



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU**

**COURT NAME: ELDORET LAW COURT**

**CASE NUMBER: ELRCC/56/2020**

**CITATION: KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS VS JAMII DISTRIBUTORS E.A LIMITED**

**RULING**

**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**

**CAUSE NO 56 OF 2020**

**KENYA UNION OF COMMERCIAL**

**FOOD AND ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**JAMII DISTRIBUTORS E.A LIMITED.....RESPONDENT**

**RULING**

By a Notice of Motion dated 11th December, 2020 the applicant sought orders among others that:

THAT the Honourable Court does issue orders restraining the Respondent from forcing employees into signing contracts of employment with an outsourced firm known as Saruja Supplies Limited or any other outsourced labour offering firm.

THAT this Hon. Court does issue interim orders restraining the Respondent from victimizing, intimidating, coercing, harassing, disciplining or terminating the services of the Claimant /Applicant members whose names appear on the check-off forms on account of their union, Pending hearing and determination of the main suit.

THAT the Honourable Court does order the Respondent to commence deduction and remittance of union dues to Claimant's whose names appear on the check off forms.

THAT the Honourable Court to order the Respondent to recognize the Claimant for purposes of Collective Agreement.

The application was supported by the affidavit of Rogers Ombati who deponed among others that:

THAT I am an Officer of the Claimant /Applicant Union in charge of membership recruitment in the North Rift region and did coordinate and supervise the recruitment of the Respondent's employees to join the Claimant/Applicant Union.

THAT the Claimant /Applicant recruited 52 unionisable employees of the Respondent out of a possible 70 and that the said employees acknowledged their membership by signing the Claimant /Applicant's check off sheets as proof of their membership.

THAT through letters dated 7th August, 2018, 25th September, 2018, 8th November, 2018, 29th January, 2019 and 26th August, 2020 the Claimant/Applicant sent check-off forms to the Respondent for the purpose of deduction and remittance of union dues.

THAT on 25th July, 2018 the Claimant/Applicant addressed the Respondent over the Trade Union membership and sent a draft copy of the

model or Draft Recognition Agreement for their study and ensuing signatures but the Respondent declined to allow the meeting for the purposes of signing the Recognition Agreement.

THAT the Respondent through a letter dated 28th August, 2018 directed the Claimant to address REAL CAREERS LTD claiming that they are the ones who provide them with outsourced labour.

THAT the Respondent later through email correspondence, advised the Claimant/Applicant to be addressing one Mr. Jack a representative of SARUJA SUPPLIES LIMITED since they are the ones who supply them with outsourced labour.

THAT the Claimant/Applicant made every effort to have the issue resolved at the party's own level but Respondent frustrated every effort forcing the Claimant/Applicant to report a trade dispute to the state Department of Labour under Section 62 of the Labour Relations Act on 4th September, 2018.

THAT the trade dispute was accepted and the Ministry of Labour endeavored to effect settlement by conciliation consequently Caroline Chemursoi of Eldoret labour office was appointed to act as a conciliator.

THAT the conciliators convened several meetings in an attempt to amicably resolve the dispute but the Respondents, remained adamant and refused to recognize the union and deduct union dues.

THAT on the meeting of 29th October, 2018 the Respondent did not come but sent a representative from Real Careers Ltd one Mr. Jackson Kemboi who the Claimant/Applicant Union felt that was a stranger to the proceedings since none of the employees' names that appeared on the check off form belonged to his firm.

The respondent filed a replying affidavit through one Bharat Krishna Pavulri who stated among others that:

THAT I am the director of the respondent company herein competent to swear this affidavit.

THAT the contents of paragraph 3 of the supporting affidavit are denied and particularly that the respondent is not the employer of the alleged employees as there exist a valid outsourcing agreeing between the 1st Respondent and Saruj supplies limited whose functions include provision of labour occupational health and safety , labour laws, payment of workers and employee's discipline among others

THAT in response to paragraph 4 of the supporting affidavit, most of the alleged recruited employees voluntarily left work and are no longer available.

THAT in response to paragraph 5 and 6 of the supporting affidavits, all the affairs of the employees including their welfare and payroll are managed by Saruj supplies limited and the respondent herein is only obligated to pay the outsourced firm consolidated payments inclusive of salaries/wages, redundancy benefits, terminal benefits and union dues. The respondent therefore has no capacity to deduct and remit union dues as he is not an employer. Further that there has been numerous correspondence between the respondent and applicant herein where the respondent has always referred the applicant to Saruj supplies limited with the applicant herein but the applicant has never made any attempt to approach Saruja supplies limited.

