REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 761 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

KENYA GLASS WORKERS UNION.....CLAIMANT

VERSUS

KENYA ENGINEERING WORKERS UNION.....1ST RESPONDENT

HERBATULIAH BROTHERS LIMITED.....2ND RESPONDENT

JUDGMENT

The claim herein was instituted by Kenya Glass Workers Union, a duty registered trade union representing workers in the glass and related sectors. The 1st Respondent is also a registered trade union representing workers in the engineering sector. The 2nd Respondent is a limited liability company whose operations straddle both the glass and engineering sectors. The 2nd Respondent has valid recognition agreements with both the claimant union and the 1st Respondent union.

It is the averment of the claimant that between 12th September and 7th October 2019, the 1st Respondent colluded with the Federation of Kenya Employers (FKE) an employer's organisation also registered under the Labour Relations Act, to recruit the 2nd Respondent's employees who were members of the claimant union. That thereafter the Federation of Kenya Employers forwarded check off forms (Form S in the Labour Relations Act) to the 1st Respondent vide a letter dated 18th October 2019. The claimant union further avers that the 1st Respondent sought help and manpower of FKE to access the employer's premises to recruit its members who are already covered under the CBA between the claimant and the 2nd Respondent.

The claimant avers that the conduct of the 1st Respondent in collusion with FKE has brought industrial unrest between the claimant and the 1st Respondent as well as FKE. It seeks the intervention of this court to stop the encroachment.

In the memorandum of claim dated 11th November 2019, the claimant seeks the following orders –

(a) A declaration that that the action by the Respondents are null and void

(b) A permanent injunction barring the Respondents from engaging into such industrial malpractices.

(c) An order expunging the check off forms manufactured by the 1st Respondent and further order barring the 2nd respondent from recognising the 1st Respondent and or effecting any deductions and remittance to the 1st respondent.

(d) Cost of this claim be provided for.

Together with the memorandum of claim the claimant filed a notice of motion under certificate of urgency seeking the following orders:–

1. Spent.

2. The Court be pleased to issue an injunction Order for stay of deduction of union dues intended to be deducted by the 2nd Respondent on behalf of the 1st Respondent as per the 1st respondents letter dated 25th September 2019 pending hearing and determination of this application.

3. That pending hearing and determination of this claim, there be a stay of deduction and remittance of any union dues from the purportedly recruited members of the 1st respondent.

4. That cost of this Application be provided for.

The application is supported by the affidavit of Maurice Okoth, the Secretary General of the claimant union and the grounds on the face thereof which are a reiteration of the facts pleaded in the

Memorandum of claim.

In reply to the application the 1st Respondent union filed a replying affidavit of Wycliffe A. Nyamwata, its Secretary General in which he deposes that long before the claimant signed a recognition agreement with the 2nd Respondent there were two (2) unions representing the workers of the 2nd Respondent. These were the 1st Respondent and Kenya Union of Commercial Workers. That the 2nd Respondent had recognition agreements and had negotiated several CBAs with both unions who represented the two different departments of the Respondent. One department deals with making and decorating aluminium frames which is engineering work. That the frames are fitted with glass, hence the glass department.

Mr. Nyamwatta deposes that its CBA with the 2nd Respondent was at the time of swearing his affidavit pending before this court under ELRC Cause No. 45 of 2019. That the claim was instituted following the 2nd Respondent's refusal to negotiate the CBA insisting that the 1st Respondent adopts the CBA between the 2nd Respondent and the claimant. That upon filing Cause No. 45 of 2019, the 2nd Respondent colluded with the claimant to move the members of the 1st Respondent to the claimant.

Mr. Nyamwatta denies that the 1st Respondent colluded with FKE and explains that the 2nd Respondent who is a member of FKE sought FKE assistance when it received check off forms from its employees in favour of the 1st Respondent together with letters resigning from membership of the claimant. That since the 2nd Respondent denied having received the check off forms, it was agreed that the 1st Respondent submits the same to the 2nd Respondent through FKE. That there is therefore no collusion between the 1st Respondent and FKE.

The 1st Respondent also filed a notice of preliminary objection dated 21st November 2019 and an application by way of notice of motion dated 4th December 2019. In the preliminary objection, it raises the following two issues –

a) That the application offends Rules 3, 4 and 5 of the Employment and Labour Relations Court (Procedure) Rules 2019 on how to institute a suit.

b) That on this ground 1st Respondent seeks that the Court be pleased to struck out this Application with costs of Kshs.50,000/= to the 1st Respondent herein.

