



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.48 OF 2019

KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

HOTEL WATERBUCK LIMITED.....RESPONDENT

AND

KUDHEIHA WORKERS.....INTERESTED PARTY

JUDGEMENT

The issue in dispute herein relates to the alleged refusal by the respondent to sign a recognition agreement with the claimant and alleged refusal to deduct and remit trade union dues to the claimant.

The parties agreed and address the suit by way of written submissions.

Claim

The claim is that the claimant and the interested party are registered trade unions pursuant to the provisions of section 19 of the Labour Relations Act, 2007 (LRA). The respondent is a registered company whose core business is hotel and catering services.

The claim is that the claimant is the relevant trade union for the respondent industry. The employees were previously members of the interested party and in July, 2018 they withdrew their membership and the claimant recruited 82 of them. The check off forms were served upon the respondent on 11th July, 2018, served a Recognition Agreement for signatures but the respondent has declined to sign and or deduct and remit trade union dues.

The respondent through letter dated 16th July, 2018 declined to sign the Recognition Agreement claiming there was a valid agreement with the Interested Party and an existing CBA.

The claimant reported a dispute to the Minister and a conciliator was appointed and who invited the parties for conciliation but the respondent failed to attend.

Article 36(1) of the Constitution give employee the right to association and belong to a trade union of choice within the meaning of Article 41 of the Constitution. The employees of the respondent have acted within their rights under section 4 of the LRA and joined the claimant. Under section 54 of the LRA the claimant has simple majority and should enjoy recognition by the respondent since the recruited number of 82 comprise 69.5% of the total unionisable employees. The claimant has served check off forms upon the respondent who should proceed and act by deduction and remittance of trade union dues to the claimant.

The claim is also that even where the recognition and CBA between the respondent and the Interested Party exists this should not stop the respondent from effecting deductions and remittance of union due to the claimant with regard to members who have joined it.

The claimant is seeking for orders that the court do direct the respondent to sign the recognition agreement pursuant to section 54 of the LRA; there be an order directing the respondent to deduct and remit trade union dues to the claimant pursuant to section 54 of the LRA; and the payment of costs of the suit.

Defence

The defence is that there is a valid recognition agreement with the Interested Party dated 5th November, 2012 and have gone ahead to

negotiate several CBAs covering all unionisable employees the last being for the year 2017/2019 and it is up for review and awaiting signatures.

On 10th July, 2018 the respondent received communication from the claimant seeking to sign a Recognition Agreement with them together with check off dated 9th July, 2018 allegedly signed by 82 employees of the respondent. There was a reply on 16th July, 2018 noting the existing recognition agreement and CBAs with the Interested Party and therefore could not sign recognition as such would defeat the provisions of section 54(4) of the LRA.

The claimant proceeded to register a dispute with the Minister and a conciliator was appointed and who wrote to the parties for a meeting and on 16th October, 2018 the respondent filed its memo and applied to have the Interested Party enjoined in the matter and the subsequent meeting convened was not convenient to the respondent and the next communication was to receive summons with regard to the instant suit.

The defence is also that the respondent has acted within the law and accorded recognition in line with the Industrial Relations Charter and to the trade union with simple majority and the right union relevant to the sector of the respondent and at the time there was no rival union.

The respondent has a unionisable workforce of 120 employees and this enable recognition to the Interested Party and there exists several valid CBAs. Out of the 120 employees, the claimant recruited 82 leaving a balance of 38 members of the Interested Party who retains recognition and has active CBAs.

On the claims made by the claimant, there is a rival union in the context of the respondent having recognised the Interested Party and the claims made should be dismissed.

Interested Party

The reply by the Interested Party is that as a registered trade union, the employees of the respondent have been members covered by CBA signed between them and the respondent. The resignation letters filed by the claimant with regard to members allegedly recruited from the respondent do not conform to the law as required under section 48 of the LRA.

There exists a valid Recognition Agreement and CBA between the Interested Party and respondent with regard to all unionisable employees.

The Interested Party case is also that the matter herein is *res judicata* the claimant having filed **Nakuru ELRC Cause No.10 of 2019** and cannot be allowed to initiate a similar suit as done herein and thus should be dismissed with costs.

That the letters of resignation allegedly signed by 50 members are unlawful and should not be admitted as they go contrary to section 48 of the LRA. These letters are not addressed to the employer who has a statutory duty to address and issue notice to the trade union before stopping trade union deduction and remittance to the IP. The orders sought by the claimant would be an illegality if allowed and the claim should be dismissed with costs.

Submissions.

The claimant submitted that Article 36 and 41 of the Constitution read together with section 4 of the LRA allow an employee the right to join a trade union of his choice and participate in its activities. Upon joining the trade union, section 54 of the LRA requires the employer to deduct and remit trade union to the union of chosen by the employee.

The claimant has since recruited 82 members out of 120 unionisable employees of the respondent and thus achieved a simple majority and should be recognised by the respondent and enjoy trade union deductions and remittances so as to commence negotiations of CBA. There are important issues with regard to salary scale and house allowance payments which can be addressed during the negotiations for a CBA.

The claimant has since submitted check off system to the respondent but there is no remittance of the due union dues as required under section 48 of the LRA. Since the claimant issued notice and there is no remittance of trade union dues, such dues should be paid from the accounts of the employer as stipulated under section 19 of the Employment Act, 2007 and made to pay costs of this suit. The claimant relied on the case of **Kenya Hotels & Allied Workers Union versus Sentrim Kenya Limited & KUDHEIHA Cause No.2145 of 2014**.

The respondent submitted that on the claims made, the claimant reported a dispute with the Minister and a conciliator was appointed but failed to allow that process to complete and moved the court prematurely. There is no communication from the labour officer that he failed to resolve the dispute.

The respondent also submitted that pursuant to section 48(6), (7) and (8) of the LRA an employer is stopped from making a deduction from an employee who has notified the employer that he/she has resigned from the trade union. The employees have never signed from the membership of the Interested Party who enjoy recognition and CBAs with the respondent. The letters attached to the Memorandum of Claim have not been served or received by the respondent to serve as resignation notices.

To ensure industrial peace the claimant should follow the correct procedure before filing suit.

The Interested Party submitted that the claimant is in violation of section 62(2)(a) of the LRA which requires that a dispute be reported to the Minister and where a conciliator is appointed to allow for the same and be issued with a certificate before moving the court which the claimant has failed to address.

The claimant is in violation of section 48 of the LRA which requires the employer to deduct and remit trade union dues to the recognised union until it has been served with a resignation letter which is not the case here. At the time of filing suit, 21 of the employees had left the service of the respondent which is a fact the claimant has ignored to bring to the attention of the court.

In the case of **Kenya Union of Printing, Paper Manufacturers and Allied Workers versus Packaging Industries Limited & Kenya Chemical and Allied Workers**

Union Cause No.1731 of 2011 the court held that there was no evidence that the claimant union had recruited employee voluntarily and thus it would be premature to conclude the recanted membership was voluntary.

Determination.

The interested party has raised the issue that the instant suit is *res judicata* and on the grounds that the claimant had filed Nakuru Cause No.10 of 2019 and has filed a similar suit on the same facts and seeking similar orders.

I have retrieved Nakuru Cause No.10 of 2019 where the court delivered a ruling on 8th July, 2019 with orders that such suit was struck out. The suit was obliterated. It ended there. It cannot be revived for any purpose.

Both the respondent and the Interested Party have submitted that instant suit is premature the claimant having filed a dispute with the Minister and a conciliator appointed but failed to follow through on the same to conclusion and thus contrary to disputes resolution under the LRA. Section 62 of the LRA requires a trade union to report a dispute to the Minister and upon the appointment of a conciliator; such conciliator should issue a Certificate of Conciliation or a Certificate of unresolved Dispute pursuant to section 69 of the LRA. To thus file suit before the relevant Certificate on the background of the claimant having moved the Minister and reported a dispute is abuse of process and the suit is premature.

