



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. E020 OF 2020

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS...CLAIMANT

V

RETAIL MANAGEMENT SOLUTIONS LTD.....1ST RESPONDENT

HANDYMAN STAFFING SOLUTION.....2ND RESPONDENT

VINEYARD INTERNATIONAL COMPANY LTD.....3RD RESPONDENT

WEST KENYA SUGAR COMPANY LTD.....4TH RESPONDENT

RULING

1. The Kenya Union of Sugar Plantation & Allied Workers (the Union) entered into a recognition agreement with West Kenya Sugar Co Ltd (West Kenya) around 5 February 1997.
2. Sometime around June 2020, West Kenya decided to outsource labour from Retail Management Solutions Ltd, Handyman Staffing Solutions and Vineyard International Co. Ltd (outsourcing Respondents).
3. West Kenya, therefore, sent some of its employees to the Outsourcing Respondents.
4. On 13 October 2020, the Union wrote to the Outsourcing Respondents notifying them that several of the employees they had recruited and sent to West Kenya had been its members and therefore they should continue effecting monthly union deductions.
5. The Union followed up with fresh recruitment of the employees and it sent Form S(s) to the Outsourcing Respondents on 15 October 2020. It asked them to commence the deduction of union subscriptions.
6. The Union further notified the Outsourcing Respondents of more members through a letter dated 19 October 2020.
7. The Outsourcing Respondents did not effect union deductions.
8. The Registrar of Trade Unions had meanwhile issued a Circular on 25 September 2020 calling upon all registered trade unions to carry out elections for officials starting 4 January 2021.
9. The Union feared that the employees it had recruited would be locked out of the elections if the Respondents did not effect deduction of monthly union dues.
10. The stalemate prompted the Union to move the Court under a certificate of urgency on 17 November 2020 seeking orders

1. ...

2. THAT the 1st, 2nd and 3rd Respondents be ordered to immediately effect deduction of union dues from the wages/salaries of workers which have signed the union forms acknowledging membership into the Claimant union and to remit the monies so deducted in the Claimant's unions accounts by end of this month of November 2020.

3. **THAT** pending the hearing and determination of this suit, the four Respondents, their agents or managers and/or any other person(s) serving the interests of the Respondents be restrained/stopped/restricted and prohibited from threatening, harassing, victimising, terminating and/or dismissing any of the employees on account of union membership or this litigation.

4. **THAT** the Honourable Court be pleased to issue orders for continuous recruitment process and the Respondents be restrained and prohibited from interfering with the union recruitment process and that union officials be accorded access into the 4th Respondents premises for recruitment and representative purposes.

5. **THAT** the Court be pleased to issue such other orders or relief as it deems fit and just in the circumstances herein.

6. **THAT** the costs of this application be provided for by the Respondent.

11. When the Motion was placed before the Court on 17 November 2020, it directed that service be effected upon the Respondents.

12. On 19 November 2020, after hearing oral submissions, the Court directed the parties to file and exchange affidavits and submissions.

13. The following were consequently filed

a. The 1st and 2nd Respondents' replying affidavit(s) sworn by their Directors in opposition to the Motion on 4 December 2020 (should have been filed/served before 26 November 2020).

b. The Union's Secretary General's further affidavit on 21 December 2020 (should have been filed/served before 4 December 2020).

c. The Union's submissions on 21 December 2020 (should have been filed/served before 4 December 2020).

14. The Respondents submissions were not on file by the agreed timeline of 18 December 2020.

15. The Court has considered the Motion, affidavits and submissions on record.

Harassment of employees

16. Although seeking orders restraining the Respondents from victimising employees on account of union membership, the Union did not place before the Court any material which suggested that the Respondents had threatened to victimise any of the employees who had joined the Union.