In the notice of motion, the 1st Respondent seeks the following orders –

1. Spent.

2. That, the Court be pleased and issue an interim Order against the Respondent to continue complying with section 48 of the Labour Relations Act, 2007 by deducting Union dues from her unionisable employees but not remitting the same to any Union that is the Claimant and 1st Respondent herein pending the hearing and determination of this Application

3. That, the Court be pleased to set aside and or vacate her Orders issued on 12th day of November 2019.

4. That, the Union dues retained as per Order one (1) herein be remitted to the 1st Respondent in accordance with the check-off forms [form 'S'] as per Appendix WAN 2 at page 61 to 112 of the Replying Affidavit filed in Court on 21st day of November, 2019.

5. *That, the cost of this application be met by the Claimant* herein.

The grounds in support of the application are that –

1. That, the orders issued by this Court on the 12th day of November 2019 are causing confusion as the same is based on a letter that is not filed in Court.

2. That the 2nd Respondent had already commenced deductions and remittance of l inion dues to the 1st Respondent as per her (1st Respondent] letter dated 25th day of September 2019 and other various letters forwarding check-off forms delivered at the 1st Respondent and attached to the 1st Respondent's Replying Affidavit as Appendix WAN2 at page 61 to 112.

3. That, the Orders sought have already overtaken by events since the Respondent has already compiled with the mandatory provision of the law that is section 48 of the Labour Relations Act, 2007.

4. That, Orders sought violated the mandatory provisional of the law that are section 19 of the Employment Act, 2007 and Section

48 of the Labour Relations Act 2007.

5. That, both the Orders issued and those sought are based on a claim that is not properly before the Court as per rules of the Employment and Labour Relations Court (Procedures) Rules, 2016.

6. That, the Memorandum of Claim is not provided for with any Labour provision as a matter to be referred to the Court under certificate of urgency.

The application is supported by the affidavit of Patrick M. Makale, an Industrial Relations Officer of the 1st Respondent in which he reiterates the grounds in support of the application.

The 2nd Respondent filed a Statement of Defence in which it denies that the 2nd Respondent has ever colluded with FKE to recruit its members or interfered with union at its workplace. It is the 2nd Respondents averment that the 1st Respondent purported to recruit members of the claimant and left documents at FKE who forwarded the same to the 2nd Respondent's office. That when the claimant was informed about this, it filed the instant claim.

It is the 2nd Respondent's position that it has recognition agreements with two (2) trade unions. That the first union represented employees in engineering department which has now been closed and some employees moved to the glass department which employees are represented by the claimant.

It is further the 2nd respondent's position that it has a running CBA with the claimant and has never interfered with the running of the affairs of either of the two unions.

Upon hearing the claimant's application, this court on 11th November 2019 made the following orders –

1. Spent

2. That the 2nd Respondent is hereby restrained from executing/implementing the letter dated 25th September 2019 from Federation of Kenya Employers purporting to forward deduction of Union forms to the 1st Respondent for the 2nd Respondent pending further orders of this court.

When the matter came up for directions on 18th December 2019, the court directed that all applications and the preliminary objection be consolidated and heard together with the claim. Parties thereafter filed written submissions.

Issues for Determination

I have carefully considered the submissions on record. It is not in dispute that the 2nd Respondent operates in the sectors covered by the claimant being glass and related sector, and the 1st Respondent being the engineering sector. As set out in paragraph 1 of the 2nd Respondent's defence, it deals in both glass and aluminium frames for balustrades, office partitions, sliding doors, folding doors, bus windows and glass showers which are within the engineering sector.

It is further not disputed that the 2nd Respondent has recognition agreements and has negotiated collective bargaining agreements with both the claimant and the 1st Respondent unions.

It is also evident from the pleadings that the 1st Respondent, the Engineering Workers Union, has had a recognition agreement with the 2nd Respondent since 1986, according to the affidavit of Wycliffe A. Nyamwata which fact has not been contested by either the claimant or 2nd Respondent. The Recognition Agreement with the claimant was signed in 2012.

The issues for determination are therefore whether the claimant has established interference with its members by the 1st Respondent, whether the claimant's application is bad in law and ought to be struck out, as pleaded in the preliminary objection field by the 1st Respondent Union and whether the claimant is entitled to the remedies sought in the claim.

