



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 424 OF 2019**

(Before Hon. Lady Justice Maureen Onyango)

DUNCAN MWANGI..... 1<sup>ST</sup> CLAIMANT  
MARK ACHILA.....2<sup>ND</sup> CLAIMANT  
GEORGE GITAHL.....3<sup>RD</sup> CLAIMANT  
GEORGE NYAWANDA..... 4<sup>TH</sup> CLAIMANT  
GEORGE METHO..... 5<sup>TH</sup> CLAIMANT  
DANIEL KIMAGUT.....6<sup>TH</sup> CLAIMANT  
BENSON MUANGE.....7<sup>TH</sup> CLAIMANT  
KENNEDY KEBUTT.....8<sup>TH</sup> CLAIMANT  
JESSE MUIGAI.....9<sup>TH</sup> CLAIMANT  
THADEUS WASWA..... 10<sup>TH</sup> CLAIMANT

(Suing on behalf of 172 Claimants)

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED.....RESPONDENT**

**AND**

**KENYA PETROLEUM OIL WORKERS UNION.....INTERESTED PARTY**

**JUDGMENT**

The claim herein was instituted vide the Claimants' statement of claim dated 24<sup>th</sup> June 2019. It is the Claimants' averments that on 21<sup>st</sup> January, 2010 they applied for union membership of the Interested Party and directed the Respondents to effect deductions of Union dues and remit to the Interested Party in compliance with Sections 48 and 49 of the Labour Relations Act by submitting check off forms from by the Interested Party duly signed by them. That to date the Respondent has failed to effect the checkoffs as directed by the Claimants thus violating their right to effective union representation.

The Claimants seeks the following reliefs;

- a. An order directed to the Respondent to deduct and remit the Claimants' union dues to the Interested Party.

- b. An order prohibiting Respondent from victimizing the employees who are in the union and or those intending to join.
- c. Damages for violation of the Claimants' constitutional and labour rights.
- d. Costs of the suit.

The Respondents raised a preliminary objection dated 6<sup>th</sup> November, 2019 on the following grounds;

- a. That the suit as filed offends the provisions of Section 10 of the Labour Relations Act
- b. The suit as filed offends the provisions of Section 62 of the Labour Relations Act no. 14 of 2007
- c. The jurisdiction of this court has been pre-maturely invoked
- d. The suit as filed is an abuse of the court's process and should be struck out.

### **Respondents Case**

The Respondents also filed a response to the claim dated 5<sup>th</sup> January, 2020. The Respondent in its response states that on 26<sup>th</sup> June 1984 it entered into a recognition agreement with the Interested Party. That in the year 2019 the Claimants filled membership check off forms with the intention to join the Interested Party and have union dues deducted from their salaries and remitted to the Union, the Interested Party.

The Respondent contends that the Claimants do not fall into the cadre of staff recognized under the agreement with the Interested Party. The Respondent states that the unionisable cadres comprise of employees in job group 10 to 14B and the Claimants herein fall outside this cadre of employees. The Respondent states that the recognition agreement and the CBA currently in force does not allow the Claimants to benefit from the same unless the same is renegotiated to have them included.

The Respondent further states that there is an existing dispute between it and the Interested Party reported and pending before a Conciliator. The Respondent avers that the claim lacks merit, is vexatious and frivolous and intends to paint the Respondent in bad light without any cogent evidence.

### **Interested Party's Response**

Interested Party filed a response to the claim dated 5<sup>th</sup> December, 2019. The Interested Party states that the Claimants have a right under Article 41 of the Constitution to join and participate in the activities of any trade union. However, there are institutions that regulate the cadres or levels in organizational structure that are categorized as managers therefore not unionisable. The Interested Party avers that it reminded the Respondents of its failure to comply and remit deductions from the Claimants. The Interested Party avers that it protested against the Respondent's silence on several employment disputes, one of such being the instant case. That a Chief Industrial Relations Officer was appointed as Conciliator and parties invited to appear before him on the 17<sup>th</sup> July 2019 when the Interested Party was served with a memorandum of claim dated 24<sup>th</sup> June 2019 thereby suspending mandate of the Interested Party in the conciliation process.

