REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 240 OF 2018

KENYA ENGINEERING WORKER UNION.....CLAIMANT

VERSUS

RIFT VALEY ENGINEERING LIMITED.....RESPONDENT

R U L I N G

1. The application before me for determination is a notice of motion dated 21st October, 2020 filed under certificate of urgency on 22nd October, 2020 by the claimant/ Applicant acting in person. It is made allegedly under Rule 12 of the Employment and Labour Relations Court and all enabling provisions of the Law.

2. The application by the claimant/ Applicant, seeks the following orders ;-

a. That this matter be certified urgent and heard ex-parte in the first instance an on priority basis.

b. That the Honourable Court be pleased to set aside, stay orders of the proceedings in this matter issued in the ruling delivered on the 20th day of July, 2019.

c. That the Honourable court be pleased to issue an order directing central planning and monitoring unit(CPMU) ministry of labour to file a report within the shortest specific time frame.

d. That any other relief the Honourable Court may deem fit to grant.

e. That the costs of this Application be provided for by the respondent.

3. The Applicant is supported by the grounds on the face thereof and the affidavit of **Wycliffe A. Nyamwata**, the applicant's secretary general, sworn on 20th October, 2020 on the following grounds;

a) That, the Honourable Court issued an Order in a Ruling delivered on 20th day of July, 2019 directing parties to revert back to their level and review the CBA due to the allegations by the Respondent herein that the suit before the Honourable Court was premature.

b) That following the aforementioned Ruling the Claimant/Applicant herein did write to the Respondent proposing the parties' joined meeting to review the Parties CBA via a letter dated 15" day of August, 2019 which the Respondent verbally declined. They attached the copy of the letter as annexure as WAN-1.

c) That on the 28th day of September, 2019 the Claimant further wrote to the Respondent requesting for parties joined meeting to discuss the proposed CBA. They attached the said letter and CBA proposal marked as annexure WAN- 2.

d) That the Respondent declined the said requested meeting for CBA review via her Counsel letter dated 4th day of October, 2019 which is attached herein as annexure WAN-3.

e) That refusal by the Respondent to review parties CBA prompted the Claimant to invoke section 62 of the Labour Relations Act, 2007 by reporting a trade dispute to the Ministry of Labour. A copy of the said letter is attached and marked as annexure WAN- 4.

f) Subsequently, the dispute was accepted under reference No. MLSP/LD/IR/13/18/2020 in which Mr. Abuto of Nakuru County Labour Office was appointed a Conciliator as evidence by the attached appointing letter marked as annexure WAN 5.

g) That since the appointment of the Conciliator on 30th day of April 2020 to date the Conciliator one Mr. Abuto is yet to convene any Conciliatory meeting, much more past the time frame provided for by the Act hence prompting the Claimant to make this Application.

4. The application is opposed and the respondent filed a replying affidavit in opposition to the application deponed to by **Tejpal Singh Hunjan**, the director of the respondent, on 30th November, 2020. The respondent stated as follows;

a) That the application is fatally defective. vague, bad in law, mischievous, frivolous, incompetent, a gross abuse of the Court process and cannot be entertained by this Honourable Court as it has been brought under totally wrong and inapplicable provisions of the Law. It ought to be dismissed with costs to the Respondent.

b) That by dint of Section 54(1) of the Labour Relations Act, 2012 the proposed Collective Bargaining Agreement (CBA) is inapplicable since currently the unionised employees are not a majority of the Respondent's employees. The said Section of the Law provides as follows;

> **"An employer .... shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.**

Consequently, that no CBA can be signed between the Claimant's Union and the Respondent presently and that the Claimant's application and entire suit must fail.

c) That the Respondent has a total of 14 employees, of which only 4 are unionised, as is evidently clear from the List of the Respondent's employees attached hereto and marked as Exhibit TSH- I. further that this information is well within the Claimant's knowledge.

d) That further, the claimants application must fail because;

i) as per prayer 2 of the Notice of Motion. there are clearly no stay orders herein issued on 20/7/2019 as alleged by the Claimant. The Court records reveals that there are no such orders herein and there was no Court attendance on 20/7/2019 whatsoever. The Claimant's application is thus clearly wrong and misrepresents facts herein and must be dismissed.

ii) Prayer 3 of the Claimant's misconceived application must also fail since as afore stated, there can be no CBA signed or even negotiated between the Claimant and the Respondent's employer by dint of the fact given of only a minority of the Respondent employees are unionised. They reiterated that by dint of Section 54(1) of the Labour Relations Act. the threshold for a CBA to apply to the Parties herein is not met.

e) That, the Claimant's application is vague and based on totally inapplicable provisions of the Law. The alleged Rule 12 of the Employment and Labour Relations Court Act cited relates to service of corporate bodies. which is inapplicable herein. The prayers purportedly prayed for are vague and inapplicable herein. Further, the Claimants totally misrepresent facts on Court attendances and orders issued herein. The Claimant's application is clearly a waste of judicial time and ought be summarily dismissed.

f) It was averred that the Claimant herein, is on a fishing expedition filing all manner of unmerited claims against the Respondent. The respondent states that, the Claimants already owes them over Kshs. 152,460 in unpaid costs following the dismissal of **NAKURU ELRC CAUSE NO. 61 OF 2018 KENYA ENGINEERING WORKERS UNION –VS-RIFT VALLEY ENGINERING LIMITED**. They therefore contended that the Claimant herein ought not be granted any audience by this Court in this matter against until they pay the said costs to them. They attached copies of a demand letter and warrant of attachment marked both marked as annexure **TSH IV (a) and (b)** respectively.

g) They finally, urged this Court to dismiss the claimant application for being vexatious.

