



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. E718 OF 2020**

**KENYA UNION OF COMMERCIAL FOOD AND**

**ALLIED WORKERS.....CLAIMANT/APPLICANT**

**VERSUS**

**MARUTI OFFICE SUPPLIES LIMITED.....1<sup>ST</sup> RESPONDENT**

**SAPPHIRE CONSULTANTS.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 5/11/2020 was filed on the even date by the Claimant/Applicant Union seeking for the following reliefs:-

- (i) This application be certified urgent, service thereof be dispensed with and the same be heard ex parte in first instance.
- (ii) That pending hearing and determination of this matter, this Honourable Court do and hereby restrain the 1<sup>st</sup> Respondent from terminating the services of their employees with intention to transfer their services to an outsourcing company.
- (iii) Pending hearing and determination of this matter, this Honourable Court do and hereby restrain the 2<sup>nd</sup> Respondent from taking over the services of employees with a direct employment contract with the 1<sup>st</sup> respondent.
- (iv) Pending hearing and determination of this Application this Honourable Court to and hereby grant status quo as at the date of the orders of this Court in terms of employees employment relationship with the 1<sup>st</sup> respondent and to preserve such employment relationship until further orders of the Court.
- (v) Pending the hearing and determination of this application, this Honourable Court do and hereby restrain the 1<sup>st</sup> Respondent from victimizing, coercing, intimidating, terminating or disciplining employees on account of their union membership.
- (vi) Pending hearing and determination of this matter, this Honourable Court do and hereby orders the 1<sup>st</sup> Respondent to continue assigning duties to its employees and discharging its management role on its employees until further orders of the Court.
- (vii) An Order do and is hereby issued directing the 1<sup>st</sup> Respondent to deduct and to remit union dues from their employees who have already acknowledge their union membership by signing the requisite check off sheets.
- (viii) Costs of this application be in the cause.

2. The application is premised on the grounds set out on the face of the Notice of Motion and in the supporting affidavit of Mike Onaya the Assistant Secretary General of the claimant that may be summarized that on 3/7/2020, the 1<sup>st</sup> respondent's unionisable employees registered trade union membership with the claimant union and the 1<sup>st</sup> respondent was served with check-off sheets on 29/9/2020 to effect deductions and remittance of union dues.

3. On 1/10/2020, the Claimant wrote to the 1<sup>st</sup> respondent, again on the matter and enclosed a draft Recognition Agreement for their study and counter signatures and a joint meeting was proposed to take place on 7/10/2020 for introduction and to sign the Draft Recognition

Agreement.

4. The 1<sup>st</sup> respondent declined the meeting without giving any reasons and the claimant wrote to the 1<sup>st</sup> respondent again on 8/10/2020 regarding the matter.
5. On 14/10/2020, the claimant reported a dispute to the Ministry of Labour for conciliation on refusal to deduct union dues and to recognize the claimant union.
6. On 20/10/2020, the 1<sup>st</sup> respondent's employees received a questionnaire distributed by the 2<sup>nd</sup> respondent requesting them to give their personal details and indicating the intention to transfer their services to the 2<sup>nd</sup> respondent and no reason was given for that move other than their trade union membership.
7. That the 1<sup>st</sup> respondent has clearly hatched a scheme to terminate and to relinquish employment relationship between them and their employees to run away from Trade Union representation.
8. That the 2<sup>nd</sup> respondent has connived with the 1<sup>st</sup> respondent in that unlawful intent to frustrate Trade Union representation.
9. That the 2<sup>nd</sup> respondent is gearing to issue employees of 1<sup>st</sup> Respondent with letters of contract requiring them to accept the new terms of service with the sole purpose of scuttling trade union representation.
10. That already employment of five (5) employees have been terminated while three (3) others have been served with warning letters and may soon be terminated.
11. That the suit shall be rendered nugatory if interim orders are not granted.
12. That the Court do grant the interim reliefs sought.
13. The respondent filed replying affidavit by Jignesh Jasani the Managing Director of the 1<sup>st</sup> respondent deposed to on 2/12/2020 in which he deposes that on 1/10/2020, the 1<sup>st</sup> respondent wrote to the County Labour office, Nairobi County notifying the office of an intended organizational restructuring by the 1<sup>st</sup> respondent. That the 1<sup>st</sup> respondent informed the Labour office that it intended to begin the redundancy process with effect from 1/11/2020. The letter is attached to the replying affidavit marked 'JJ 1'.
14. That the 1<sup>st</sup> respondent admits having received the union's letter dated 29/9/2020 but the same was received on 5/10/2020.
15. That the 1<sup>st</sup> respondent admits having received the union's letter dated 1/10/2020 on 7/10/2020 which requested for a meeting with the union the same day at 2.30 p.m.
16. That the deponent believes that both letters by the union were backdated to stop the redundancy process that had been started by the 1<sup>st</sup> respondent on 1/10/2020.
17. That the Check-off sheets are signed by 28 of its employees on 3/7/2020 yet the union wrote to the 1<sup>st</sup> respondent on 7/10/2020 seeking recognition, a period of three months later.
18. The respondent denies that it declined to allow the meeting on 7/10/2020 at 2.30 p.m but rather the notice was short to hold the meeting and the 1<sup>st</sup> respondent wrote to the union requesting for 30 days to consult. Letter of request is attached and marked "JJ 3."
19. The 1<sup>st</sup> respondent denies that it intends to terminate employment of the employees recruited by the union and or hand them over to the 2<sup>nd</sup> respondent as alleged by the union.
20. The 1<sup>st</sup> respondent states that the intended redundancy is due to loss of business which is stationary in nature caused by the prolonged closure of all learning institutions since March, 2020 as well as massive decline in office stationery purchase due to many company employees working remotely and with little business in sectors such as hospitality. Statement of account are attached marked "JJ 4."
21. That the employees with disciplinary matters are not connected at all to the issue of unionization. The 1<sup>st</sup> respondent denies that it intends to issue employees with new letters of offer as alleged or at all.
22. The 1<sup>st</sup> respondent also denies that it intends to transfer the services of its employees to the 2<sup>nd</sup> respondent and puts the applicant to strict proof thereof.
23. The 1<sup>st</sup> respondent states that it believes that this period the Country is afflicted with COVID-19 is not ideal time for the 1<sup>st</sup> respondent to engage in Recognition and Collective Bargaining Agreements due to the economic impact COVID-19 has had on its operations.
24. That the application lacks merit and it be dismissed.

25. Both parties filed written submissions. The issue for determination is whether the Applicant has satisfied the requirements for grant of interim injunction pending the hearing and determination of the suit as set out in the case of **Giella –vs- Cassman Brown and Company Limited [1973] E.A. 358** that, an applicant must show a *prima facie* case with a probability of success; secondly, the applicant must demonstrate that it is likely to suffer irreparable harm that is not remediable by damages if the suit is eventually successful and in case of doubt the Court to weigh balance of convenience in the exercise of its discretion to grant interim relief.

26. The respondent cited the case of Kenya **Union of Commercial, Food and Allied Workers’ –vs- Kenya Credit Traders Ltd. [2019] eKLR 42** where Makau J. stated as follows:-

“It therefore follows that the suit herein ought not to have been brought until the Conciliation process was exhausted as required under Section 73 of the Act.”

27. It is common cause that this dispute was referred to the Ministry of Labour for conciliation by the applicant union on 14/10/2020.

28. It is also common cause, that the applicant union has not furnished the Court with the progress made in respect of that Conciliation exercise before filing the suit on 5/11/2020 a few weeks later.

29. *Section 73 of the Labour Relations Act provides:-*

“(1) If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the industrial Court in accordance with the Rules of the Industrial Court.

30. *Section 74 of the Act, thereof also provides:-*

“**A trade union may refer a dispute to the industrial Court as a matter of urgency if the dispute concerns:-**

**(a) The recognition of a trade union in accordance with Section 62; or**

**(b) A redundancy where:-**

**(i) the trade union has already referred the dispute for conciliation under Section 62(4); or**

**(ii) the employer has retrenched employees without giving notice;**

**or**

**(iii) Employers and employees are engaged in an essential service.”**

31. The present dispute concerns recognition of a trade union and was rightly brought before the Court by the applicant seeking interim orders to preserve the status quo pending the hearing and determination of the suit. The interim orders may also be granted pending conclusion of the commenced conciliation process.

32. The interim orders sought are not with regard to the issue of recognition as such but are meant to stop alleged victimization, intimidation, termination or disciplining of employees on account of their membership to the union. The Court is also urged to injunct intended transfer of these employees to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent to avoid unionization of its employees.

33. The 1<sup>st</sup> respondent has denied that it intends to terminate, transfer, victimize, or discipline the 28 employees recruited by the union on account of their membership.

32. The 1<sup>st</sup> respondent has also indicated that it deems the COVID-19 period as inappropriate for its employees to engage in union activities due to the economic and operational hardships presented to the enterprise by the pandemic.

33. Furthermore the 1<sup>st</sup> respondent has deposed that these union activities were commenced to obviate the 1<sup>st</sup> respondent’s already commenced retrenchment process notified by the 1<sup>st</sup> respondent to the Labour office on account of the economic difficulties posed to the enterprise by the COVID-19 pandemic.

34. It is the Court’s considered finding that the applicant has failed to establish a *prima facie* case with a probability of success regarding the specific matters in respect of which the interim injunction is sought.

35. The dispute of recognition and deduction of union dues, which in terms of Section 74 of the Labour Relations Act, may be brought to Court on a Certificate of Urgency cannot attract any interim relief pending resolution of disputes of fact, on their merit upon hearing and determination of the main suit. This dispute ought to be prioritized as dictated under Section 74 of the Labour Relations Act, 2007.

36. In the final analysis, the application for grant of interim injunction pending the hearing and determination of the suit lacks merit and is dismissed with costs in the cause.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of April, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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, this ruling has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearance**

Mr. Macharia for Claimant/Applicant

Isaack Owuor for 1<sup>st</sup> respondent

Ekale – Court clerk.