



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. E016 OF 2021

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS.....CLAIMANT

VERSUS

BOM – LIRHANDA GIRLS HIGH SCHOOL.....RESPONDENT

RULING

1. The Applicant filed a statement of Claim dated 27th December 2021 and a Certificate of urgency with Notice of Motion Application all filed in court on 30th December 2021. The Notice of Motion Application is brought under Section 13 of the Employment and Labour Relations Court Act and Procedure Rules 2016 seeking the following orders:-

- a. That this application is certified urgent and heard ex-parte in the first instance pending inter-parte hearing.
- b. That the Honourable Court be pleased to issue temporary orders restraining the Respondent from harassing, suspending, terminating otherwise preferring disciplinary action of any kind on members of the Claimant pending -inter-parte hearing and determination of this application.
- c. That the Honourable Court orders the Respondent to stop unfair labour practices.
- d. That the Honourable Court compels the Respondent to deduct and remit Union dues as required by law.
- e. That the Honourable court compels the Respondent to sign the forwarded recognition agreement to allow for negotiation of a collective Bargaining Agreement.
- f. That the costs of this application be awarded to the Claimant
- g. Any other relief the court deems fit.

2. The grounds of the Application are stated with supporting Affidavit of Thomas Mboya sworn on the 27th December 2021.

3. Order (a) and (b) of the Application are spent.

4. The Respondent entered appearance vide Memorandum of appearance on 21st January 2022 through the law firm of Amasakha & Company Advocates. The Respondent in response to the suit and the Application filed Replying Affidavit sworn by Linda Muhonja Mulehane on the 19th January 2022 and filed in court on the 21st January 2022. The Respondent also filed in court statement of response to the claim on the 2nd February, 2022.

5. The Application was canvassed by way of written submissions pursuant to directions of the court. The Applicant's submissions labelled "Final submissions" are dated 31st January 2022 and filed in court by Justine Wangu Kamuye on the 1st February 2022. The Respondent's submissions drawn by Amasakha & Company Advocates are dated 4th February 2022 and filed in court on the 7th February, 2021.

The Applicant's Application in summary

6. The Applicant states that 19 members of staff out of total 20 non-teaching staff of the Respondent joined the Claimant's Union between 29th December 2020 and 18th August 2021 translating to 95% of the total non-teaching staff workforce and have surpassed the minimum threshold pursuant to Section 54 of the Labour Relations Act.

7. That vide letters dated 20th January 2021, 30th August 2021 and 6th October, 2021 the Applicant forwarded to the Respondent authority to deduct and remit union dues in accordance with Kenya Gazette Supplement 135, Legal Notice No. 195 dated 1st November, 2018 and Sections 48, 49 and 50 of the Labour Relations Act and the deductions were to commence on 31st January 2021. That the Applicant forwarded the Notices and the same were received by the Respondent. That the Claimant further forwarded the recognition agreement to the Respondent vide letter dated 20th July received 23rd July, 2019 and proposed to meet the Management for signing in line with the Labour Relations Act Section 54.

8. The Applicant states it educated members at the school on the 22nd July, 2021 and the principal in attendance promised to sign the recognition agreement. That the Principal further told the school bursar to comply in so far as deduction and remittance of Union dues was concerned. That the Principal changed her mind and started threatening workers to withdraw from the Union and has since subjected the members to unfair labour practices with some of the members under suspension. These statements are supported by Thomas Mboya who avers to be Branch Secretary Kakamega and National Treasurer of the Claimant and states he read the averments made in the Application and confirms the same to be true and correct.

9. The Respondent in response to the Application filed replying affidavit sworn by Linda Muhonya Melehane who avers she is the Principal of Lihanda Girls High School as well as the Secretary of the Respondent and that is authorized to Respondent. That she had been advocates by her advocates on record the Application is bare and not supported by documents referred to in the Application which ought to be marked and Commissioner on oath. The Principal denies the Claim that the Claimant has registered majority of non-teaching staff workforce of the Respondent as its members. The Respondent avers that they have not signed a recognition agreement with the Claimant and thus it will not be proper to effect deductions and remittances of Union dues. That the Claimant has not been engaging the Board of Management and instead has been trying to arm twist the Principal to sign a recognition agreement in her personal capacity which decision lies with Board of Management.

