



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 102 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

LONDON DISTILLERS (K) LIMITED.....RESPONDENT

AND

CENTRAL ORGANISATION OF

TRADE UNIONS KENYA.....INTERESTED PARTY

RULING

The application before me for determination is dated 28th February 2020. It is filed by the Respondent under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016; Sections 12 and 20(1) of the Employment and Labour Relations Court Act, Article 159(2) of the Constitution and all enabling provisions of the law. In the application, the Respondent seeks the following orders: -

1. Spent.
2. *The court be pleased to order a stay of further proceedings and all consequential orders thereto pending the hearing and determination of this application inter partes.*
3. *The court be pleased to order that the instant application be heard and determined in priority to any other application or proceedings herein.*
4. *The court be pleased to order a stay of further proceedings and all consequential orders thereto pending the hearing and determination of Nairobi Constitutional Petition No. 326 of 2019: London Distiller (K) Limited & Another v Kenya Union of Commercial Food & Allied Workers.*
5. *IN THE ALTERNATIVE, the Court be pleased to strike out these proceedings for being sub judice and abuse of Court process.*
6. Costs

The application is supported by the grounds on the face thereof and the affidavit of MOHAN GALOT, who describes himself as the Respondent's Founder, Governing Director, Principal Shareholder and Chairman of London Distillers (Kenya) Limited, the Respondent.

The grounds advanced on the face of the application and the supporting affidavit are that there is a multiplicity of suits between the parties herein being: -

- a) *Nairobi Constitutional Petition No. 326 of 2019: London Distillers (K) Limited & Another v KUCFAW in which parties are awaiting hearing date of the main Petition before the High Court at Nairobi.*
- b) *Nairobi Civil Appeal No. 362 of 2019: Galot Estate & Another v Kucfaw & London Distillers (K) Limited and Civil Appeal No.*

387 of 2019: London Distillers (K) Limited v KUCFAW, Mohan Galot & Galot Estate being appeals scheduled for pre-trial on 10th March 2020 after which hearing date shall issue; and being appeals emanating from **Nairobi ELRC No. 120 of 2019: KUCFAW v London Distillers (K) Limited & Others.**

c) **Nairobi Constitutional Petition No. 326 of 2019: London Distillers (K) Limited & Another v KUCFAW** is awaiting main hearing and determination.

The Respondent avers that it is in the interests of justice that the instant matter be stayed to avoid duplicity of issues and the possibility of diverse/conflicting decisions. That unless these proceedings are stayed, the court risks embarrassing the administration of justice through duplication of judgments/decisions over the same issue/subject matter.

The Respondent avers that there will be no prejudice to be occasioned to the Claimant if the Orders sought by the Respondent are granted. Further, that unless this application is allowed and orders sought therein granted, the Respondent shall be unfairly subjected to the inconvenience and expense of vexatious proceedings in different Courts over the same subject matter. That it is in the interests of justice that the Orders sought herein are granted.

The Claimant opposed the Respondent's application and filed a replying affidavit of REBECCA MUTHOKI sworn on 17th August 2020 in which she states that London Distillers (K) Limited, the Respondent herein, filed a **Constitutional Petition No. 326 of 2019** against the **Kenya Union of Commercial, Food and Allied Workers**, the Claimant herein, in which they seek the following prayers:-

(a) AN ORDER OF DECLARATION declaring that the Respondent is engaged in unfair trade practices.

(b) AN ORDER OF DECLARATION declaring that the Respondent's actions of forcefully recruiting the employees of the 2nd Petitioner is unlawful and the Respondent lacks locus Standi to represent the employees of the 2nd Petitioner in any court action and is engaged in unfair trade practices.

(c) AN ORDER terminating all court proceedings commences/instituted by the Respondent against the 1st and 2nd Petitioner.

(d) AN ORDER OF DECLARATION terminating the Recognition Agreement between the 1st petitioner and the Respondent.

(e) AN ORDER OF DECLARATION declaring that all matters commenced before exhaustion of the dispute resolution process contravenes the provisions of the Labour Relations Act and the Constitution of Kenya 2010 and is contrary to the employee's legitimate expectation.

