REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E643 OF 2020

FIDELIS OMWAMBA ONSONGO & 1648 OTHERS.....APPLICANTS

-VERSUS-

TAILORS & TEXTILE WORKERS UNION.....1ST RESPONDENT

GLOBAL APPAREL (EPZ) LIMITED.....2ND RESPONDENT

RULING

1. The Applicants/Claimants filed a Notice of Motion on 12.10.2020 seeking orders that:

a. Spent.

b. Pending the hearing and determination of this application, the 2nd Respondent be restrained from effecting any deduction on the Claimants' salaries on account of union dues.

c. Pending the hearing and determination of this casue, the 2nd Respondent be restrained from effecting any deductions on the Claimants' salaries on account of union dues.

d. The costs of this application be in the cause.

2. The application is premised on grounds that:

a. The Applicants are all employed by the 2nd Respondent and are not members of the 1st Respondent.

b. The 2nd Respondent has served the Applicants with a notice to start deducting union dues for remittance to the 1st Respondent.

c. The intended deductions are unlawful and unless the Court urgently intervenes, the Applicants shall suffer immense financial losses as a result of the intended unlawful deductions.

3. The Application is supported by the Affidavit of Fidelis Omwamba Onsongo the 1st Applicant , on behalf of the other applicants, sworn on 12.10.2020. She reiterated the grounds set out on the face of the motion.

1st Respondent

The 1st Respondent opposed the application vide a Replying Affidavit sworn by Rev. Joel Kandie Chebii its General Secretary sworn on 16.10.2020. He denied the Applicants 'allegation that they have colluded with the 2nd Respondent to have unlawful deductions effected from their salaries.

4. He averred that there exists **Cause ELRC Cause No. 678 of 2018** between the 2nd Respondent and itself in which the Court issued orders on 21.10.2020 dismissing the application for stay to prevent sentencing of the applicants' herein; that the orders were not complied with leading to the filing of the contempt application against the 2nd Respondent which was determined on 10.7.2020 when the Court stated that the failure by the Respondent to deduct and remit union dues was in contempt of the Court's orders.

5. Further, he contended that he is aware that the 2nd Respondent has been ordered to effect union deductions from the members and unionisable staff who are enjoying benefits from the Union's Collective Bargaining Agreement (CBA) by way of the payment of agency fees in terms of section 49 of the Labour Relations Act.

6. He further averred that the notice by the 2nd Respondent to its employees arises from the orders issued by the Court and unless the orders are complied with the instant suit is baseless and misconceived, and it is premised on non-disclosure of material facts relating to the existence of the aforementioned suit and the orders granted. Accordingly, he contended that the Application lacks merit and should be dismissed.

2nd Respondent

7. The 2nd Respondent filed a Replying Affidavit sworn on 28.10.2020 by its Administrative Manager, Mr. Tom Mboya. He deposed that the 2nd Respondent was initially a member of the EPZ Apparel Manufacturers and Exporters Group of the Federation of Kenya Employers (FKE) which disintegrated. He admitted that the Respondents herein currently have a Recognition Agreement and CBA signed between them.

8. He admitted that the Applicants are currently their staff who are categorised as unionisable employees but denied the allegation that there is collusion by the Respondent to defraud the Applicants. He further admitted that the 2nd Respondent was compelled to effect union deductions for its 1644 employees vide Court Order in **ELRC Cause No. 678 of 2018 Tailors and Textiles Workers Union v Global Apparels (EPZ) Limited**.

9. He averred that in March 2018, the 1st Respondent forwarded check off forms in respect of the employees listed therein; the check off forms were riddled with errors as the 113 names were duplicated, 154 were non-existent employees, 210 listed employees had left employment and other signatures were not attributable to the employees.

10. He averred that in May 2019 they received letters from their employees who were members of the 1st Respondents re-emphasizing their resignation from membership of the 1st Respondent but upon forwarding the letters to the 1st Respondent, it declined to acknowledge them, resulting in the ruling by Wasilwa J. on 30.4.2019.

11. In complying with the Court's order, on 14.5.2019 they notified the affected staff of the impending deductions and as a result the staff went on a go slow on 11.5.2019 and 30.5.2019, and threatened to go on strike which would have crippled operations. He further contended that the company once again communicated to the 1st Respondent about the challenges arising but the same was met with hostility.