The Interested Party avers that according to the current CBA, it covers employees from job group 10 to 4B while the Claimants are drawn from Job Group 9-5 which is presumed as managerial. That the same can be reviewed but not necessarily through the court process. The Interested Party prays that the court do issue an order establishing timelines for Respondent and Interested Party to review their recognition agreement and collective bargaining agreement to accommodate the Claimants and any other potential members outside the current CBA coverage.

Parties took directions to dispose off both preliminary objection and the claim by way of written submissions.

### **Claimants Submissions**

The Claimant relied in the case of **Mukhisa Biscuit Manufacturing Limited v West end Distributors Limited (969) E.A 696.**

“So far am aware a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and which are argued as a preliminary point may dispose off the suit. Examples are on an objection to the jurisdiction of the court or a plea of a limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

The Claimants submit that under Section 10 of the Labour Relations Act option it is not mandatory for a party to go for conciliation.

On the second point raised in the Notice of preliminary objection that the suit offends the provisions of Section 62 of the Labour Relations Act, the Claimants submit that Section 62 of the Act does not oust the jurisdiction of this Act. That the Preliminary objection does not conform to the required legal threshold. They submit that the Claimants had already filed the matter in court and the court has not directed parties to undergo any alternative dispute resolution process.

On the third limb of the preliminary objection, that the court has been prematurely invoked, Claimants submit that lack of impugned points of law relied upon renders the point ambiguous and not clear hence the same ought to be dismissed. That the court has jurisdiction to

entertain the present matter by virtue of Section 12 of the Employment and Labour Relations Court Act.

The Claimant relied on the following cases:

**ELRC Cause No. 755 of 2019 Kenya National Union of Teachers v Nancy Njeri Macharia and Kenya Union Domestic, Hotels Educational Institutions and Hospital Workers v Registered Trustees of East African Ramgarhia Board t/a Guru Nanak Ramishia Sikh Hospital cause No. 113 of 2013.**

The Claimants submit that the Claimants are members of the Union as they expressed their interest to join the union by signing check off forms directing the Respondent to deduct and remit Union dues to the Interested Party. The Claimant relies on the Constitution of Kenya 2010 Article 41 and Section 4(1) and (2)(a) of the Labour Relations Act, 2007.

The Claimants submit that clause 2(a) of the recognition agreement is in conflict with rule 3(a) of the union constitution and rules since the constitution allows any worker employed in any capacity and in any post are eligible to become member and clause 2(a) of the recognition agreement to be inconsistent with the Constitution of Kenya 2010 and also inconsistent with the rules of the union constitution.

The Claimants submit that Section 48(3) of Labour Relations Act compels the Employer to deduct the union dues and remit the same. The Claimants urges the court to protect them by directing the Respondent to deduct and remit union dues from the Claimants in favour of the Interested Party.

Claimant relies in the case of **Kenya Private Universities Workers union v Don Bosco Utume Salesian Theological College Cause No. 1347 of 2018** and **Kenya Union of Commercial Food Allied Workers v Eldomatt Supermarket Limited Cause No. 406 Of 2013**

### **Respondents submissions**

The Respondent submits that Section 10 of the Labour Relations Act provides

**If there is any dispute about the interpretation or application of any provision of this part, any party to the dispute may refer the dispute in writing-**

**a. To the minister to appoint a conciliator as specified in part VII; or**

**b. If the dispute is not resolved at conciliation, to the industrial court for adjudication**

The Respondent submits that the Claimant violated the laid down procedure of dispute settlement before approaching the court's jurisdiction as there was no proof that the matter was before a negotiating committee.

The Respondents relied in the case of **Fuels and Lubricants Limited v Kenya petroleum Oil Workers Union (2018) eKLR** where the court held that the claim is pre-mature as there is a statutory process initiated by the Respondent at the ministry of labour which has not been exhausted.

The Respondent urges the court to make a similar finding as there is a statutory process in this matter that has not been initiated by the Claimant. The Respondent submits that this court's jurisdiction is prematurely invoked. The Respondent submits that pursuant to Section 48 of the Labour Relations Act it is the Interested Party who should have instituted a dispute with the Minister to receive the union dues from the Respondent. The Respondent urges the court to uphold the preliminary objection.

