



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NUMBER E048 OF 2021

KENYA PLANTATION &

AGRICULTURAL WORKERS UNION.....CLAIMANT

-VERSUS-

BARAKA ROSES LIMITED..... RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

RULING

1. INTRODUCTION

1. Vide a Memorandum of claim dated 7th September, 2021 the Claimant prays for:-

- (1) A declaration that the failure by the Respondent to sign the Recognition Agreement between itself and the Claimant as unlawful.**
- (2) A declaration that the actions by the Respondent amount to unfair labour practices.**
- (3) An Order prohibiting the Respondent from victimizing, harassing, intimidating and terminating the employees who have signed up for union membership.**
- (4) An order compelling the Respondent to commence deduction of union dues from emoluments of the grievants and remittance of the same to the Claimant.**
- (5) An order directing and/or compelling the Respondent to pay the arrears for union dues from the time it was served with the membership form until the date of judgment.**
- (6) An order compelling the Respondent to conclude a recognition agreement with the Claimant within fourteen (14) days from the date of judgment.**
- (7) Costs of this cause.**
- (8) Interest on (4) hereinabove from the date of service of check-off form upon the Respondent until the date of payment in full.**
- (9) Any other relief that this Honourable Court may deem fit and just to grant.**

2. Together with the claim was filed a Notice of motion dated 7th September, 2021 under certificate of urgency seeking the following:-

- (1) This application be certified urgent, heard *ex parte* in the first instance and service be dispensed with.**
- (2) This Honourable Court be pleased to prohibit and/or restrain the Respondent from victimizing, harassing, threatening to dismiss its employees who have joined the Claimant/Applicant from employment pending the hearing and determination of this application and/or cause.**

(3) This Honourable be pleased to compel the Respondent to deduct and remit union dues from the emoluments of the three hundred and six (306) employees of the Respondent or any number thereof.

(4) This Honourable Court be pleased to compel the Respondent to sign a recognition agreement with the Claimant/Applicant herein.

(5) Costs of this application be borne by the Respondent.

3. The said application is expressed to be brought under **Articles 36 and 41 of the Constitution, Section 12 of the Employment and Labour Relations Court Act, and Sections 4 and 48 of the Labour Relations Act.** It is supported by an affidavit of **THOMAS KIPKEMBOI** sworn on 7th September, 2021 and there are several documents annexed thereto.

4. The Respondent entered appearance on 23rd September, 2021 and filed a defence on 23rd November, 2021 in which it prays that this cause be dismissed with costs.

5. In response to the Notice of motion the Respondent filed a Replying Affidavit on 9th November, 2021 sworn by **WESLEY SIELE** on 5th November, 2021 together with several annexures thereto.

6. By consent, it was agreed that the application be disposed of by way of written submissions; the Claimant filed on 9th and the Respondent on 14th December, 2021.

II. ISSUES FOR DETERMINATION

7. This court has gone through the application, the supporting affidavit and the annexures thereto, the replying affidavit and the annexures thereto, and the written submissions from sides, as well as the entire pleadings, and the following issues manifest for determination:-

(a) Pending the hearing and determination of this cause, should this court issue an injunctive order prohibiting and/or restraining the Respondent from victimizing, harassing, and/or threatening to dismiss its employees who have joined the Claimant/Applicant?

(b) Pending the hearing and determination of this cause, should this court issue a mandatory injunctive order compelling the Respondent to deduct and remit union dues from the emoluments of 360 employees of the Respondent, or any such number thereof who have signed into membership of the Claimant and remit the said dues to the Claimant/Applicant?

(c) Pending the hearing and determination of this cause, should this court compel the Respondent to sign a recognition agreement with the Claimant/Applicant?

(d) Who should meet the costs of this application?

This court shall look into each of the above issues as hereunder.

III. ALLEGED HARASSMENT, VICTIMIZATION, INTIMIDATION AND THREATS

8. Harassment, victimization, and intimidation of employees by an employer for reason of joining a union is unconstitutional and unlawful. **Article 36** of the **Constitution** guarantees freedom of association, **Article 37** guarantees right to assembly, demonstration, picketing and petition, and **Article 41** guarantees the right to fair labour practices.

9. **Section 46(c) of the Employment Act** outlaws termination or disciplinary actions against an employee based on membership or proposed membership to a trade union. Further, Sections 4 and 5 of the Labour Relations Act protect the right of an employee to associate with others in a trade union and carrying out lawful activities in such a union and association.

10. It would therefore be unlawful for an employer to victimize, harass, threaten, and or intimidate an employee for reason of joining or intending to join a trade union or carrying out or taking part in lawful activities of such union.

11. However, this court has gone through the pleadings in this cause and more so the supporting affidavit to the application and I am not able to identify any acts by the Respondent that would amount to victimization, harassment, threats, and or intimidation of the employees alleged to be members of the Claimant/Applicant or any of them or at all.