12. He averred that to date, majority of the 2nd Respondent's unionisable employees have consistently maintained that they are not members of the 1st Respondent and have threatened industrial action should the deductions be effected against their earning. He contended that the 2nd Respondent is an innocent stakeholder whose hands are tied by the wishes of its employees and whose attempts have so far cost the 2nd Respondent immensely in terms of time and resources spent in Cause No.678 of 2018 where the 2nd Respondent was fined on account of contempt of the order.

13. He averred that the 1st Respondent has all along been reprehensible and bullying in nature despite opposition from the very persons they seek to represent whose interests they are serving. He contended that the 2nd respondent is ready and willing to have the Court conduct a site visit if need be to ascertain the position and that the circumstances of the notion of collusion between the Respondent could not be further from the truth.

Applicants' rejoinder

14. In response to the 1st Respondent's Replying Affidavit, the Applicants filed a Further Affidavit also sworn by the 1st Applicant on 30.10.2020 in which they maintained that there is an outright collusion between the Respondents to continue unlawfully making deductions from the Applicants' salaries despite being informed that they are not members of the 1st Respondent.

15. They denied being parties to ELRC Cause No. 678 of 2018 and averred that the orders issued in that suit cannot in any way bind the Applicants who are not party to that suit.

16. The Application was disposed of by way of written submissions.

Applicants' submissions

17. The Applicant relied on Article 36 (2) of the Constitution and section 4 (1) (c) of the Labour Relations Act and submitted that the 1st Respondent's actions are geared towards forcibly enjoining them into membership of the 1st Respondent against their will and in violation of their rights. They relied on the decision in **Kenya Union of Printing, Paper Manufacturers and Allied Workers v Packaging Industries Ltd & ano [2014] eKLR** where the Court held that the section 4 (1) of the Labour Relations Act and Article 41 of the Constitution recognise the right of employees to associate and dissociate.

18. They further relied on **Aviation Allied Workers Union v Air Kenya Express Ltd & ano** where the Court held also that the right to belong to a union must be accompanied by the right not to belong. Finally, they submitted that they have demonstrated that they have a prima facie case with a probability of success and prayed for the orders sought to be granted.

1st Respondent's submissions

19. The 1st Respondent submitted that arising from the difference between the 2nd Respondent and the Union, the 2nd Respondent sought to frustrate the union by refusing to remit union dues in terms of section 49 of the Labour Relations Act and this culminated to **ELRC Cause No. 678 of 2018** which the Court found in favour of the union.

20. It further submitted that the 2nd Respondent instigated the employees to file the present suit under the mistaken belief that they would not pay union dues and agency fees. According to it, the Applicant's attempt to stop deductions should have been considered if they so wished under **ELRC Cause no. 678 of 2018** and thus this matter is *subjudice*.

21. It argued that even if the Applicants have resigned from the union membership they are enjoying the benefits of the terms and conditions of the Union's negotiated CBA with the employer, and as such they are liable to pay union agency fees of 2.5% in accordance with the provisions of section 49 of the Labour Relations Act.

22. It relied on **Universities Academic Staff Union v Jomo Kenyatta University of Agriculture and Technology & 6 Others [2020] eKLR** where the Court ordered for deduction and release of agency fees towards the Union. Finally, it submitted that the application lacks merit, is misconceived and should be dismissed with costs.

2nd Respondent's submissions

23. The 2nd Respondent submitted that under section 48 of the Labour Relations Act, it is under an obligation to deduct union dues upon receipt of the statutory forms. It however submitted that pursuant to section 48 (6) of the Labour Relations Act, it is barred from deducting union dues from its employees for onward transmission to the Union where there is resignation from the membership of the 1st Respondent.

24. It further argued that the relationship between the Applicants and the 1st Respondent is underpinned by the freedom of association as safeguarded by Article 41 of the Constitution and section 4 (1) of the Labour Relations Act. It submitted that the withdrawal of membership by the Applicants from the 1st Respondent directly impacts on the its ability to effect or otherwise deal with the issue of deduction of union dues which is the subject of this suit.