On the issues in the claim, the Respondent submits that the collective agreement is clear on the cadres of employees who are unionisable being Job Group 10 to 14B and that all the Claimants fall outside the scope of the unionisable employees in the CBA. The Respondent relied in the case of **Kenya Chemical and Allied Workers Union v Bamburi Cement Limited (2017) eKLR**.

The Respondent submit that the Claimants are calling upon the Court to re-write the rules of the contract and set out the labour practices between parties which falls outside the jurisdiction of the court. It further submits that the court is being called upon to reprimand the Respondent for abiding by an agreement jointly and freely entered into by the parties. It submits that the instant suit is an abuse of the court process and purely meant to vex the Respondent. It prays that the same be dismissed.

### **Interested Party's Submissions**

The Interested Party submits that the preliminary objection as filed by the Respondent is a desperate attempt to delay the determination of the suit, lacks merit and should be dismissed.

The Interested Party submits that the Respondent has failed to show how job groups (cadres) can stop any employee from joining a union. That the Respondent has not demonstrated to this court how each of the Claimants holds a managerial/confidential position in the company. That the Claimants have a right to become members of the union. That the dues are to be deducted from their salaries and as such do not pose any inconvenience or prejudice to the Respondent.

The Interested Party submits that the conciliation process may not bear any fruits and urges the court to retain the matter and determine the matter rather than have it remitted to conciliation. It further submits that the Claimants are unionisable and should be allowed to exercise their constitutional rights. It urges the court to determine the matter in favour of the Claimants by ordering the Respondent to commence

deduction of Union dues for the Claimant.

## **Analysis and Determination**

Having considered the Statement of Claim, Notice of Preliminary Objection, the Responses and the submissions of all the parties herein, the issues for determination are:

### **1. Whether the Notice of Preliminary objection meets the threshold**

The Respondent raised a notice of preliminary objection on the grounds that

- a. The suit as filed offends the provisions of Section 10 of the Labour Relations Act
- b. The suit as filed offends the provisions of Section 62 of the Labour Relations Act No. 14 of 2007
- c. That the jurisdiction of this court has been prematurely invoked
- d. That the suit as filed is an abuse of the court process and should be struck out.

As stated in **Mukhisa Biscuit** case a preliminary objection ought

to be raised only where it is a pure matter of law that if determined is likely to dispose off the entire suit.

All the grounds of preliminary objection are matters of procedure. They do not meet the threshold in Mukisa Biscuit case which is that a preliminary objection must raise a pure point of law. Article 159 and Section 20 of the Employment and Labour Relations Court Act are explicit that the court is to administer justice without undue regard to technicalities. **I find no merit in the grounds raised in the preliminary objection dismiss the same.**

### **2. Whether the Claimants qualify to be members of the union**

Article 41 of the Constitution of Kenya 2010: -

#### **1. Every person has a right to fair labour practices**

#### **2. Every worker has a right.**

##### **a. To fair remuneration**

##### **b. To reasonable working conditions**

##### **c. To form and participate in activities and programmes of a trade union.....**

Section 4(1) of the Labour Relations Act further provides: -

#### **4. Employee's right to freedom of association**

##### **(1) 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.**

The relationship between the Union and the Respondent is set out in the Recognition Agreement signed between the Union a employer and the Collective Bargaining Agreement (CBA) negotiated by them.

The Recognition Agreement between the Interested Party and the Respondent provides for the representation of only “*unionisable*” employees. The Labour Relations Act defines unionisable employers in relation to any trade union to mean the employees who are eligible for membership of the trade union. This therefore takes us to the Recognition Agreement and the Collective Bargaining Agreement between Respondent and Interested Party. At page 2 of the Recognition Agreement at paragraph (a) under “*Recognition*” it is provided that: -

- a. “The Company affords full recognition to. the Union as a properly constituted and representative body and the sole labour organisation interests of workers who are in the employment of the Company concerning negotiable matters such as rates of pay and overtime, hours of work, method of wage payment, paid leave, duration of employment, collection of Union dues, sick leave,

principles of redundancy and other generally accepted terms and conditions of service. This shall not include confidential, managerial and supervisory staff as defined from time to time by the Company.“

