 and therefore not unionisable; of the 74 staff members fall within the unionsable grades, 7 comprise of staff whose nature of work do not allow them to join a union, and 58 are members of the Kenya Aviation Workers Union who have not resigned from the membership of Kenya Aviation Workers Union.

16. The Respondent further advised the Claimant to recruit simple majority of membership in the Respondent's employment before seeking to be recognized by the Respondent.
17. The Claimant was not satisfied with the Respondent's reply and immediately instituted the instant suit with the Application under reference filed under certificate of urgency.
18. In the Memorandum of Claim filed with the application before me, the Claimant seeks orders that:
 - a. That, the Hon. Court issue an Order directing the Respondent to comply with the provisions of section 48 & 50 of the *Labour Relations Act*-2007 L.K. by implementing deduction of Trade union monthly dues from two hundred and seventy-one (27) of its employees who are the Claimant union members and any other member that may be recruited thereafter.
 - b. That, in the event that the Respondent does not comply to the deductions of Monthly Trade Union dues, the Hon. Court issue an Order for enforcement of section 19(6) of the *Employment Act*-2007 L.K. directing the Respondent to pay all un-remitted trade union monthly dues from its own funds from February, 2022 and all other subsequent months until full implementation of the check off forms.
 - c. That, the Respondent be restrained from intimidating and/or harassing its employees on account of union membership.
 - d. That, this honourable Court do issue any other appropriate relief deemed fit to meet the end of justice.
19. It is evident from the proceedings that this is a demarcation dispute between the Claimant and the Interested Party who has a recognition agreement with the Claimant that is still valid and subsisting.
20. It is further evident that the Respondent actually complied with the Claimant's demand by deducting and remitting union dues from the employees in the check-off form whose membership was not in doubt.
21. The averments by the Claimant that the Respondent failed to comply are therefore not factual as the Respondent only failed to remit union dues in respect of employees whom in its view were not eligible to join the membership of the Claimant union by virtue of either being not unionisable or because they were already members of the Interested Party and had not resigned from such membership.
22. The Respondent has by the documents attached given valid reason for not deducting and remitting union dues for the rest of the employees in the Claimants check-off forms.
23. The issue of level of union representation, which in the court's view is the main issue in contention in this suit is a matter that cannot be determined at interlocutory stage as sought by the Claimant. The Court notes from the documents filed by the Interested Party that this is an issue that has also been



raised in a dispute reported to the Cabinet Secretary Ministry of Labour by the Interested Party in its letter dated 29th March 2022 a short while before the instant dispute was filed on 20th April 2021.

24. It is the view of this court that the dispute was filed in court prematurely as the Claimant did not comply with the requirements of section 62 of the *Labour Relations Act* which provides that trade disputes be reported to the Minister for Labour for purposes of conciliation and should only come to court when conciliation fails to resolve the dispute. Section 69 of the *Labour Relations Act* is explicit on when a trade dispute is deemed to be unresolved. The section provides:

Dispute unresolved after conciliation.

69. A trade dispute is deemed to be unresolved after conciliation if the—

- (a) conciliator issues a certificate that the dispute has not been resolved by conciliation; or
- (b) thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires.

25. Further, section 74 of the *Act* provides for circumstances when urgent referrals of trade disputes may be made to the court as follows:

74. A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns—

- (a) the recognition of a trade union in accordance with section 62; or
- (b) a redundancy where –
 - i. the trade union has already referred the dispute for conciliation under section 62(4); or
 - ii. the employer has retrenched employees without giving notice; or

- (c) employers and employees engaged in an essential service.

26. Section 15(4) of the *Employment and Labour Relations Court Act* provides as follows in respect of matters filed in this court before conciliation:

15. Alternative dispute resolution

- (1)
- (2) (Deleted by Act No. 18 of 2014, Sch.).



- (3) (Deleted by Act No. 18 of 2014, Sch.).
- (4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.
- (5)

- 27. From the foregoing I find that it is premature to grant the orders sought by the Claimant in the application dated 20th April 2022.
- 28. The court further holds the view that because the Claim and application have similar prayers, parties it would make better use of its and that of the parties to determine the entire Claim rather than the application.
- 29. In view of the fact that the dispute was filed before conciliation, the court accordingly stays the same and refers the dispute to the Minister for Labour for purposes of conciliation.
- 30. For good management of the case, the court directs that the parties exhaust all the issues in dispute during conciliation. Should the parties not agree with the recommendations of the conciliator they will be required to file submissions on all the outstanding issues for this court to make a final determination.
- 31. The conciliator is directed to file a report in court within 60 days. A mention date shall be taken at the time of delivery of this ruling.

DATED, DELIVERED VIRTUALLY AND SIGNED AT ELDORET THIS 2ND DAY OF NOVEMBER, 2023.

**M. ONYANGO
JUDGE**