25. Further, it submitted that in order for the 1st Respondent to receive agency fees it must follow the prescribed procedure in section 49 of the Labour Relations Act which it has failed to do. It contended that the 1st Respondent's Replying Affidavit is misleading.

26. It reiterated that the move by the 2nd Respondent to deduct union dues for onward transmission to the 1st Respondent is borne out of Rulings in ELRC Cause no. 678 of 2018. It maintained that union deductions go hand in hand with membership and without the latter, the 2nd Respondent cannot effect union deductions. It maintained that the mechanism to provide for agency fees has not been instituted hence it is handicapped. It referred the Court to the decision in **Kenya Jockey and Betting Workers Union v Resort Kenya Limited [2014] eKLR**.

27. Finally, it denied having colluded with the 1st Respondent and sought that justice be done.

Analysis and determination

28. The main issue for determination arising from the application is whether the 2nd Respondent should be retrained from deducting the Applicant's union dues in favour of the 1st Respondent pending the hearing and determination of the suit herein. The law applicable to the instant application remains holding by the Court of Appeal in **Giella –vs- Cassman Brown & Co. Ltd. [1973] E.A. 360** where it was held that:

> **"The conditions for the grant of an interlocutory injunction are now settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."**

Prima facie case

29. A Prima facie case was defined by the Court of Appeal in **Mrao Limited v First American Bank of Kenya limited & 2 others [2003] eKLR** as follows: -

> **"…in civil cases is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

30. The Applicants contended that they are not members of the 1st Respondent but the Respondents have colluded to deduct union dues for remittance to the 1st Respondent. The 1st Respondent averred that the notices arose from the orders in **ELRC Cause 678 of 2018** between the 2nd Respondent and itself and the 2nd respondent has instigated the applicants to withdraw union membership and to file this suit to frustrate the right to collect union dues from the employees. The 2nd Respondent has denied the alleged collusion and maintained that the intended deduction of union dues was done pursuant to the said Court order. It further contended that further deductions have now been frustrated

after the employees withdrew membership, and the 1st Respondent failed to institute the process of collection of agency under section 49 of the labour Relations Act.

31. The court appreciates that under Article 41 (2) (c) of the Constitution, every employee has a right to form, join or participate in the activities of a trade union. Further, an employee has the right to join or leave a Union as provided under Section 4 (1) of the Labour Relations Act which states:

> **"Every employee has the right to—**
>
> **(a) participate in forming a trade union or federation of trade unions;**
>
> **(b) join a trade union; or**
>
> **(c) leave a trade union."**

32. The Applicants withdrew membership from the 1st Respondent following the notice by the 2nd Respondent to the union members that from their salaries would be deducted. The notice dated 7.10.2020 stated as follows:

> **"TO: TO ALL EMPLOYEES**
>
> **FROM: HUMAN RESOURCE OFFICE**
>
> **SUBJECT: NOTIFICATION OF UNION DEDUCTIONS ON THE CHECK OFF FORMS FROM TTW UNION**
>
> **This notice refers to those employees whose names had been presented to the employer by T.T. Workers Union through check off forms.**
>
> **The said employees are hereby notified that their monthly salaries shall be subjected to deduction at the rate of 2.5% basic pay as union dues effective date, October, 2020 salary.**
>
> **This is pursuant to the court order issued by her Lordship Justice Wasilwa on 30.04.2019.This shall apply only to those employees who were in the check off forms and are still in our employment…"**

33. Having considered the material presented to the Court, what is at stake in this application is the applicants rights to join or leave a trade union, on the one hand, and the 1st respondent's right to payment of union dues and Agency fees after concluding a CBA, and the 2nd respondent's obligation to obey Court orders and comply with the law, on the other hand.

34. In this case, I find that the applicants have not proved that the respondents have colluded to deduct union dues from their wages unlawfully. The evidence on record show that respondents have signed a recognition agreement and concluded a CBA on behalf of the applicants. It is also clear that the deduction of the union dues is pursuant to a court order and not due to the voluntary action by the 2nd respondent.

35. However, there is no doubt that the Applicants cannot be forced to remain in the 1st respondent union, or to continue paying union dues after withdrawing from the union. Consequently, I must hold that the applicants have made out a prima facie case with probability of success because their right to join or leave a trade union under the constitution and the Labour Relations Act will be infringed by the deduction of union dues from their salary in favour of the 1st respondent.