In the case of **Kenya Union of Commercial, Food and Allied Workers versus Kenya Credit Traders Limited [2019] eKLR** the court in addressing the provisions of section 62 of the LRA held that;

*In this case, the dispute is recognition of a trade union and the claimant has admitted that she referred the dispute to the Labour C.S for conciliation under section 62 of the LRA. It follows therefore that the suit herein ought not to have been brought [to court] until the conciliation process was exhausted as required under section 73 of the Act. The said finding is fortified by **Kenya Union of Printing, Publishing, Paper Manufacturers, Pulp and Packaging Industries Vs Bags (E.A) Limited [2014]eKLR** ... also found that section 74 of the LRA has made conciliation of recognition disputes mandatory before urgently referral to the court but observed that:-*

“But once the parties have taken the route of Preindustrial Court conciliation, the process should be exhausted before the parties move to court.”

It is therefore important to appreciate that one a party has opted for the mode of dispute resolution as that of conciliation; the same cannot be circumvented to whatever purpose by moving the court to expect a different outcome. The conciliation process is lawful pursuant to section 62 of the LRA and where invoked, it should be allowed to complete unless there is an urgent matter for the court to address pursuant to section 73 and 74 of the LRA.

The court finds the suit is premature and should not proceed parallel with the conciliation process.

Even where the suit was properly before court, which is not the case here, recognition of a trade union by an employer is regulated in law and under section 54 of the LRA. Where a trade union has recruited employee from a trade union enjoying recognition and has running CBA with the employer, the provisions of section 48 must be given account.

It is not in dispute that the respondent and the Interested Party have a valid Recognition Agreement and within which several CBAs have been negotiated and registered and the last covering the years 2017/2019. In this regard, the members of the Interested Party enjoy the right to associate and join the trade union of choice save; such right(s) are regulated in law to ensure industrial peace.

Section 48(7) and (8) of the LRA provides that;

7. A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

8. An employer shall forward a copy of any notice of resignation he receives to the trade union.

The resignation notice(s) must be served upon the employer and who in return must serve the trade union affected by the exit of its member(s). See **Kenya Building, Construction, Timber and Furniture Industries Employees Union v Kings Developers Limited [2020] eKLR**

Where an employee has signed from his/her trade union and joined the trade union of choice, the notice must be served upon the employer and who is return must issue a 30 days' notice to the subject union with regard to the resignation. See **Kenya Hotels and Allied Workers Union versus Tourism Promotion Services (Management) Limited t/a Serena Lodges and Hotels; Kenya Union of Domestic, Hotels, Educational Institutions and Hotel Hospital Workers & another (Interested Parties) [2020] eKLR**

In this case, the claimant has attached annexures at page 15 to 50 of the Memorandum of Claim, a generic letter all dated 6th July, 2018 to the Interested Party and referenced *Withdrawal from KUDHEIHA Workers Union*.

This notice fall short of the statutory requirements outlined under section 48(8) of the LRA.

The court finds there exists a valid Recognition Agreement between the respondent and the IP. From such recognition, there are several valid CBAs.

Where the claimant has recruited members from the employees of the respondent, section 52 of the LRA allow the payment of trade union directly without comprise to the existing recognition of the Interested Party and terms of the existing CBAs registered with the court unless and until the claimant has complied with the provisions of the LRA.

Nothing in this Part prevents a member of a trade union from paying any dues, levies, subscriptions or other payments authorised by the constitution of the trade union directly to the trade union.

Had the claimant completed the conciliation it has initiated, the above matters would have been apparent and shall hence meet the costs due to the respondent and the Interested Party.

Accordingly, the suit herein is found premature and is dismissed. Costs to the respondent and the Interested Party.

DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF JANUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

.....and.....