I will start with the grounds raised in the preliminary objection by the 1st Respondent. Rules 3, 4 and 5 of the Employment and Labour Relations Court Act, provides as follows –

3. Sittings of the Court

The Court may sit in any station established by the Chief Justice in consultation with the Principal Judge.

4. Institution of claim

(1) A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim

setting out—

(a) the name, physical and mailing address and full particulars of the claimant;

(b) the name, physical and mailing address and the description of the respondent;

(c) the name, physical and mailing address of any other party involved in the dispute;

(d) the facts and grounds of the claim specifying issues which are alleged to have been violated, infringed, breached or not observed and in the case of a labour dispute, the rights of the employees not granted or to be granted, any other employment benefits sought and the terms of collective bargaining agreement on which the jurisdiction of the Court is being invoked;

(e) any principle, policy, convention, law, industrial relations issue or management practice to be relied upon;

(f) a schedule listing the documents that are material and relevant to the claim; and

(g) the relief sought.

(2) A statement of claim filed under paragraph (1) shall be accompanied by an affidavit verifying the facts relied on.

5. Statement of claim issued pursuant to the Labour Relations Act (No. 14 of 2007)

(1) Where a labour dispute is referred to the Court in accordance with the provisions of the Labour Relations Act (No. 14 of 2007)—

(a) the statement of claim shall be signed by the authorized representative of the party referring the labour dispute to the Court; or

(b) where the labour dispute has been a subject of conciliation, the statement of claim shall be accompanied by—

(i) a report by the conciliator on the conciliation process supported by the minutes of the conciliation meeting; and

(ii) a certificate of conciliation issued by the conciliator under section 69(a) of the Labour Relations Act.

(2) Where the labour dispute has been a subject of conciliation and the conciliator has not issued a certificate, the statement of claim shall be accompanied by an affidavit sworn by the claimant or by the representative of that claimant attesting to the reasons why the conciliator has not issued a certificate of conciliation.

(3) Where no conciliation has taken place, the statement of claim shall be accompanied by an affidavit sworn by the claimant or by the representative of that claimant attesting to the reasons why conciliation has not taken place.

All these are rules of procedure. Section 20(1) of the Employment and Labour Relations Court Act provides as follows –

20. General powers of the Court

(4) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities:

Provided that the Court may inform itself on any matter as it considers just and may take into account opinion evidence and such facts as it considers relevant and material to the proceedings.

These provisions echo Article 159(2)(d) which provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that *"justice shall be administered without undue regard to procedural technicalities among others"*.

Procedural technicalities can therefore not be the basis for striking out pleadings. In any event, the prayers in the preliminary objection are to strike out the application and not the claim. Striking out the application and leaving the claim would serve no purpose.

I do think the preliminary objection has any merit, and accordingly dismiss the same.

The application dated 4th December 2019 filed by the 1st Respondent Union seeks in the main, the setting aside and vacation of the orders issued by this court on 12th November 2019 in favour of the claimant. Since these orders will become redundant upon the determination of the claim, I find no value in making any determination on the same. In any event, the grounds raised in support of the application are the same as those raised in opposition and defence to the memorandum of claim and would therefore be considered alongside the 1st Respondent's defence to the claim.

Turning to the issues of determination in the claim, as I have already set out above, the issue herein is whether the 1st Respondent has interfered with the members of the claimant. In support of its claim, the claimant produced check off forms signed by several employees in

favour of Kenya Engineering Workers Union, the 1st Respondent between 11th September and 5th October 2019. It also produced a letter dated 18th October 2019 written by one L. W. Kariuki of FKE addressed to the Managing Director, Hebatullah Brothers Limited, the 2nd Respondent. The letter which is only one paragraph reads:-

> *"**REF: DEDUCTION ON UNION DUES FOR KEWU***
>
> *Enclosed herein please find forms bearing names of 192 employees who have joined the union of KEWU for your attention and FNA. This is as per our agreement yesterday in that I was to forward the names to you.*
>
> *Yours Faithfully*
>
> *SIGNED*
>
> *L.W. KARIUKI*
>
> *MANAGER, INDUSTRIAL RELATIONS*
>
> *cc. The General Secretary, Kenya Engineering Workers Union,*
>
> *P.O. Box 73987 – 00200 NAIROBI"*

The only other evidence produced by the claimant is the recognition agreement between the claimant and Hebatulla Brothers Limited, the 2nd Respondent dated 1st August 2012 and the Collective Bargaining Agreement between the claimant and the 2nd Respondent herein dated 27th August 2018 with an effective date of 2 years effective 1st July 2018. The claimant further produced the certificates of registration of the said CBA by this court dated 20th August 2018 (sic). It would appear that the date on the certificate of registration of the CBA is erroneous as it predates the CBA which is dated 27th August 2018.