[Emphasis added]

In the Collective Bargaining Agreement, Union Membership is provided for at Clause 4 as follows: -

#### 4. UNION MEMBERSHIP

Both parties recognize that this Agreement imposes a serious duty and grave responsibility on the Company, the Union and its members. Both parties realize that the responsibilities laid on them can only be fulfilled if a high standard of discipline in the organization is mutually maintained among both the employer and employee. While recognizing that the question of the union membership is entirely a matter for individual choice and while reiterating that membership or non-membership is a factor which is not regarded by the Company in arriving at any decision which may in any way affect either the employment, the continued employment or the career prospects of the individual employees, the Company accepts Union membership will be effective on engagement or at a later date as the employee may express in writing by signing the check off form. Both the Union and Company undertake to observe the provisions of the Industrial Relations Charter. The Company shall generally respect the provision concerning application or principal of the right to organize and to bargain collectively as contained in I.L.O. Convention No. 87 & 98 and shall not engage in such practices as:

- i. Interfering with the rights of the employee to enrol or continue as a union member
- ii. Discrimination, restraint or coercion against any employee because of recognized activities of Trade Union.
- iii. Victimization of any employee and abuse of authority *in any form*.
- iv. Abusive or intemperate language which may result to industrial instability.
- v. Discrimination against any employee because of race, colour, creed, religion, tribe, political affiliation and Health Status
- vi. Nepotism shall not be practiced while considering permanent employment, promotion and training

Although this Section refers to the Industrial Relations Charter, it does not set out the level of union representation between the Respondent and Interested Party. It is Clause 6 of the CBA that provides for level of Union representation as follows: -

#### 6. UNION LEVEL OF REPRESENTATION

Union level of representation shall be in accordance with the provisions of the Industrial Relations Charter currently in force. For this Agreement, it has been determined that the unionisable cadres comprise of employees in Job Group 10 to 14B.

[Emphasis added]

The Industrial Relations Charter referred to by the parties provides as follows with respect to level of Union Representation: -

“LEVEL OF UNION REPRESENTATIVE as follows: At a meeting chaired by the Minister of Labour and attended by representatives of the Federation of Kenya Employers and Central Organisation of Trade Unions (K) it was agreed that the following persons shall be excluded from Union representation:

1. (i) Executive Chairman; Managing Director; General Manager (and his Deputy) and Functional Heads – that is – Departmental Heads (and their Deputies).
- (ii) Branch Manager (and his Deputy)
- (iii) Persons in-charge of operation in an area (and their Deputies)
- (iv) Persons having authority in their organisations to hire, transfer, appraise, suspend, promote, reward, discipline and handle grievances provided that such persons fall within the Industrial Relations Charter Clause No. 11-1
- (v) Persons training for above positions (including understudies).
2. (i) Personal Secretaries to persons under 1 above.
- (ii) persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties.
3. Any other category of staff who may, in the case of any particular undertaking, be excluded from union representation by mutual agreement.”

In **Kenya Chemical and Allied Workers Union v Bamburi Cement Limited (2017) eKLR**, the Court of Appeal had occasion to discuss the Industrial Relations Charter and stated as follows: -

“The next document we must turn to is the Charter, which is recognised by the Labour Relations Act where it is denied as: -

**“... a tripartite agreement between the Government, the most representative employers’ organisation, and the most representative employees’ organisation for the regulation of Labour and Industrial Relations in Kenya.”**