5. On **16th November, 2020** this court granted the Claimant/applicant leave to file a supplementary affidavit which it did and filed on 7th December, 2020 deposed upon by **Patrick M. Makale**, the claimant's industrial relations officer and states as follows;

a) That the application herein is filed under section 12 of the Employment and Labour Relations Act, 2016 and if not properly captured then it can be covered by the words "ANY OTHER PROVISION OF THE LAW', hence if there is any provision that has been misquoted then the proper remedy shall be to amend the same of which it was only typing error instead of section 12 it was typed rule 12.

b) That section 54 of the Labour Relations Act, 2007 provides for recognition of a trade union after attaining simple majority which the Claimant did and if the Respondent feels otherwise the same provision has given procedure on renovation of thé same which she is at liberty to utilize but the current suit is about CBA negotiations hence the reason the Honourable Court issued Orders for parties to go back to the grass root for the same after requisition by the Respondent.

c) That the issue of membership is not before the Honourable Court and as stated at paragraph 4 above, the Respondent can follow the laid down procedure to revoke the Recognition Agreement but for now it is in place and valid and the purpose is meant for CBA negotiations.

d) That it is upon the Respondent to give print outs to the Claimant but has either refused or ignored and the same is not part of the dispute before this Honourable Court.

e) THAT, the words **'Stay Orders'** can be interpreted differently since the Court issued Orders for parties to go back and negotiate at their level and if they can't agree to invoke section 62 of the Labour Relations Act, 2007 which the Claimant has compiled with when the matter was pending before the Honourable Court hence the use of the words 'Stay Orders.'

f) That it is common sense that there are no Rules in any Act but section, hence typing error on the face of the Application ought not to change the purpose of the application and thus urged this court to adopt or allow the Applicant to amend.

g) The applicant denied owing the Respondent Kshs. 152,460/= as the said Orders were stayed by this Honourable Court in Appeal No. 25 of 2019 at Nairobi before being transferred to Nakuru although parties are the same but it does not relate to this one directly.

Submissions

6. the claimant submitted that this application is properly before this court as it has complied with this Honourable courts direction issued on 25th day of July, 2019 and the provisions of section 69 of the labour relations Act.

7. It is submitted that the reliefs sought by the claimant are within the law as the issue of central planning and monitoring unit (CPMU) is provided for under rule 37 of the employment and labour relations Court Procedure Rules ,2016.

8. The respondent on the other hand submitted that the application by the claimant seeks review of a collective Bargaining Agreement (CBA) between its unionised members and the respondent. He however submitted that the claimant has not met the initial threshold of recognition of a trade union as provided for under section 54(1) of the labour relations Act, since it has only recruited 4 out of 14 employees at the respondents' employ. Consequently, the respondent submitted that the claimants' application and the entire suit must fail.

9. It is further submitted since the claimant does not have a simple majority of its members in the respondent employment, they ought not to be recognized by the respondent as a trade union and it follows that there is no need of any negotiation on CBA. It buttressed this argument by relying on the case of **Kenya Union of Entertainment and music industry employees –versus- Bomas of Kenya Limited [2018] eklr.** Where the court held;

> **"The Claimant herein has lost the right to represent the respondent's unionisable staff under Section 54(1) of Labour Relations Act since it did not meet the initial requirement of recruiting a simple majority".**

10. It is further argued that the initial CBA between the Applicant and the Respondent herein expired before the respondent moved the ministry of Labour and trade for its revocation. Further that most unionisable employees in the former CBA have left the respondent employment leaving only 4 employees out of 14 who are currently desirous of joining the claimants' union.

11. The respondent submitted that the claimant's application and the entire suit was filed prematurely without following due procedure set out under section 54(6) of the labour relations Act which provides that when a dispute arises as to the right of a trade union, with regard to recognition for the purposes of collective bargaining or cancellation of the recognition agreement, the trade union may refer the said dispute for conciliation. They thus submitted that, the claimant should have referred this dispute to a conciliator before filing this suit not after as evidence in paragraph 6 of the claimants supporting affidavit.

12. It was further submitted that no evidence was tendered before this court to confirm that a notice to refer the dispute between the parties herein to a conciliator was ever served upon the conciliator and the respondent. Further that no report has been filed in court by the alleged conciliator. The Respondent therefore urged this court to dismiss the application herein and the main suit with costs to the respondent.

13. I have considered the averments of the parties herein. Indeed it is clear there were no court proceedings on 20/7/2019 and no stay orders were issued. Prayer 2 is therefore not necessary.

14. However as per this court's ruling on 25/7/2019, the court directed that the respondent should provide the claimant with the audited financial statement from the period of 1st May, 2015 to 28th April 2017 within 30 days from the even date.

15. The Honourable Judge also gave directions that if the respondent failed to comply as directed, the claimant was free to invoke the provision of Section 62 of the Labour Relations Act 2007.

16. The only recourse for the applicant herein was to invoke Section 62 of the Labour Relations Act if the respondent failed to act as ordered.

17. Section 62 of Labour Relations Act deals with reporting of a dispute to the Minister which the applicant have already done. As the conciliator failed to resolve the dispute the claimant is free to proceed with the main claim as it is or amended to reflect the current position.

18. Those are the orders of this court.

19. Costs in the cause.

Ruling delivered virtually this **8TH** day of **JUNE, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Makali for the Claimant – present

Githiru & Co. for Respondent – present

Court Assistant - Fred