



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
CAUSE NUMBER E6502 OF 2020

BETWEEN

KENYA PRIVATE UNIVERSITIES WORKERS UNION.....CLAIMANT

VERSUS

MANAGEMENT UNIVERSITY OF AFRICA..... RESPONDENT

RULING

1. In its Application dated 24th November 2020, filed on 30th November 2020, the Claimant seeks in main, the following orders: -
 - a. Prohibitory order, restraining the Respondent from coercing, threatening or victimizing the Respondent's Unionisable Employees, on account of their subscribing to the Claimant.
 - b. An order compelling the Respondent to grant the Claimant access to the Respondent's premises, to recruit members.
 - c. An order compelling the Respondent to comply with Section 48 of the Labour Relations Act regarding trade union dues.
2. The Application is based on the Affidavit of General-Secretary Peter Emisembe Owiti, sworn on 24th November 2020.
3. He explains that his Union has written to the Respondent severally asking for access to the Respondent's premises, to recruit members. It has sought the intercession of COTU-K. The Respondent has adamantly denied the Claimant access.
4. At the same time the General-Secretary states that, his Union Representatives visited the Respondent's premises uninvited, and managed to recruit 15 members.
5. The Claimant has however not submitted check-off forms signed by the recruitees. Owiti explains that when the Claimant wished to submit the forms, the recruitees implored the Claimant to first seek protective measures against possible victimization by the Respondent, on account of their membership.
6. The apprehension of victimization, the Claimant states, is based on occurrences at other Universities, where recruitment was carried out. The Claimant lists several Universities where alleged victimization occurred, after recruitment. In all of the listed Universities, there are pending Claims filed in various Courts by the Claimant Union, against the respective Universities.
7. The Application is opposed through an Affidavit sworn by an Officer from the Respondent, Paul Wanjama Mwangi. It is explained that the Respondent received a letter from the Claimant, dated 7th November 2016, requesting the Respondent to organize a meeting at the Respondent University on 22nd November 2016.
8. This fell within the University's examinations period and the meeting could not be held without, interrupting examinations.
9. In February 2018, the Claimant reported the existence of a trade dispute to the Cabinet Secretary for Labour on the issue of access to the premises. A Conciliator was appointed, but did not communicate with the Respondent. Conciliation has not been exhausted.
10. The Respondent holds that it has allowed the Claimant access on more than 5 occasions, whereof the Claimant managed recruitment of a paltry 14 members. [The Claimant states it has recruited 15 members].

11. It was ordered by the Court on 12th March 2021, that the Application is considered and determined on the strength of the record. Parties confirmed filing and exchange of their Submissions, underscoring their respective positions, at the last mention on 3rd June 2021.

12. In that virtual session it was erroneously indicated that Judgment, rather than Ruling, would be delivered on 30th September 2021.

13. The record is hereby rectified to read that the matter is due for a Ruling.

14. That Ruling, is ready for delivery earlier than the stated date of 30th September 2021.

15. This Court's policy is that if its decision is ready earlier than the date given to the Parties, it should be released immediately, in expediting administration of justice. It is noted on the record that delivery of the Ruling has been adjusted to the date indicated below.

The Court Finds: -

16. The Claimant Union seeks to enforce deduction and remittance of trade union dues, and the right of access to the Respondent's premises to recruit members.

17. There is no evidence that access has been denied. The Claimant has written letters formally asking the Respondent to facilitate meetings with Unionisable Employees, at the Respondent's premises. The Respondent has not facilitated such meetings.

18. The Court does not think that failure in facilitating such meetings, amounts to denial of access. The Claimant Union has not been locked out from the Respondent's premises. The Respondent has failed to organize meetings between its Employees and the Claimant Union. It has not closed its gates upon the Claimant.

19. The Claimant has indeed accessed the premises, and recruited 15 [or 14] members. This is acknowledged by the Claimant. There are check-off forms signed by the Employees. The Claimant Union must have had access, in order to recruit those Employees. The Claimant states it accessed the premises uninvited; it does not have to be invited by the Respondent, to have access.