Apart from this definition the Charter is not mentioned anywhere else in the Act or in any of the other labour statutes. The first time the Charter was signed was in 1962 by the late J.T. Mboya as the Minister in charge of Labour on behalf the Government of Kenya, on the one part, the Federation of Kenya Employers and the Central Organization of Trade Unions (then known as the Kenya Federation of Labour) on the other part. It was last revised in 1984. It is today one of the primary documents used in industrial relations in Kenya. Rika, J in **Kenya Game Hunting & Safari Workers Union v Lewa Wildlife Conservancy Limited Industrial Cause No. 1567 of 2011**, described the Charter as “the cornerstone of industrial jurisprudence”. Clause B (10) and Appendix C of the Charter provide for the level of unionisation of employees while prohibiting certain categories of employees, who by virtue of their positions in the organization, having authority to hire, transfer, appraise, suspend, promote, reward, discipline or handle grievances, from being represented in the union. It must follow from this that those in the management of an organisation cannot form or belong to a trade union. Under the Charter, the parties mutually agreed that the following categories of staff be excluded from being represented in the union: –

1. Persons who are formulating, administering, co-ordinating and/or controlling any aspects of the organization’s policy;
2. Staff who perform work of a confidential nature as shall be defined by a tripartite Committee;
3. The Executive Chairman, Managing Director, General Manager (and his deputy) and functional Heads – that is, departmental Heads (and their deputies);
4. the Branch Manager (and his deputy);
5. persons in-charge of operations in an area (and their deputies);
6. persons having authority in their organisations to hire, *transfer, appraise, suspend, promote, reward, discipline and handle grievances provided that such persons fall within the Industrial Charter Clause No. 11-1*;
7. persons training for the above positions (including Under-studies);
8. personal Secretaries to persons under 1 above;
9. persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties;
10. any other category of staff who may, in the case of any particular undertaking, be excluded from union representation by mutual agreement.”

So that by the nature of their undisputed salaried staff terms, the employees fell in the category enumerated above. Those in the management can, however form a staff association to protect and promote their interests in so far as their terms and conditions of employment are concerned. But such an association does not have similar legal status as a trade union unless it conforms to the requirements of sections 12, 13 and 14 of Labour Relations Act.

We think we have sufficiently set out the law and must now apply it to the facts of the case. It is common factor that the employees were initially members of the appellant; that at some stage they were promoted to higher posts. However, like the learned Judge it is not apparent at all from the record to what cadres or grades they were promoted and served up to the time of their retirement. What is clear to us is that all them served for long periods of time having been employed between 1977 and 1981. At the time of his employment in 1986, for example, Humphrey Mwazighe was designated as a welder/fabricator, Eliud Kamande in 1977 as motor vehicle mechanic, Said Islam Said in 1980 as a welder Grade 2b, to give only a few examples. That omission notwithstanding, there is no dispute that the employees moved out of the unionisable category of employees. Their cause of action before the court below was concisely stated on their behalf by the appellant thus;

“The said employees although during some previous years were transferred by the company to the salaried staff cadre and the respondents stopped to deduct or to remit union dues from their salaries to the union, although we had nothing on the record that they had denounced their union membership, these workers have been paying directly since 2008, as is allowed by the law under Labour Relations Act, section 52...the union constitution allow union dues to be paid directly by its members, as the respondent refused to be deducting them through check-

off.....

The jobs the salaried staff are doing are the same as those being done by unionisable employees of the company, and calling them salaried staff has denied them the CBA benefits when they retire..... The respondent did not transfer the amount of gratuity for the years they had worked before being transferred to the salaried staff cadre nor were their contracts terminated to start to start (sic) fresh terms.”

From the foregoing, it is clear that the Respondent and the Interested Party have discussed and agreed on a threshold for Union Membership which at the moment constitutes employees from Job Group 10 to 14B.

The Claimants can only join the Union once it had expended its membership to include them. At the moment the agreement between the Respondent and the Union cannot accommodate the Claimants. The Union has stated as much in both its response to the Statement of Claim and in its submissions.

Although both Article 41 of the Constitution and Section 4(1) of the Labour Relations Act recognise the right of every worker to join a union of their choice, the right can only be exercised in so far as the Union Constitution, which by statute is required to provide for the scope of its membership, and the agreement between the Union and the employer, in this case the Respondent and Interested Party, can accommodate them. The Claimants are outside the agreed definition of unionisable employees as currently in force between the Respondent and Interested Party. They can thus not be accommodated in the agreement.

**For the foregoing reasons, the claim herein fails and is accordingly dismissed. There shall be no orders as to costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF MARCH 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**