10. The Principal states that on the 10th January 2022 she brought to the attention of the Board the matter in presence of a representative from the Claimant's Union and a Committee was set up to engage the Claimant. That the allegation of intimidation and harassment is not supported by any documentary evidence. That on 7th January 2022 she received a letter from the Chief Industrial Relations Officer dated 23rd November 2021 declaring a dispute and appointing a conciliator (LMM-1).

11. The Application was canvassed by way of written submissions. The Applicant's submissions are dated 31st January 2022 and filed on the 1st February 2022. The Respondent's submissions are dated 4th February, 2022 and filed 7th February 2022.

DETERMINATION

12. The Application is brought to court under Section 13 of the Employment And Labour Relations Act and Procedure Rules 2016.

Section 13 of the Employment and Labour Relations Court Act provides for enforcement of court orders. The application before court is not for enforcement of any order of the court consequently from the outset the Application is not grounded on irrelevant provision of the law. The court has reviewed the orders sought in the Application and finds that there ought to be an affidavit to affirm on the facts and annex relevant documents as exhibits. That is not the case here. The grounds stated on the Application remain mere allegations. The court declined to grant order 2 at ex parte stage. The remaining orders 3,4 5 are substantive and are the same orders sought under the claim. The Court finds that orders 3,4,5 under the Application can only be considered on merit. That means the parties have to produce documents and witnesses statements as evidence in their cases. The court notes the Applicant's submissions are titled " final submissions "and prays for judgement . This was an application and hence not ripe for grant of final orders.

13. The court does not find the exhibit "LMM-1' annexed to affidavit of Linda Mohanja Mlehane to relate to the dispute before court. The dispute state therein is:-

“Refusal by the school Board of Management to honour payment of terminal benefits to Henry Shilovele Lisuli contrary to parties CBA and labour laws of Kenya”

That is not dispute before court in the instant case. The case before court is alleged unfair labour practices which issue requires the claimant to lead evidence to prove its existence. The other issues are refusal to deduct and remit Union dues, and refusal by Respondent to sign recognition agreement.

14. Section 54 (1) of the Labour Relations Act, provides as follows:- *‘an employer including an employer in the public sector shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees’* The Applicants allege they have met the threshold(Appendix 1).

15. The Applicant have alleged that the Respondent has failed and/ or refused to sign recognition agreement despite the union meeting the threshold. Section 54 (6) of Labour Relations Act provides, *‘if there is a dispute as to the right of a trade union to be recognized for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement the trade union may refer the dispute for conciliation in accordance with provisions of Part VIII.’*

16. The Court is of the considered opinion the first port of call in this dispute was the Conciliator as per the process described under part VIII of the Labour Relation Act . There is no evidence placed before the court that this dispute was referred to the conciliator as envisaged under section 54(6) of the Labour Relations Act.

17. The court finds the Application bad in law for being brought under wrong provision of the law and for seeking permanent orders. Secondly that the application and the claim are premature for non-compliance with the provisions of section 54(6) of the Labour Relations Act. Consequently, the Application dated 25th December 2021 is dismissed. Costs in the cause.

18. Further the Court hereby refers the dispute to Conciliation under section 54(6) and PART VIII of the Labour Relations Act with immediate effect for settlement. The Conciliator to file a report in court on the dispute within 60 days from today. The Applicant/Claimant to extract this Order and serve the same at the Kakamega County Labour Office.

19. The hearing of the Claim dated 27th December 2021 is stayed pending the outcome of the conciliation process.

20. It is so ordered.

DATED, SIGNED AND DELIVERED IN BUNGOMA THIS 31ST DAY OF MARCH, 2022

J.W. KELI

JUDGE

IN THE PRESENCE OF

Court Assistant: Brenda Wesonga

For Claimant: Kamunya

For Respondent:- Amasakha