In submissions in support of the Motion, Mr. Kamuri for the applicant stated in the main that none of the respondent's employees had ever been employed by Real Careers Ltd or Saruj Supplies Limited to work for the respondent but were being forced and or intimidated to sign contracts with Saruj Supplies Limited against their will. Further the names of the employees who appear on the applicant's check-off forms were employed by the respondent but were being forced to sign employment contracts with Saruj Supplies which was an outsourced company only out of their trade union membership, Mr. Karuri further submitted that the respondent had been paying the employees their salaries and remitting their statutory dues until October 2020 when the respondent transferred the paying of statutory dues to Saruj Supplies Limited without the knowledge of the employees . Further, the application was not intended to intimidate or bully the manner in which the respondent should run its business affairs but was purely to protect employees labour and employment rights.

Ms Luseria for the respondent on her part submitted that the respondent contracted Saruj Supplies Limited to provide employees to perform various duties. The employees though working in Jamii premises remained under Saruj Supplies management and control. The affairs of the employees including their welfare, payroll, occupational health and safety etc. are managed by Saruj Supplies. The respondent was only obligated to pay the outsourced firm consolidated payments inclusive of salaries, redundancy benefits, terminal benefits and Union dues. According to Counsel, the respondent could not sign a recognition because the workers in question were under control of Saruj Supplies Limited.

This is an interlocutory application therefore the Court only needs to consider whether the applicant merits the orders sought in the interim. However, an examination of the application and the main claim reveals that the prayers sought in the interim are more or less similar to prayers sought in the main claim.

The main bone of contention between the parties is whether the Claimant's members are employees of the respondent or those of Saruj Supplies Limited. According to the respondent it entered into a Labour Outsourcing agreement with Saruj to supply it with employees. According to the respondent Saruj is responsible for discipline and control of the outsourced employees including payment of their salaries and Union dues.

The Claimant does not dispute the fact that the respondent since October, 2020 started outsourcing Labour except that according to the Claimant its members were being forced and intimidated to enter into employment contracts with Saruj Supplies Limited.

Labour Outsourcing is gaining popularity with most organizations across the world opting for it. Of course, there has been resistance and suspicion about it but this has not prevented it from gaining ground. It is at the discretion of an organization, when it comes to restructuring their business operations in order to sustain profitability and remain competitive. Usually, a Court will not interfere with management discretion on how to conduct its operations provided they are aligned with the relevant Labour laws and regulations.

The applicant has indicated that there has been an attempt to conciliate the dispute without success. According to the Claimant, the respondent has maintained that it was not the employer of the concerned employees hence was not in a position to sign recognition agreement and deduct union dues.

The Outsourcing agreement tabled before the Court is dated 26th June, 2020 and is stated to take effect from 1st July, 2020 and was to run for one year terminating on 30th July, 2021 but renewable. It is however not clear from both parties in dispute, the prevailing position prior to the Outsourcing agreement. The Court was not told at what point the respondent decided to Outsource Labour and how the transition was handled. If there were employees of the respondent affected by the decision to Outsource, their transfer to the Outsourcing Organization must be handled in consultation with them and in accordance with the Employment Act or existing CBA if any.

In the circumstance the Court will not issue the Orders sought in the Motion dated 11th December, 2020 but will instead order that his matter be resubmitted to the County Labour Office for Conciliation with the sole purpose of establishing the prevailing situation prior to the decision to Outsource and how the affected employees were handled including their terminal benefits that accrued prior to Outsourcing. The Conciliation should further establish the terms of the contract of employees affected prior to the decision to Outsource Labour . That is to say if by entering into an Outsourcing agreement which is only for a year, employees who were on an open-ended contract would be subjected to the duration of the Outsourcing contract.

Further, since the Court has deemed it not appropriate to injunct the decision of the respondent to Outsource Labour, the Conciliator should discuss with the parties including Saruj Supplies Limited the possibility of entering into recognition agreement with the applicant and deduction of Union dues once the applicant is satisfied that transition of its members from the respondent to the Saruj is procedural and in accordance with prevailing Labour Laws and practices as per existing CBA if any.

The matter will be mentioned sixty (60) days from tis ruling for further directions or orders. Mention on 13th September, 2021.

It is so ordered.

**DATED AT ELDORET THIS 11TH DAY OF JUNE, 2021**

**DELIVERED AT ELDORET THIS 11TH DAY OF JUNE, 2021**

**SIGNED BY: HON. JUSTICE J. N. ABUODHA**