17. Most of the material placed before the Court in this regard was historical (decided cases).

18. In the circumstances, the Court declines any general or at large order as proposed by the Union.

Union subscriptions

19. The Respondents did not deny that the Union had forwarded to them Form S.

20. However, in declining to effect union deductions, the Outsourcing Respondents asserted in the filed affidavits that the Union had not attained simple majority representation for purposes of a collective bargaining agreement; the exact membership of the Union had not been ascertained; a trade dispute had not been reported to the Cabinet Secretary, Labour and that it was necessary to appoint a Conciliator to ascertain the level of membership.

21. The conditions to be fulfilled before an employer can commence the deduction of union dues are outlined primarily in section 48 of the Labour Relations Act.

22. The first condition is the existence of an order by the Cabinet Secretary, Labour directed to an employer of more than 5 persons who have been recruited by a trade union.

23. In the instant case, the Union drew the attention of the Respondents to Gazette Notice No. 4980.

24. The second criteria is that the trade union should demonstrate that it had recruited more than 5 employees.

25. In the case of the Respondents, the Union sent to them Form S(s). The forms indicate that the Union had met and surpassed the 5 employee threshold.

26. The 1st Respondent admitted in the replying affidavit that the Union had recruited 268 out of 3023 employees while the 2nd Respondent indicated that the Union had a membership of about 10%.

27. In respect to the 3rd Respondent, Form S exhibited by the Union showed that it had recruited about 23 employees.

28. The third condition is that there is in place a specified bank account belonging to the trade union.
29. The Union set out the particulars of its designated bank account in the letters forwarding the Form S(s) to the Respondents.
30. The Respondents, as already indicated opposed the Motion on various fronts. One of the fronts was that the Union had not reported a trade dispute to the Cabinet Secretary.
31. Section 74 of the Labour Relations Act allows a trade union to move the Court under urgency if the dispute concerns recognition. By inference, therefore, a trade union may opt to move the Court before reporting a trade dispute concerning recognition, to the Cabinet Secretary, Labour.
32. In such case, it would be up to the Court on its own motion stay the proceedings to enable alternative dispute resolution to be attempted and/or for the parties to seek directions as to whether to refer the dispute to conciliation.
33. As to the objection based on the threshold of a simple majority, that is not a requirement for the commencement of union deductions. The simple majority threshold comes into play when the trade union is seeking recognition.
34. In the present case, the Union has demonstrated that all the statutory conditions had been fulfilled.
35. The deductions to be effected are from the employees' salaries and wages. The employer is not expected to pay from its funds unless the Court orders in situations where it has failed to give effect to the law and the instructions of the employees.
36. On this point, it is also noteworthy that under section 19(1)(f) & (g) of the Employment Act, 2007, an employee is free to dispose of his wages freely.
37. The Union sent the Form S(s) to the Respondents around 15 October 2020.
38. By dint of section 48(3) of the Labour Relations Act, the Respondents should have commenced effecting the deductions by 15 November 2020 (now past).
39. In consideration of the above the Court orders that
- a. The Respondents to effect deduction of union dues from the wages/salaries of workers who have signed Forms S(s) acknowledging membership of the Claimant Union and to remit the monies so deducted into the Claimant's union's accounts from January 2021.
 - b. In default, the Respondents to pay from their own funds such accrued union subscriptions backdated to November 2020.
40. The Court notes that it had directed the Respondents to commence the deduction of union dues from November 2020 while giving directions on 19 November 2020. In the further affidavit, the Secretary-General of the Union deposed that the order had not been complied with. If that assertion is true, then it is regrettable.
41. Because of the anticipated and/or on-going social partnership between the Union and the Respondents, the Court orders that costs be in the cause.

Delivered through Microsoft teams, dated and signed in Kisumu on this 18th day of January 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Union Mr. Akhonya, Branch Secretary

For 1st and 2nd Respondents Reuben Masese & Co. Advocates

For 3rd Respondent M. Kiveu & Co. Advocates

For 4th Respondent did not participate

Court Assistant

Chrispo Aura