(f) AN ORDER OF DECLARATION declaring that the actions of the Respondent's actions of constantly visiting the 2nd Petitioner's home, and surreptitious surveillance of the 2nd Petitioner's residence have violated and continue to violate the 2nd Petitioner's right to security of his person and privacy under Article 29(a), (d) & (f) and Article 31 (a), (c) & (d) of the Constitution respectively.

(g) AN ORDER OF DECLARATION declaring that the actions of the Respondent have threatened and continue to threaten the 1st Petitioner's right to property and economic rights under Article 40 and 43 of the Constitution.

(h) AN ORDER OF DECLARATION declaring that the 2nd Petitioner's

(i) personal employees are not unionisable members of the Respondent.

(j) Costs.

(k) Such other orders that the court shall deem just to grant.

That the Claimant's Application and Claim herein both dated 19th February, 2020 are on the issue of "**Refusal to deduct and to remit union dues from union members**" and in particular, the Application dated 19th February, 2020, seeks the following prayers

(i) Spent.

(ii) That pending hearing and determination of this matter, this Court do and hereby orders the Respondent to deduct and remit union dues from their employees who are union members for the month of February 2020 and to continue doing so on monthly basis.

(iii) That pending hearing and determination of this matter, this Court do and hereby restrains the Respondent from victimizing, coercing, terminating or disciplining union members whose payslips are now before this court as proof of deduction and discontinuation and on account of their union membership.

(iv) That this Court be pleased to set down this matter for hearing on priority basis.

(v) That costs of this application be in the cause

That **Nairobi ELRC Cause No. 120 of 2019 – KUCFAW v London Distillers (K) Ltd and Others** has the following issues in dispute:-

- (i) *Forced union membership withdrawal*
- (ii) *Lock out of employees who declined to sign prescribed forms for union membership withdrawal.*
- (iii) *Intention to terminate the services of 9 employees account of their union membership (names attached) on*
- (iv) *Employment status of employees at Galot Estate.*

The prayers therein were set as hereunder:

(A)

- (i) *The 1st Respondent's employees have unquestionable and fundamental right of freedom of association and that the choice to enjoy this freedom only rests with employees.*
- (ii) *The 1st and 3rd Respondent's action to force employees to withdraw their union membership unwillingly and involuntarily is unlawful.*
- (iii) *That the lock out of employees is unlawful as the procedure set out under Section 76 of the Labour Relations Act, 2007 was not observed by the 1st and 3rd Respondents.*

(B)

- (i) *That this Court to order the 1st and 3rd Respondents to allow employees to access their working areas and allocate them duties as usual.*
- (ii) *That this Court do and hereby restrains the 1st and 3rd Respondents from any further acts of unfair labour practice, termination, intimidation, coercion or otherwise disciplining employees on account of their union membership.*
- (iii) *That the 1st Respondent's employees have employment relationship with the 2nd Respondent by way of appointment letters, staff identification cards and payment of NSSF Contributions.*
- (iv) *That Mr. Mohan Galot in his personal capacity has no right to lock out and demand loyalty pledge from the 1st and 2nd Respondents employees other than the services offered to him.*
- (v) *That London Distillers (K) Ltd has a duty to ensure that their employees' deployed at Galot Estate do enjoy their right of freedom of association and same is respected, obeyed and observed.*
- (vi) *That this Court be pleased to grant any other relief it deems fit and appropriate to grant in the circumstances.*

That there is no issue or prayer in **Cause No. 120 of 2019** on refusal to deduct and to remit union dues and as such there cannot be a conflicting decision as there is no parallel claim or prayer on this issue.

That the ruling of the Court issued and dated 9th July 2019 directed parties to proceed to the claim and call evidence to establish *locus standi* which is claimed to be lacking on the part of the claimant.

That the Ruling dated 9th July 2019 which is the subject of Appeal in **Nairobi Civil Appeal No. 362 of 2019** and **Nairobi Civil Appeal No 387 of 2019** does not have the question touching on union dues and is not part of the grounds raised or part of the proposition at the Court of Appeal for consideration.

That in the Constitutional Petition No. 326 of 2019, all the suits in that Petition are on completely different issues with no relevance to deduction and remittance of union dues and are on:-

(i) ELRC Cause No. 192 of 2016 (Now Nairobi Employment and Labour Relations Court Cause No. 526 of 2016) Kenya union of Commercial, Food and Allied Workers v London Distillers (K) Ltd

Issue in disputes – Unlawful termination of two employees:

- (a) Kennedy Odhiambo Obiewa
- (b) Monica Njeri Gatherere

(ii) Nairobi ELRC Cause No. 913 of 2018 Kenya Union of Commercial, Food and Allied Workers v London Distillers (K) Ltd

Issue in dispute – Failure to pay terminal benefits to 8 employees

(iii) Nairobi ELRC Cause No. 912 of 2018, Kenya Union of Commercial, Food and Allied Workers v London Distillers (K) Ltd

Issue in dispute – Negotiation of Collective Bargaining Agreement for the period 2017-2019.

London Distillers (K) Ltd filed a Preliminary Objection which is pending ruling on whether a Job Evaluation Exercise can stop the hearing and determination of Collective Bargaining Agreement for the period 2017-2019.

(iv) Nyeri ELRC Cause No. 127 of 2018 (Now Nairobi ELRC Cause No. 914 of 2018) Kenya Union of Commercial, Food and Allied Workers v London Distillers (K) Ltd

Issue in dispute – Wrongful/unlawful dismissal of four employees. This is pending hearing and determination.

(v) Nairobi ELRC Cause No. 1639 of 2016, London Distillers (K) Ltd v Kenya Union of Commercial, Food and Allied Workers

This matter was filed by London Distillers (K) Ltd against the Kenya Union of Commercial, Food and Allied Workers.

The court delivered two rulings on 26th May 2017 and on 19th December 2017 which finalized the matter and settlement effected.

(vi) Nairobi ELRC No. 1363 of 2018, Kenya Union of Commercial Food and Allied Workers v Gallot Estate

Issue in dispute – Unfair/unlawful termination of William Nyakundi Marori pending hearing.

(vii) Nairobi ELRC No. 120 of 2019, Kenya Union of Commercial, Food and Allied Workers v London Distillers (K) Ltd (1st Respondent), Galot Estate-Kiambu (2nd Respondent) and Mohan Galot 3rd Respondent

The Claimant avers that in all the pending suits there is no issue before the court on deduction and remittance of union dues whose stay is sought in **Petition No. 326 of 2019** or in any other matter presently before the court and as such the question of *sub judice* fails flat for the reasons advanced herein.

That Section 48 of the Labour Relations Act, 2007 covers Union dues and provides as follows:

48. Deduction of trade union dues

(1) In this Part, "trade union dues" means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.

(2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to –

(a) Deduct trade union dues from the wages of its members; and

(b) pay monies so deducted -

(i) into a specified account of the trade union; or

(ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

(4) The Minister may vary an order issued under this section on application by the trade union.

(5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.

(6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.

(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

(8) An employer shall forward a copy of any notice of resignation he receives to the trade union.

The Claimant avers that no union member has withdrawn from union membership to warrant stoppage of deduction and remittance of union dues neither has any member addressed the Respondent seeking to pay his/her union dues directly to the union.

That the Respondent is bound by the laws of Kenya and once the Cabinet Secretary responsible for labour issues a Gazette Notice authorizing deduction and remittance of union dues, the Respondent has a duty to comply and not to try to rewrite the law to suit its interests as it has no capacity to do so.

That the Respondent intends to arm-twist the union and turn it into a lame duck union which it can use at the expense of employees, which shall never be the case as the union has a duty to its members.

That arising from the foregoing, there is no connection between this matter and any other matter already filed in Court. That Petition No. 326 of 2019 shall be heard and determined on its own merits or demerits without trying to associate it with the instant suit.

That employees in Kenya have a constitutional right of Association and of Trade Union membership, this being a universal and fundamental Human Right.

That Recognition Agreement is achieved out of union membership and can only be terminated upon union membership withdrawals to an unsustainable level or where another union claims representation of the same set of employees or where the union has breached the terms of its constitution or the law but such reasons do not include strong and effective Trade Union representation.

That the terms of the Collective Bargaining Agreement are negotiated voluntarily and without coercion and where the union is able to realise better terms of service, such cannot be construed as trade union malpractices.

The Claimant had also filed an earlier application dated 19th February 2020 filed together with the claim, which I will handle later.

Both applications were by consent of the parties disposed of by way of written submissions.

Analysis and Determination

I have considered the application and grounds in support thereof, the replying affidavit and the submissions by both parties. The issue for determination is whether the instant suit is a duplication of issues in suits pending before this and other courts and therefore *sub judice*.

The application did not set out the issues in all the suits between the parties and only attached a Memorandum of Claim in Cause No. 120 of 2019 in which the issues in dispute are –

- (i) Forced union membership withdrawal*
- (ii) Lock out of employees who declined to sign prescribed forms for union membership withdrawal.*
- (iii) Intention to terminate the services of nine employees on account of their union membership.*
- (iv) Employment status of employees at Galot Estate.*

The other documents attached to the instant application are case management notices for the Court of Appeal in **Civil Appeal No. 387 of 2019** filed by **London Distillers (K) Limited** against the claimant herein, and **Civil Appeal No. 362 of 2019** filed by **Galot Estate Kiambu & Another** also against the Claimant union herein. Both notices are not helpful to this court, as they do not set out the issues in dispute in the two (2) appeals.

The claimant has however, in the Replying Affidavit, set out the issues in the two appeals and in other matters pending between the parties herein, which I have already set out herein above. There was no further affidavit contesting the facts pleaded in the replying affidavit and I will therefore assume that the issues in dispute in those suits are as set out in the replying affidavit of REBECCA MUTHOKI.

It is evident from the replying affidavit that there are at last 11 suits between the parties excluding the instant suit.

In the instant suit, the issue in dispute is **“Refusal to Deduct and Remit Trade Union Dues from Union Members”** The two appeals cited by the Respondent being **Appeal No. 362 of 2019** and **No. 387 of 2019** arise from **Cause No. 120 of 2019** where the cause of action was: -

- (i) Forced union membership withdrawal*
- (ii) Lock out of employees who declined to sign prescribed forms for union membership withdrawal.*
- (iii) Intention to terminate the services of nine employees on account of their union membership.*
- (iv) Employment status of employees at Galot Estate.*

Petition No. 326 of 2019 filed by the Respondent seeks to terminate the recognition agreement between the parties. All the other suits being **Causes No. 913 of 2018, 912 of 2018, 127 of 2018 and 1363 of 2018** concern termination, dismissal or payment of terminal dues of employees named herein. The issues in the said suits are thus different from the instant suit.

Cause No. 1639 was concluded vide two rulings delivered on 26th May 2017 and 19th December 2017. The parties have however not stated what the issue in dispute in the suit was. Suffice to state that in view of the fact that the suit is concluded, it cannot be *sub judice* as alleged by the Respondent.

Black's Law Dictionary (9th edition) defines *sub judice* as pending before Court or Judge for determination. The principle of *sub judice* is provided for in **Section 6** of the **Civil Procedure Act** as follows:

No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having Jurisdiction in Kenya to grant the relief claimed.

The Court in **Thika Min Hydro Co. Ltd v Josphat Karu Ndwiga (2013) eKLR** held that:

“It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”

It is clear that the issues in dispute in the instant suit and those in **Cause 120 of 2019** and **Petition 326 of 2019** are not the same. Specifically, **Cause 120 of 2019** seeks to restrain the Respondent from coercing union members to resign from union membership, from locking out employees who decline to resign from union membership and a declaration of the status of employees of Galot Estate, the 1st Respondent in the suit. **Petition 326 of 2019** seeks to terminate the recognition agreement between the Claimant and Respondent herein. In the instant suit, the Claimant seeks reinstatement of union dues, which has been stopped by the Respondent. The issues in dispute herein is thus not similar to the issues in dispute in either **Cause 120 of 2019** or **Petition 326 of 2019**.

I thus find that the issues in dispute therein are not *sub judice*.

The Respondent's other prayer is that the application is an abuse of the court and its process. In advancing its case the Respondent has relied on the case of **Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others [2018] eKLR** where the court described abuse of Court process as follow:

“22. The concept of abuse of court/judicial process is imprecise.

It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.

23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.*
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.*
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.*
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*
- (g) Where an Appellant file an application at the trial court in respect of a matter, which is already subject of an earlier application by the respondent at the Court of Appeal.*
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.”*

It is the submission of the Respondent that the claimant has engaged in clear and uncontroverted abuse of Court process by filing multiple proceedings between the same parties on the similar question of payment of union dues and forceful recognition of domestic staff of the directors of the Respondent. The pending proceedings between the Claimant and the Respondent are; -

- i. Nrb 120 of 2019: KUCFAW v London Distillers Ltd;**
- ii. Nrb Petition 326 of 2019; London Distillers Ltd v KUCFAW,**
- iii. Nrb ELRC 192 of 2016; KUCFAW v London Distillers Ltd;**
- iv. Nrb ELRC 913 of 2018; KUCFAW v London Distillers Ltd;**
- v. Nrb ELRC 912 of 2018: KUCFAW v London Distillers Ltd;**
- vi. Nrb ELRC 127 of 2018; KUCFAW v London Distillers Ltd;**
- vii. Nrb ELRC 1362 of 2019: KUCFAW v London Distillers Ltd;**
- viii. Nrb ELRC 1639 of 2016: KUCFAW v London Distillers Ltd;**
- ix. Nrb ELRC 161 of 2019: Kucfaw v London Distillers Ltd and Nrb ELRC 163 of 2019: KUCFAW v London Distillers Ltd.**

That by filing numerous actions, the Claimants are engaging in a move meant to forum shop for favourable orders by filing distinct claims with the hope of attaining different outcomes before different Courts.

All the suits cited by the Respondent, some of which are filed by the Respondent itself, are on different subject matters. None of those matters are before this court for determination and therefore the court cannot make a determination on a matter that has not been pleaded in the application. Parties are bound by their pleadings and are not allowed to submit or litigate any matter outside their pleadings.

Besides the foregoing, as already held above, the suit herein is not *sub judice*.

Claimant's Application dated 19th February 2020

In the application dated 19th February 2020, the claimant seeks the following orders: -

(i) Spent.

(ii) That pending hearing and determination of this matter, this Court do and hereby orders the Respondent to deduct and remit union dues from their employees who are union members for the month of February 2020 and to continue doing so on monthly basis.

(iii) That pending hearing and determination of this matter, this Court do and hereby restrains the Respondent from victimizing, coercing, terminating or disciplining union members whose payslips are now before this court as proof of deduction and discontinuation and on account of their union membership.

(iv) That this Court be pleased to set down this matter for hearing on priority basis.

(v) That costs of this application be in the cause

The application is supported by the affidavit of REBECCA MUTHUKI and the grounds on the face thereof, which are that: -

(i) That the claimant/Applicant and the Respondent do have a valid Agreement relative to Recognition and Negotiating Procedure which is signed and dated 6th March, 1996 pursuant to which several Collective Bargaining Agreements have been concluded.

(ii) That the Respondent's employees are members of the claimant/Applicant having duly signed the check off sheets as proof of their union membership

(iii) That the check off sheets bear the Orders through Gazette Notices by the Cabinet Secretary, Ministry of Labour authorizing deduction and remittance of union dues to the Claimant/Applicant and to the Central organization of Trade Unions (Kenya) in specified proportions and which also disclose Bank Account Numbers where such are to be paid.

(iv) That the Respondent has over the years been deducting and remitting union dues terminating with remittances for December 2019 for no lawful reason.

(v) That on 22nd January, 2020, the Respondent, without any valid or lawful reason threatened to stop deduction and remittance of union dues.

(vi) That on 23rd January 2020, the Claimant/Applicant asked the Respondent to act within section 48 of the Labour Relations Act, 2007 and reminded the Respondent's Chairman that he is not above the laws of Kenya.

(vii) That a letter dated 25th January 2020 from the Interested Party to the Respondent supporting the sentiments of the claimant/Applicant was equally ignored with complete disregard.

(viii) That the Respondent, in complete defiance of the advice and caution given by the Claimant/Applicant and the Central Organization of Trade Unions (Kenya), went ahead and stopped deduction and remittance of union dues from the month of January 2020.

(ix) That this is not the only form of anti-union activity so far exhibited by the Respondent as on 22nd June 2017 they threatened to revoke the recognition Agreement between them and the claimant which also involved another of their sister companies all in a bid to scuttle the review of collective bargaining agreements which were then ongoing and which have since stalled and are now pending hearing and determination before this court.

(x) That the Respondent herein has also filed a Constitution Petition No. 326 of 2019 seeking to sever its relationship with the claimant/Applicant and to stay all court proceedings now filed in Court in complete disregard to the right to fair trial and access to justice.

(xi) That employees of Galot Estate who declined to withdraw their union membership and who did not pledge their allegiance to the chairman, have been terminated and evicted from the company housing all in complete defiance of the orders of this court in Cause No. 120 of 2019.

(xii) That the Respondent has steadily escalated their anti-union activities beyond measure and that their employees may no longer observe Industrial Peace should this unlawful action continue.

(xiii) That unless the court intervenes and grants the prayers sought herein, the Respondent's employees will continue suffering from anti-union and unlawful activities in flagrant disobedience of the laws of Kenya.

(xiv) That it is only upon grant of the prayers sought herein that the Respondent's employees will be cushioned and protected from anti-union and unlawful activities by the Respondent.

The Respondent opposes the application and filed a replying affidavit of Mohan Galot sworn on 20th August 2020.

It is the Respondent's position that the claimant has been collecting union dues directly from individuals who are not employees of the Respondent but rather, are personal employees of the Directors of the Respondent. That this is in breach of the doctrine of legal personality as these are domestic employees including house servants, gardeners and dog handlers who work at the residence of the Directors. The Respondent submits that such employees are not unionisable under the recognition agreement between the claimant and Respondent.

The Respondent relies on Section 59(1) of the Labour Relations Act, which provides that: -

59. Effect of collective agreements

(1) A collective agreement binds for the period of the agreement—

(a) the parties to the agreement;

(b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or

(c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.

It submits that under Section 2 of the Labour Relations Act unionisable employee is defined as an employee eligible for membership of that trade union.

The Respondent further relies on the case of **Kenya Chemical and Allied Workers' Union v Bamburi Cement Limited [2017] eKLR** the Court stated that;

“Through the trade union the relations between employees and employers, including any employers' organisation are regulated. The regulation is through a collective agreement process in which an agreement is made between a trade union on the one hand and an employer or organization of employers on the other hand, regarding the terms and conditions of employment of the employee. Although by section 32 of Labour Relations Act any employee who is above 16 years of age is entitled to enjoy the rights of membership of a trade union, this rights are however limited by section 59 of that Act to the extent that any CBA made between a trade union and an employer will only bind the Unionisable employees.”

That the Court in **Said Ndege v Steel Makers Ltd [2014] eKLR** also held that: -

“In my view, a reading of section 59(1)(b) of the Labour Relations Act and the definition of unionisable employee in section 2 of the Act leads to an inescapable conclusion that the terms of a collective bargaining agreement bind and are incorporated into the contract of all unions members and unionisable employees of a particular employer who has entered into a recognition agreement with a union and concluded a collective bargaining agreement.”

The Respondent submits that in the absence of a unionisable employee and a valid collective agreement, not even the concerned Minister under Section 49 of the Labour Relations Act can order deduction of any dues. That an employer is only bound to deduct and remit dues for its unionisable employees. The respondent submits that the claimant is trying to arm-twist the Respondent to remit deductions of persons who are not unionisable and are not its employees and that this is an attempt of the Claimant to benefit from an illegality.

The Respondent submits that there is no recognition agreement between the Directors of the Respondent and the Claimant regarding their domestic employees. That although a Company’s Directors are agents of the Company, their private and domestic affairs are autonomous to their position as directors of the company, therefore a collective bargaining agreement between the employees of the Company should not extend to affect those of the domestic workers of a director, who are clearly not unionisable under such agreement.

That no evidence has been adduced to demonstrate that Union dues are not being paid for unionisable employees of the Respondent who are Union members. That by the application, the Claimant is using the Court process to vex the Respondent into paying Union dues for non-unionisable employees who are not even employees of the Respondent. That this issue is directly in issue in **NRB ELRC 120 of 2019** and **Petition 326 of 2019**. The Respondent submits that the instant Suit should await determination of the said issue in the other cases.

For the claimant it is submitted that the Claimant having recruited and having achieved simple majority membership, signed a recognition agreement with the Respondent way back on 6th March 1996. The parties have since then negotiated and concluded Collective Bargaining Agreements with the last such agreement having come into effect on 1st May 2015 for twenty four months and is still in force.

That for a trade union such as the Claimant to act and represent employees, such employees must have joined the Trade Union and the employees have a duty to pay their monthly union dues subscription as proof of their membership.

The claimant submits that by letter dated 22nd January 2020, the Respondent wrote a letter to the claimant informing the claimant of its intention to stop remitting union dues. The claimant submits that its attempts to persuade the Respondent not to actualise its threats to stop union deductions did not bear fruit. It referred to Exhibits 6 and 7 of the application which are letters from the claimant and COTU (K) dated 23rd January 2020 and 25th January 2020 respectively requesting the Respondent rescind the decision to stop deduction of union dues. The claimant further referred to payslips for December 2019 and which reflected union deductions while payslips for January 2021 did not reflect any union dues deductions. Specifically payslips for Lillian Amindo Nasibi, Anna Kamanthe Kivuva and Ramona Mmbwange for December 2019 at exhibit 4 of claimant’s claim reflect union and COTU (K) deductions while payslips for January 2020 at exhibit 8 do not reflect deductions.

All three are employees of the Respondent, London Distillers (K) Limited. Their payslips indicate that they all work in Branch: Factory, Department: Bottling.

From the forgoing, it is not true that the persons whose union dues were not recovered from their salaries were not members of the Claimant Union or eligible for membership as alleged by the Respondent.

Section 48 of the Labour Relations Act provides for union deductions as follows –

48. Deduction of trade union dues

(1) In this Part, "trade union dues" means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.

(2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to –

(a) Deduct trade union dues from the wages of its members; and

(b) pay monies so deducted -

(i) into a specified account of the trade union; or

(ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

(4) The Minister may vary an order issued under this section on application by the trade union.

(5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month

following the month in which the notice is served on the employer.

(6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.

(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

(8) An employer shall forward a copy of any notice of resignation he receives to the trade union.

Further Section 19(1)(f) and (g) of Employment Act provide for deductions from wages of an employee of the following: -

(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;

(g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

Both Section 48 of the Labour Relations Act and Section 19 of the Employment Act authorise deductions of union dues.

Section 48(3) is couched in mandatory terms. An employer is therefore under obligation to comply once an employee has signed Form S (the check off form). The employer has no ability to refuse to deduct union dues once an employee signs the check off forms.

I therefore find that the claimant is entitled to the orders sought in the application.

Conclusion

1. Having found that the respondent has not proved that the claim herein is *sub judice*, its application dated 28th February 2020 is dismissed.

2. The claimant having proved that the Respondent has declined to deduct and remit union dues in violation of the provisions of Section 48 of the Labour Relations Act, I make orders as follows: -

(i) That pending hearing and determination of this matter, this Court do and hereby orders the Respondent to deduct and remit union dues from their employees who are union members for the month of February 2020 and to continue doing so on monthly basis.

(ii) That pending hearing and determination of this matter, this Court do and hereby restrains the Respondent from victimizing, coercing, terminating or disciplining union members whose payslips are now before this court as proof of deduction and discontinuation thereof on account of their union membership.

In view of the fact that the Respondent has not filed a defence to the claim, the Respondent is granted 14 days to do so. A date will be given at the time of delivery of this ruling for mention of the suit for pre-trial directions.

Costs of the applications shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF APRIL 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