For comparison with this evidence, the 1st Respondent produced its recognition agreement dated 16th November 1986, a CBA dated 7th November 2016 and an earlier CBA dated 1st January 2011.

It further produced a letter from L. W. Kariuki of FKE dated 5th November 2019 inviting the 1st and 2nd Respondents for a meeting for CBA negotiations at FKE on 19th November 2019.

The 1st Respondent further produced letters from employees of the 2nd Respondent resigning from the membership of the 1st claimant in October 2018 and check off forms of employees joining membership of the 2nd Respondent in September and October 2019. The check off forms together with letters forwarding the same to the 2nd Respondent are the same as the ones that were produced by the claimant. The 1st respondent further produced letters written by employees of the 2nd Respondent resigning from the membership of Kenya Glass Workers Union, the claimant. The letters are addressed to the 2nd Respondent and copied to the claimant union.

The 1st Respondent further filed a list of employees of the 2nd Respondent who it states are its members and a cheque from the 2nd Respondent in the sum of Kshs.64,080/- on account of union dues. The cheque is dated 15th November 2019 and is drawn on Habib Bank AG Zurich, Habib House, Koinange Street.

From the foregoing it is evident that some of the 2nd Respondent's employees were originally members of the 1st Respondent union but resigned in October 2018 to join the membership of the claimant union. Again in September and October 2019 some employees resigned from the membership of the claimant and joined the 1st Respondent's membership.

Section 4(1) of the Labour Relations Act provides that every employee has a right to join a trade union and a right to leave a trade union. It would appear that because of the two rival union both of whom have recognition agreements with the 2nd Respondent, the employee keep moving from one union to the other and vice versa at will. This is obviously not good for stable industrial relations.

However, taking into account the provisions of Section 4(1) of the Labour Relations Act, the Employees are within their right to resign from the membership of the one union and join the other. The claimant having been a beneficiary of an exodus of members from the 1st Respondent, has no moral authority to cry wolf when the exodus is from its membership to the 1st Respondent.

The foregoing notwithstanding, I agree with the sentiments of Rika J. in **Bakery Confectionery, Food Manufacturing and Allied Workers Union (K) v Mombasa Maize Millers Limited and 3 Others (2016)** that

> *"... Recruitment of employees is a continuous process, and grant of recognition does not end the requirement for the trade union to remain relevant, most representative, and with a healthy majority in the collective bargaining unit..."*

And further that -

> *"Recognition, once granted must therefore not be viewed as cast in bronze. Labour is highly mobile. It is not inconceivable that*

Employees upon which the initial recognition is made, all move out of the workplace for various reasons, after recognition is granted, leaving their Trade Union with an empty shell of a collective bargaining unit. An Employer may change its business, in which case the Trade Union's relevance is lost."

It is therefore in the interest of the claimant herein to remain relevant by maintaining a majority of its membership from among the 2nd respondent's employees. The fact that the employees moved out to join the membership of another union speaks loudly about the perception of the employees of the union. It is unconscionable for the claimant to expect that by virtue of recognition its members are bound to remain in its membership, or that they will always use the court to maintain its membership even where it is so evident that the employees are not happy with the union."

The claimant must therefore up its game to keep its members from *"defecting"* to the 1st Respondent.

This being an industrial relations issue that was created by the 2nd Respondent when it entered into a recognition agreement with two separate unions, the only way to resolve the same is by one union recruiting all the unionisable employees and pushing out the other union so that the 2nd Respondent can terminate the recognition agreement with the union that has no members. Before this is done, the two unions must each be content with the presence of and competition from the other union and ensure that it keeps as many of the employees in its membership as it can.

Conclusion

From the foregoing, it is clear that the claimant has not proved that the 1st Respondent colluded with the FKE and the 2nd Respondent to recruit its members. It has therefore not persuaded the court that it is entitled to the orders sought in memorandum of claim. The result is that the claim is dismissed and the orders granted on 12th November 2019 discharged. The 2nd Respondent is directed to deduct and remit union dues in accordance with the check off forms received from each of the two unions.

If any union dues were collected and retained by the 2nd Respondent in respect of check off forms from the 1st Respondent, it is directed to release the same to the 1st Respondent.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE