



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

AT NAIROBI

CAUSE 223 OF 2020

KENYA BUILDING CONSTRUCTION TIMBER AND

FURNITURE INDUSTRIES EMPLOYEES UNION (K.B.C.T & F.I.EU).....APPLICANT

-VERSUS-

KENYA UNION OF ROAD CONSTRUCTION AND

CIVIL ENGINEERING WORKERS UNION.....(K.U.R.C.A.C.E.W)

RULING

1. The Claimant/Applicant filed a Notice of Motion on 5.6.2020 seeking the following orders:

a. Spent.

b. THAT pending the hearing of this application interpartes , this Honourable Court be pleased to issue an order directing the Chief Industrial Relations Officer to discontinue the hearing of the conciliation of the Ministry of Labour dispute no ML/LD/IR/66/3/2020 reported by the Respondent.

c. THAT at the hearing of this application interpartes, this Honourable Court be pleased to issue an order directing the Chief Industrial Relations Officer, to discontinue the hearing of the conciliation of Ministry of Labour dispute no ML/LD/IR/66/3/2020 initiated by the Respondent pending hearing of the main cause herein.

d. THAT this Honourable Court be pleased to issue a temporary order of injunction barring the Respondent from approaching, purporting to recruit, or in any way whatsoever interfering with the unionisable workers recruited and organised by the Claimant where the Employer or the Employer's association has recognised the Claimant pending the hearing of the cause herein.

e. THAT costs of this application be provided for.

2. The Application is based on grounds that:

a. The Applicant is the Recognised Union by China Road & Bridge Corporation (K), hereinafter referred to as "the employer" for the last 30 years they have several times negotiated and revised Collective Bargaining Agreement.

b. The Applicant has recruited almost all of the unionisable employees of the Nairobi West Bypass Project and the Employer has been deducting and remitting union dues from its members in the said project.

c. The Respondent is a trade union registered in the month of November 2019 and has interfered with the industrial harmony and purported to recruit workers with the intent to cause chaos and havoc among the parties.

d. The interference by the Respondent offends the legal backdrop against which it was granted registration in ELRC Appeal No. 18 of 2019.

e. The Respondent lacks authority to institute a dispute in the office of the Cabinet Secretary, Ministry of Labour and has no *locus standi* to engage the Employer in regard to workers' representation.

f. The Applicant will suffer irreparable damage in the event the employer withholds the remittance of the monthly union dues deducted on its behalf.

3. The Application is supported by the Affidavit of Francis K Murage ,the Secretary General of the Applicant, sworn on 4.6.2020. He deposed that at a page 8 of the Judgment delivered by Ongaya J, he referred to specific alleged evidence presented by Charles A.J. Osicho the Secretary General for the Respondent that the Applicant had managed to only recruit 26% of the available unionisable employees in the said industry which leaves out 74% of the workers which when recruited would easily justify registration of another Union in the industry.

4. He further deposed that the Secretary General of the Respondent convinced the Judge to grant registration of the respondent after stating that it will recruit the cadre of workers with key employers with whom the Applicant has no Recognition Agreement.

5. He deposed that in a letter dated 18.2.2020, the Respondent forwarded a list of the allegedly recruited employees and demanded deduction and remittance of union dues on behalf of the said members; that the Respondent reported a dispute to the Cabinet Secretary on 5.3.2020 between itself and the Employer with regard to union dues; that in a letter dated 28.4.2020 MS. Hellen Maneno was appointed as the Conciliator; and that applicant has sought to be enjoined in the said dispute.

6. He further averred that vide the Employer's comprehensive memorandum to the Conciliator dated 8.5.2020, it affirmed that at the time of the demand, the members alleged to have been recruited by the Respondent were the Applicant's members and had not served the employer with resignations letters from the Union.

7. He averred that the Applicant then invited all its members in the employment of the Employer to re-affirm their membership with it which they did by signing fresh Check-Off forms and that the Respondent has not complied with requirements to obtain a ministerial order to grant it authority to demand union dues from its alleged members in Form S.

8. He averred that the Respondent should be barred from interfering, meddling or in any way tampering with organised workers in the sector which the two unions are registered.

9. The Respondent opposed the Application by an undated Replying Affidavit sworn by Charles A.J. Osicho, its General Secretary. He deposed that the CBA entered into between the employer and the Applicant sometime in 2019 was an arrangement with the employer and does not reflect the will of the employees in the sector; that the rates that were allegedly negotiated on behalf of the employees provide for the bare minimum as set out under the Regulation of Wages (General) (Amendment) Order 2018 and the employees receive less wages compared to what is stipulated in the CBA.