20. The Court, in a similar Application involving the ***Claimant v. Mt. Kenya University, in Cause Number 117 of 2020***, was of the view that once an Employer has opened its gates to a Trade Union, there is no obligation on the part of the Employer to do more, to be deemed to have granted access.

21. There would only be such an obligation to do more than mere opening of its gates, if there is in place a Recognition Agreement creating other obligations relating to access, pursuant to Section 56 of the Labour Relations Act.

22. The Respondent's submission on Section 56 above, that there would have to be a Recognition Agreement for the Claimant to have the right of access, is incorrect.

23. As observed in the ***Mt. Kenya University*** Ruling, initial recruitment of members, precedes Recognition Agreement. Based on sufficient members [50% +1] recruited, the Employer then, grants recognition to the Union. Recognition Agreement comes after the Union has established that it has a simple majority at the given workplace. Recognition Agreement however, does not signal end of recruitment. Employees are constantly moving in and out of employment. Labour is highly mobile and volatile. Employment contracts are routinely terminated. The number of members recruited keeps shifting. To sustain its right as the sole collective bargaining agent, given by Recognition Agreement, the Union must continue to recruit, to always have a majority of Unionisable Employees at the relevant workplace. Rival Unions in the industry may recruit from the same workplace, achieve higher numbers than those enlisted by the existing Union, and seek invalidation from the National Labour Board, of recognition granted to the existing Union. There is need therefore for continuous recruitment and access, which may be regulated in a Recognition Agreement, under Section 56 of the Labour Relations Act. This law should therefore not be understood as denying unrecognized Trade Unions, the right of access to workplaces, for purposes of recruiting members.

24. The interpretation given to Section 56 by the Respondent, supported by some decisions of this Court cited by the Respondent, would mean Trade Unions without Recognition Agreements, do not have the right of access to recruitment grounds. How will they achieve the required numbers to enter into Recognition Agreements with Employers?

25. In the respectful view of the Court, section 56 intends to regulate access for purposes of continuous recruitment, where Parties have Recognition Agreement. Access becomes among issues that may be dealt with in the Recognition Agreement. The right would be regulated through the Recognition Agreement, determining for instance, when and how the right is to be exercised. The Parties may agree on which Union Representatives are allowed in and on education of Employees about trade unionism. Section 56 allows the Parties to have in place the ground rules, for the Recognized Trade Union to access the Employer's premises, for continuous recruitment of members. The provision is not meant to bar unrecognized Trade Unions from accessing workplaces, to recruit members. They must be allowed access, in line with the right to freedom of association under Section 4[1] of the Labour Relations Act, The Industrial Relations Charter and Articles 36 and 41 of the Constitution of Kenya.

26. There is no evidence that any of the 15 [or 14] recruited members have been victimized or threatened with victimization by the Respondent, on account of their association with the Respondent. None of them has sworn an Affidavit, disclosing victimization or threats of victimization.

27. They seek the protection of the Court, based on unsupported apprehension of victimization.

28. The various cases cited by the Respondent, as examples of victimization, are *sub judice*. This Court would be interfering with the work of the Courts in which those cases are pending, by declaring that respective Employees left employment through victimization by their Employers, on account of their association with the Claimant.

29. On trade union dues, the Claimant has put the cart before the horse. The check-off forms have not been forwarded to the Respondent. How will the Respondent act under Section 48 of the Labour Relations Act, without the names and authorisation of the recruits? The Claimant should submit the check-off forms first. The Respondent would be bound to act on the forms, under Section 48 of the Labour Relations Act. There is an order made by the Cabinet Secretary for Labour, under Section 48[1] of the Labour Relations Act, and the Respondent would have no reason not to comply, once the check-off forms are submitted. The Court however, cannot issue an order compelling the Respondent to act on check-off forms which are not within the custody of the Respondent.

IN SUM, IT IS ORDERED: -

a. The Application filed by the Claimant dated 24th November 2020 is declined.

b. Costs in the cause.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT CHAKA, NYERI COUNTY, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 20TH DAY OF AUGUST 2021

JAMES RIKA

JUDGE