12. There is no affidavit filed by any employee or employees of the Respondent who are members of the Claimant/Applicant alleging such unlawful actions against them by the Respondent or its agents or proxies. The letter dated 7th September, 2021 addressed to the Managing Director of the Respondent by the Claimant is not of itself evidence that there has been harassment, intimidation, victimization, or threats by the Respondent to the alleged employees or members of the Claimant.

13. The issue as to whether there has been threats, harassment, intimidation, or victimization by the Respondent is a matter of fact that can only be proved by way of evidence either oral or documentary to be placed before the court by way of an affidavit and or oral testimony. No such evidence has been placed before this court.

14. For the foregoing reasons, it would be premature for an order of injunction to issue prohibiting or restraining the Respondent from doing that which has not been demonstrated to be eminent or to have occurred. It is for these reasons that prayer 2 of the application is hereby denied.

IV. PAYMENT AND REMITTANCE OF UNION DUES

15. From the pleadings filed in this cause and the evidence placed before this court by way of affidavits from both sides, one of the hotly contested issues is on the number of employees of the Respondent who have lawfully joined the Claimant. In paragraph 7 of the supporting affidavit the Claimant avers that it has recruited 306 employees of the Respondent into its membership. However, in paragraph 2 of the replying affidavit the Respondent avers that it is only 93 of its employees who have joined the Claimant and that it has been collecting and remitting all union dues to the Claimant.

16. The Claimant has not filed a list of the names of the employees of the Respondent who have joined it. There are no duly executed forms or membership documents filed in court to authenticate the alleged membership to enable this court to verify the accurate membership and the numbers thereof.

17. In view of the foregoing, the issue of numbers is contested and the averment by the Respondent that it has been remitting to the Claimant dues for 93 of its employees who are union members has neither been denied nor controverted by the Claimant.

18. These twin issues of membership and collection and remittance of union dues cannot be determined at this interim stage without the benefit of weighing the evidence from both sides in a full hearing. There are also allegations by the Respondent of withdrawal by some of its employees from membership with Claimant.

19. In the circumstances, granting prayer 3 of the application would prejudice the subject issues without hearing the parties and that request is hence denied at this stage.

V. RECOGNITION AGREEMENT

20. As noted above, the issue of the number of the employees of the Respondent who have joined the Claimant is a hotly contested issue. The Claimant avers that they have attained the numbers necessary for a recognition agreement to be executed with the Respondent while the Respondent avers that the numbers do not add up. The Respondent further avers that there is no need for execution of such a recognition agreement as there is already one in existence between the Claimant and the entire Floriculture sector across Kenya.

21. For the above reasons, the issue as to whether the parties herein legally need to execute a recognition agreement, and whether a binding agreement is already in force, is contested and calls for a full hearing and this court is hence reluctant to issue any orders on the same at this interim stage. The net result is that prayer 4 in the application is denied at this interlocutory stage.

VI. LAW APPLICABLE

22. The prayers sought by the Claimant in this application are to a large extent the same ones prayed for in the main cause. This court is to a large extent apprehensive that if the prayers sought are granted at this interim stage there is a great danger of prejudging the entire cause at an interim stage.

23. The principles upon which interim injunctive orders may be issued were in earnest set out in the popular case of **Geilla Vs Casman Brown Co. Ltd 1973 EA 358**. An applicant has to first demonstrate that it has a *prima facie* case with a probability of success. A *prima facie* case is a case beyond just an arguable case. Cumulatively an applicant has to demonstrate that if the interim conjunctive order is denied it shall suffer or is likely to suffer irreparable loss/damage/injury. If the court is still in doubt it has to consider the balance of convenience.

24. For the reasons stated in the foregoing parts of this ruling, this court is of the considered view that the Claimant has not demonstrated that it has a *prima facie* case capable of persuading this court to grant the orders sought at this interim stage. This court is not alluding that the Claimant may not have an arguable case, but this court holds that it is more prudent to allow the parties to tender their evidence in the main cause before granting or denying the prayers sought.

25. Further, this court holds that the Claimant has not demonstrated that it shall suffer irreparable loss, damage, or injury that may not be compensated by way of an award of damages if the interim orders are denied. The balance of convenience at this stage is in favour of not granting the interim orders sought, for among other reasons not to prejudice the main cause at this interlocutory stage.

26. This court is, without prejudice, of the opinion that the parties have not exhausted negotiations, reconciliation, mediation and or other mechanisms that may settle this matter out of court.

VII. COSTS

27. This court orders that the costs of this application be in the cause.

VIII. DISPOSAL

28. The net effect of the foregoing is that the Notice of motion dated 7th September, 2021 by the Claimant is hereby dismissed with costs in

the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 9TH DAY OF MARCH, 2022.

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DAVID NDERITU

JUDGE