10. He averred that the Applicant does not have the entire unionisable workforce employed by the employer because since the Respondent's registration, it has received over 600 members to its union; that the Applicant has never had any check off forms signed by the employees and that the check off forms dated 8.4.2020 are a means of covering up the fact that since its inception the Applicant has never received recognition from employees in the sector despite illegally receiving monthly deduction.

11. He deposed that the check off forms forwarded to the employer by the applicant have been received and stamped by individuals who are not the employer's representative and the receiving stamps bear a different postal address from the employer's.

12. He contended that the Applicant and the employers have never had a harmonious relationship and the workers in the sector receive minimal wage; that the respondent was registered as a result of lack of proper representation by the applicant to champion the employee rights; that the upon evaluating the evidence presented before it, the Court decided to grant it registration as employees in the sector lacked proper representation.

13. He deposed that the Respondent has been engaged not only in pushing for better wages but also in the settlement of disciplinary matters and upon registration the respondent received employees who wished to join the union thus it forwarded the check off forms to the employer to effect monthly deductions but it failed to do so hence it reported the matter to the Ministry.

14. He admitted that there is a dispute between the 2 unions in relation to which trade union is entitled to collect dues from the employer and that the most expeditious avenue of resolving the dispute is to proceed with conciliation.

15. He averred that the Respondent's members would suffer grave injustice if the orders sought are granted since their right to fair labour practice and freedom of association would be violated.

16. In response to the Replying Affidavit, the applicant filed a Further affidavit sworn by Francis K. Murage on 6.7.2020 in which he reiterates the averments in the application.

Applicant's submissions

17. The Applicant submitted that the Judgment by Ongaya.J, in Appeal No. 18 of 2019, granted the registration of the Respondent to supplement the representation of the workers in the roads and civil engineering sector. It argued that the Respondent, in that appeal referred to insufficient representation and not lack of representation.

18. It maintained that the Respondent is a meddler in its affairs and its intention is to cause disharmony where it has been recognised and organised workers. It argued that the Respondent cannot purport to represent 24% of the represented workers.

19. It argued that the Respondent is not qualified to demand for union dues from the Employer for reasons that it is not compliant with

section 48 of the Labour Relations Act as the purported Form S is not as per the section. It submitted that in **Cause No. 301 of 2017 Kenya National Union of Nurses v The County Public Service Board** the Court held that without the Form S, a trade union had no authority to demand for union dues.

20. It submitted that the freedom of association and the right to labour relations do not fall within the confines of Article 25 of the Constitution which spells out the fundamental rights and freedoms which may not be limited. It relied on the Court of Appeal decision in **Charles Salano & 9 Others (Proposers & Promoters of Kenya Supermarkets Workers Union (KESMWU) v Registrar of Trade Unions & another [2017]** where it was held that Article 24 (1) of the Constitution sanctions the limitation of fundamental rights and freedoms including those under Article 36 and 41 of the Constitution.

21. It submitted that by meddling with an organised group of workers, the Respondent shall prejudice the employees' rights. It submitted that the court should disregard the Replying Affidavit and urged it to allow the application.

Respondent's submissions

22. The Respondent submitted that Article 2 of the ILO Convention 87 and Article 41 of the Constitution make provisions for the freedom of employees to join and participate in a union of their choice. It argued that the Court cannot grant an court order that has the effect of barring employees from joining any other trade union. It further submitted that in accordance with article 36 the employees have a right to associate wilfully.

23. It also submitted that the Applicant cannot approach the court with the sole aim of curtailing the unionisable employees from joining a sister union in the section. It relied on **Cause No. 279 of 2014 Bakery, Confectionery , Food Manufacturing and Allied Workers Union (K) v Mombasa Maize Millers Limited & 3 Others [2016] eKLR** where the Court held that section 4 of the Labour Relations Act and Articles 36 and 41 of the Constitution grant employees freedom of association.

24. It admitted that Article 36 and 41 of the Constitution may be limited by virtue of Article 24 (1) but there exists no clear and specific provisions in the Labour Relations Act that limit the right to assembly and fair labour practices.

25. It further submitted that Article 24 (2) (b) of the Constitution provides that a right shall not be limited unless there is clear and specific right or freedom to be limited and the nature and extent of the limitation. For emphasis it relied on **Kenya Union of Commercial Food & Allied Workers v Ukwala Supermarket Ltd [2013] eKLR**.

26. It denied interfering with the Applicant or its members and relied on **Kenya Concrete Structural Ceramic Tiles Wood Ply and Interiors Design Employees Union (K.C.S.C.W.I) v Kenya Building, Construction, Timber, Furniture and Allied Industries Employers Union (K.B.C.T & F.I.E.U) [2016] eKLR** where the Court held that it is not for the employer to direct its employees on the union to join or not.

27. It maintained that it is entitled to collect union dues and that it has requested for a ministerial order for deduction of dues which has not been issued. It argued that its members' rights cannot be curtailed over a delay in issuances of an order by the Ministry. It relied on **Rift Valley Railways Workers Union v Rift Valley Railways (Kenya) Limited & another [2014] eKLR** where the Court held that in the current constitutional dispensation, there was no place for a minister to override the wishes of the employees to join and participate in the activities of a trade union by withholding a Ministerial Order for deduction and remittance of union dues.

28. It argued that the details of union members' cannot be conclusively deciphered from Form S and the same can be ascertained from other documents signed by the members. In support of this position it relied on **Kenya Petroleum Oil Workers Union v Petro Oil (K) Limited [2019] eKLR** and **Kenya Union of Commercial Food & Allied Workers Case supra**.

29. In conclusion, it submitted that it had attained 51% simple majority and approached the employer for deduction of union dues but the efforts have been futile hence necessitating conciliation of the dispute. It urged the Court to dismiss the application with costs.

Issues for determination

30. Having considered the pleadings, application, affidavits and written submissions, it obvious that apart from prayer (a) in the motion, prayer (b) are also spent because they sought pending hearing and determination of the application. It follows that the only issue for determination is whether pending the hearing and determination of the suit herein, the Court should grant a temporary injunction stopping conciliation proceedings and also barring the Respondent from recruiting union members from employers who have signed Recognition Agreement with the claimant or in any manner interfering with claimant's members who work for the said employer or employers' association.

31. The law governing interlocutory injunctions in Kenya remains what was enunciated by the Court 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.”

32. 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.”

33. The applicant contended that she has enjoyed recognition by the China Road & bridge Corporation for 30 years and together they have concluded and revised Collective Agreements. It further contended that it represents all the unionisable employees of the said company among others in the sector. It also contended that Court granted the respondent registration after convincing Ongaya J that it will not recruit members from employers who have recognised it (Claimant). It further contended that it has since appealed against the judgement by Ongaya J, which granted registration to the respondent.

34. The respondent denied that it has interfered with the claimant’s members or employers who have recognised the claimant and contended that Article 2 of the ILO convention and Article 41 of the Constitution of Kenya provides for the freedom of employees to join and participate in a union of their choice. It further contended that under Article 36 of the Constitution employees have the right to associate wilfully. Consequently, it submitted that the Court cannot issue any order to bar employees from enjoying their freedom of association or right to join a trade union of their choice.

35. Having carefully considered the rival contentions by the parties, I am not satisfied that the applicant has shown that any of its legal rights have been violated by the respondent recruiting members from the employer or employers’ association who have signed a recognition agreement with itself including China Road & Bridge Corporation (K). It is common ground that the respondent is a trade union registered to represent unionisable employees in the Road construction sector. Although there is an appeal against the said registration, there is no stay of the judgment which granted the registration.

36. In addition, the issue of membership and collection of union dues is yet to be determined by the conciliator in proceedings where both parties herein are involved. In that regard the Court ought to act carefully to avoid being seen as interfering with the conciliation proceedings.

37. Having made the foregoing observations, I wish to note that under Article 41 (2) (c) of the Constitution, every employee has a right to join or participate in any trade union of his choice. Again, under Section 4 (1) (b) and (c) of the Labour Relations Act an employee has right to join or leave a union. It follows that, barring the Respondent from recruiting members would also be interfering with the employees’ rights to withdraw from one union and join another one which best addresses their needs. Consequently, I reiterated that the Applicant has not demonstrated how its right would be or has been infringed upon by the respondent recruiting members from the employers who have already granted recognition to it.

38. In my view, the Court is not bound to consider the best interest of the trade union but the fundamental right and freedoms of the employee as enshrined under Article 41 and 36 of the Constitution because the union exists for the employees and not the vice-versa. Having found that no legal rights of the applicant have been or will be infringed by the recruitment of members from the said employers, I must hold that the applicant has failed to satisfy the Court that it has a prima facie case with probability of success.

Irreparable harm

39. In the absence of a prima facie, there would be no need to discuss whether the Applicant would suffer irreparable injury or even the issue of balance of convenience. I gather support from the decision of the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** that:

“...If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

40. In the end, the application should be dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY MARCH, 2021.

ONESMUS N MAKAU

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 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