36. I gather support from **Kenya Jockey case**, cited by the 2nd Respondent, the Court held:

> **" … This would then mean that since the employer and employee share a relationship of an employment contract, any deductions from the employer's salaries, wages or dues must be with the consent and approval of the employee. Where an employee no longer wishes to be a member of any union, such an employee must notify his resignation to the employer for the same to take effect. The employer being the one who remits union and agency fees to the union, must then, in the alternative of submitting the union dues or agency fees forward the notice of resignation hence stopping the union deductions."**

Irreparable harm

37. Irreparable harm is understood to mean damage or injury which cannot be computed and compensated in monetary terms. In **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR** Mativo J. described irreparable harm as follows:

> **"In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured."**

38. In this case, the loss to be suffered is deduction of union dues or Agency fees from their salaries. It means that the injury at stake is

quantifiable into monetary terms and capable of monetary compensation. The applicant has not been shown that the 1st respondent will not be able to refund the deducted union dues or agency fees if after the trial the court finds that the deduction was unlawful and unjustified. Therefore, I find and hold that the applicant has not proved that they will suffer irreparable harm if the injunction is withheld.

39. Having found that the applicants have not proved that they will suffer irreparable harm, the Court need not proceed to consider the balance of convenience since the principles of interlocutory injunction are cumulative.

Balance of convenience

40. The foregoing notwithstanding, I have considered the aforesaid stakes involved herein above in order to balance between the applicants' right to join or leave a trade union, the 1st respondent's right to payment of union dues or Agency fees from employees who are benefiting from a CBA negotiated by it, and the 2nd respondent's obligation to obey Court orders and to comply with the law with regard to deduction of union dues or agency fee from its employees' salaries.

41. In my considered view, the balance of convenience tilts against the applicants because granting the injunction sought would have the effect of defeating the earlier orders made in **ELRC Cause 678 of 2018** whereby the 2nd respondent was ordered to deduct union dues from the applicants and remit to the 1st respondents. On the other hand, the balance of convenience tilts in favour of the 1st respondent because the section 48 and 49 of the Labour Relation Act entitles it to deduction of union dues and Agency fee from the wages of the unionisable staff who like the applicants enjoy the benefits under a CBA negotiated by it.

42. It has been admitted by the 2nd respondent that there is a Recognition agreement and CBA signed by the respondents herein and the applicants are benefiting from the same. It follows that even if the applicants withdrew membership after signing of the CBA, they are automatically liable to pay agency fees to the union by dint of Section 49 (5) of the Labour Relations Act which provides that:

> **"A member of a trade union covered by a collective agreement contemplated by subsection (1) who resigns from the union, is <u>immediately liable</u> to have an agency fee deducted from his wages in accordance with this Section." (Emphasis added)**

43. In view of the foregoing, the applicants are bound to have agency fees deducted from their wages which they are enjoying courtesy of the fruitful negotiation done on their behalf by the 1st respondent. The said agency fees is an automatic levy resulting from their resignation from the trade union and it is equivalent to the union dues they would have paid had they continued with their union membership. Consequently, the 2nd respondent is bound to comply with the above statutory provision and the court orders in **ELRC Cause 678 of 2018** to deduct agency fee equal to union dues pending the hearing and determination of this suit.

Conclusion and disposition

44. I have found that the Applicants have demonstrated a prima facie with good chances of success since their rights under Article 41 (2) (c) of the Constitution and section 4 (1) of the Labour Relations Act would be infringed upon. However, I have also found that they have failed to prove that they stand to suffer irreparable harm if the injunction order is declined. Finally, I found have that the balance of convenience is against the claimant because the 1st respondent is entitled to be paid union dues or agency fees to be deducted from the applicants for negotiating a CBA on their behalf, on the one hand while the 2nd respondent is bound to comply with the Court orders in **ELRC Cause 678 of 2018** and the statutory provisions that bind it to deduct and pay union dues or agency fee in favour of the union. Consequently, I dismiss the application with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY MARCH, 2021.

ONESMUS N MAKAU

JUDGE

<u>ORDER</u>

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE