



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 306 OF 2020

KENYA QUARRY AND MINE WORKERS UNION.....APPLICANT

-VERSUS-

TRANSFLEET LIMITED.....RESPONDENT

RULING

1. The Applicant filed a Notice of Motion on 14.7.2020 seeking the following Orders:

a. THAT this Honourable Court be pleased to note that the Respondent is using unfair labour practices by refusing to implement the negotiated Collective Bargaining Agreement.

b. THAT the Honourable Court do compel the Respondent to remit the deducted Union dues.

c. THAT the Respondent to pay costs of the application.

2. The application is premised on grounds that the Respondent ought to implement the negotiated Collective Bargaining Agreement (CBA); that the respondent ought to deduct and remit union dues; and that the claimant will suffer economic loss if the orders sought are not granted.

3. The application is supported by the affidavit of Wafula wa Musamia, the Applicant's General Secretary sworn on 13.7.2020 in which he deposed that the claimant and the respondent have signed a Recognition Agreement and registered CBA; the respondent has violated the CBA; and that his efforts to meet the respondent have proven futile.

4. The Respondent opposed the motion by a Replying Affidavit sworn on 27.11.2020 by James Isabirye Mugoya , its Managing Director, in which he deposed that the Respondent has at all times made all reasonable and practical attempts to fulfil the terms of the CBA but majority of its employees have withdrawn their membership from the Applicant after realising that it was not geared towards their needs and interests.

5. He further deposed that by their withdrawal from the Applicant, the workers were exercising their right to freedom of association under section 4 (1) of the Labour Relations Act. He contended that the Applicant no longer holds a simple majority of the Respondent's employees required for recognition and to enforce the CBA as well as undertake collective bargaining in line with the provisions of section 54 of the Labour Relations Act.

6. He deposed that it is violation of workers' rights to labour relation to remit union dues for employees who are no longer members of the union. He averred that by asking the Court compel the Respondent to deduct and pay dues for its workers, the Applicant is in violation of Clause 2 (d) of the CBA that stipulates that no employees shall be compelled to become a member of the Applicant.

7. He averred that the application is unmerited and should be dismissed with costs.

Applicant's submissions

8. The Applicant submitted that it had recruited 154 unionisable employees between 28.5.2014 and 3.9.2019 and that these employees duly acknowledged their membership by signing the Check Off "Form S". It further submitted that pursuant to section 48 (3) of the Labour Relations Act, the Respondent commenced deduction of trade union dues from the members' salaries and remitted the same to it. However, it stopped remitting the Union dues from December 2018 until August 2019 when it remitted the withheld deductions in lump sum.

9. It submitted that the Respondent had previously refused to sign the CBA and was compelled by an Order of the Court in ELRC Cause No. 316 of 2018 and thereafter signed the CBA on 14.10.2019 which was registered as RCA no. 305 of 2019 on 27.11.2019. It further submitted

that thus CBA was to take effect from 1.1.2016 but the Respondent refused to implement it as mutually agreed.

10. It contended that the Respondent has only annexed 54 letters of its employees who have purportedly resigned/withdrawn from the Union but still failed to deduct the union dues of the remaining 100 employees. It relied on section 48 of the Labour Relations Act and submitted that Respondent is obligated to deduct and remit union dues from its one 100 employees who haven't resigned.

11. It argued that the Respondent did not send copies of the letters of resignation as required under section 48 (8) of the Labour Relations Act. It further argued that if it is true that the 54 employees resigned from the Union, the Respondent should have stopped the deduction of trade union dues from August 2020 being one month preceding the date of the resignation letters being 28.7.2020.

12. It submitted that as at the time of registering the CBA, no employee had resigned from the Union hence the Respondent had no legal reason not to implement it. It contended that the failure to implement and register the CBA, infringed the rights of her members under Articles 41 (1) and (2) (a) & (b) of the Constitution. Again it contended that a CBA binds the parties thereto for its entire period by dint of section 59 (1) of the Labour Relations Act.

13. According to it, the issue of simple majority arises at the time when the Union needs to be recognised by the employer for purposes of collective bargaining and once the Union meets this threshold the parties are duty bound to conclude and sign a CBA.

14. It argued that if a Union loses the command of the simple majority of the workforce a Recognition Agreement remains in force and continues to bind the parties until such a time when the employer successfully applies to the de-recognise the Union. It cited the decision in **Nairobi ELRC Cause No. 1661 of 2016 Kenya Quarry & Mine Workers Union v National Cement Company Limited**.

15. It submitted that the Respondent has no legal basis to refuse to implement the registered CBA and should be compelled to pay the affected employees all the benefits and accrued arrears from the time the CBA was to take effect.

16. Finally, she submitted that she had proved her case on a balance of probability and that the Respondent shall not suffer prejudice if the reliefs sought are granted.

Respondent's submissions

17. The Respondent submitted that the effect of an employee's resignation from a Union on the employer's obligation to remit union dues and make deductions is provided under section 48 (6) of the Labour Relations Act. Further, it contended that, employers cannot be forced to remit union dues to a union and make deductions from the pay of an employee who is not a member of a Union.

18. It acknowledged the existence of a CBA with the claimant but averred that it should not be obligated to deduct and remit Union deductions of employees who are no longer members of the Union. It argued that the resignation reduced the number of union members such that the Applicant no longer held a simple majority of its workers and therefore it is not entitled to any remittance of union dues.

19. For emphasis, it relied on **Kenya shoe and Leather Workers Union v Crown Industries Limited & another [2017] eKLR** where the court held that trade union pursuing recognition must lay before the Court documentary evidence that it has recruited a simple majority of the unionisable employees.

20. It also relied on **Kenya Chemical & Allied Workers Union v Strategic Industries Limited [2016] eKLR** which also dealt with recognition. It further argued that Section 54 of the Labour Relations Act which provides that the burden of proving the workers it represents is placed upon the Union.

21. It argued that the principle of recognition and implementation of the CBA under section 54 of the Labour Relations Act rests on the Fundamental freedom of association under Article 41 of the Constitution. Consequently, it submitted that as at 28.7.2020, its workers were no longer members of the Applicant and as such their pay was not subject to deduction of union dues. For emphasis, it relied on **Kenya Jockey and Betting Workers Union v Resort Kenya Limited [2014] eKLR** where the Court held that the union having no simple majority could not demand dues and agency fees to be remitted to them.

22. It contended that it was merely acting within the law by not remitting union dues to the Applicant. Therefore, it urged the Court to dismiss the Application since it lacks merit and is an abuse of the court process.

Issues for determination

23. Having considered the material presented by the parties, it is undisputed that the parties herein have signed a Recognition Agreement and registered a CBA on 14.10.2019. It is also common ground that some of the respondent's employees have since resigned from the union but there are still some employees of the respondent who continue being members of the union. The main issue for determination is whether the Respondent should be compelled to deduct and remit union dues to the claimant.

24. The Applicant submitted that between 28.5.2014 to 3.9.2019, it had recruited 154 unionisable staff but the Respondent did not remit union dues until August 2019 when it remitted the withheld dues in lump sum.

25. The Check Off Forms produced by the Applicant indicate that it recruited 152 employees and not 154 as alleged. On the other hand, the resignation notices dated 28.7.2020, produced by the Respondent, show that 54 employees resigned on 1.9.2019.

26. Union dues can only be deducted when an employee belongs to a union. Upon withdrawal from the Union, employer cannot make such deduction. Section 48 (6) of the Labour Relations Act provides:

“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.”

27. The letters of withdrawal from the Union were done 10 months after the intended withdrawal date which is also 14 days after the suit was filed. This action was mischievous as it was aimed at remedying the non-compliance with sections 48 (6) and (8) of the Labour Relations Act because there was no notice in writing and the Applicant was never served with the resignation notices.

28. The Applicant submitted that they received the withheld Union dues from the month of December 2018 to August 2019. Therefore, the Respondent did not remit dues from the month of September 2019 when 54 of its employees resigned notwithstanding the fact that the employees did not present their notices of resignation.

29. Pursuant to section 48 (7) of the Labour and Relations Act, the notices were to take effect 30 days from the month they are given. In this case, the notices were to be implemented in August 2020. However, the 54 employees seem to have made a decision to leave the Union which is within their right under section 4 (1) (c) of the Labour Relations Act.

30. As a result, this Court cannot forcefully require for the deduction of union dues where employees have chosen to resign from a union. This would also be allowing an employer to limit how an employee disposes their wages, contrary to section 17 (11) of the Employment Act. However, since the union has negotiated a CBA with the respondent, it is at liberty to claim deduction of Agency fees from the employees who resigned from the union membership under section 49 of the Labour Relations Act.

31. With respect to the implementation of the CBA, the parties agreed that there exists a valid CBA between them. The Applicant produced a CBA signed on 14.10.2019 and submitted that the CBA was registered on 27.11.2019. Clause 25 of CBA provided:

“EFFECTIVE DATE

This Agreement shall be effective as from 1st Jan 2016 and it shall remain in force for a period of 24 months. Thereafter the agreement shall continue in force until it is amended. Provided that the party wishing to amend or terminate it gives two months’ notice in writing giving in details all the amendments required.”

32. The foregoing clause is clear that parties intended that the CBA shall operate from 1.1. 2016 but continue to bind them until it is amended or terminated. In the absence of a termination letter on account of not attaining a simple majority, the Respondent cannot allege that it cannot implement the CBA.

33. Additionally, since only 54 of its employees have resigned from the Union, there remains 98 employees who have elected to remain in the Union. Therefore, the Respondent cannot curtail their right under Article 41 (2) (c) of the Constitution and section 4 (1) (b) of the Labour Relations Act by failing to remit their dues to the Union.

34. Having found that the claimant still has members among the respondent’s employees, I proceed to hold that under section 48(2) of the Labour Relations Act, the Respondent is legally bound to deduct dues from its employees who have not resigned from the Union and remit the same to the to the claimant union. However, concerning the unionisable employees who are not members of the claimant, it is at liberty to pursue Agency fees under section 49 of the Act.

35. In the end allow the application to the extent stated is, that the respondent is hereby compelled to deduct union dues from employees who are members of the claimant and remit the same to the trade union pending herein and determination of the suit. The claimant is also awarded costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 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 ruling has been delivered to the parties online via Google Teams 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