



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1520 OF 2016

TRANSPORT WORKERS UNION KENYA.....CLAIMANT

VERSUS

AUTOMOBILE ASSOCIATION OF KENYA.....RESPONDENT

AND

KENYA LONG DISTANCE TRUCK DRIVERS & ALLIED

WORKERS UNION.....INTERESTED PARTY

JUDGMENT

1. The Claimant Union filed a Memorandum of Claim on 3rd August 2016 against the Automobile Association of Kenya, seeking for prayers:

- a. That, the Respondent be compelled to forward the concluded parties CBA for year 2016/17 to the Hon. Court (and to the Claimant) for registration within Section 60 of the Labour Relations Act-2007.
- b. That, the Respondent be restrained from terminating the parties Recognition Agreement with the Claimant or entering into another Agreement detrimental to the Claimant and its members.
- c. That, the Respondent be Ordered to remit trade union monthly dues to the Claimant for the months of – April 2016, June 2016 and July 2016.
- d. That, the Respondent be Ordered to continue remitting monthly trade union dues within the provisions of Sections 48 & 50 of the Labour Relations Act-2007.
- e. That, the Respondent be permanently restrained from terminating/ discriminating and/or threatening the unionized employees within Section 5 of the Labour Relations Act-2007
- f. That, cost of this application be provided.

2. The Claimant Union avers it has a binding Recognition Agreement with the Respondent and a unionised membership base of over 90% of the Respondent employees. The Claimant avers that both parties herein have severally negotiated Collective Bargaining Agreements (CBAs) registered by the Court and that parties reviewed the current CBA in November 2015 and concluded and signed a new CBA for the period 2016/2017 in March 2016. The Claimant averred that after signing the said CBA, the Respondent Management and the Claimant's former official illegally colluded and entered into a deal to purport that the CBA had not been concluded, despite evidence of signed minutes. The Claimant averred that the Respondent further coerced and deployed the services of some employees to issue notices to fellow employees to induce them to withdraw their union membership from the Claimant. It contends that the foregoing action was a ploy by the Respondent to delay registration of the CBA it had signed with the Claimant. The Claimant avers that in seeking to register their negotiated CBA, it wrote a letter to the Respondent and its General Secretary also sought for a meeting with the Respondent but when parties met on 31st May 2016 no agreement was recorded. The Claimant averred that the Respondent proceeded to forge employees' signatures on notices purporting to withdraw their membership and also started to illegally withhold payment of union dues to the Claimant. The Claimant Union avers that when it was apparent the dispute could not be resolved within the parties' level, it reported the same to the Ministry of Labour and a Conciliator was appointed. The Claimant averred that the Respondent however declined to honour the conciliation process and is further threatening to unlawfully enter into a Recognition Agreement with another Union before terminating the Recognition Agreement it has with the Claimant Union.

3. The Claimant also filed two Witness Statements made by its officials, Dan Mihadi and Dishon Ogowa Nyambok who reiterate the averments made in the Memorandum of Claim. Mr. Dishon further states that he was one of the Claimant's officials who negotiated parts of the CBA with the Respondent and confirmed the minutes of the said negotiations that took place from 5th November 2015 until its conclusion and signing. He also states that the Respondent committed to thereafter prepare the required CBA schedule forms and forward the same to the ELRC for registration and they were thus shocked when the Respondent denied that the CBA had not been concluded and signed.

4. The Respondent did not file any response to the Claim. The Interested Party Union filed a response to the Claim on 10th March 2021 averring that the Respondent had about 322 unionisable members as at the time this matter was filed in court but currently has about 250 unionisable members, who were previous members of the Claimant Union. It avers that the Claimant's members wilfully and without any inducement, threats and or duress, resigned from the Claimant's union on or about April 2016 after having notified the Claimant of their intention to resign. Further, the Respondent notified the Claimant on 3rd June 2016 of its employees' intention to resign from the Claimant union. It is the Interested Party's averment that the 322 unionisable employees of the Respondent then joined the Interested Party Union on 24th June 2016 and upon attaining the simple majority, they all signed check off forms which were duly forwarded to the Respondent. The Interested Party averred that it then signed a Recognition Agreement with the Respondent on 18th July 2016 and eventually signed a CBA in September 2016. The Interested Party further avers that the last CBA to be negotiated and registered between it and the Respondent is for the year 2019/2020 while the CBA for the year 2021 is under negotiations. It asserts that the Respondent has been duly deducting and remitting trade union dues to the Interested Party to date. It contends that the Claimant Union no longer enjoys 90% of the Respondent's employees as alleged and that the Respondent's employees have a right to wilfully resign and join any trade union as they wish and deem fit. The Interested Party prays: that the Claim herein be dismissed with costs to it; for an order that the Interested Party is the legally recognized union of the Respondent Union members; that the Respondent be ordered to continue complying with Section 48 of the Labour Relations Act and remit trade union dues to the Interested Party; and for cost of the suit. In a Witness Statement made on 26th February 2021, the Interested Party's Nicholas Mbugua states that the recognition agreement between them and the Respondent was only entered after the Respondent's employees freely joined the Interested Party Union after being union-less for about 3 months. The Interested Party averred that due process was thus followed by the employees before joining the Interested Party Union which is thus the only recognised union of the Respondent's employees, and not the Claimant. He further states that their last registered CBA with the Respondent was for 2018/2019 expiring December 2019. The Interested Party averred that the 2020/2021 CBA was neither completed nor registered due to the Tri-partite Directions by Federation of Kenya Employers, COTU and Ministry of Labour and Social Services to hold off the same due to the Covid-19 pandemic.

5. The Claimant Union filed its Reply dated 20th April 2021 denying that the Respondent's employees resigned from its Union and asserting they have always and are to date members of the Claimant. It avers that the Interested Party has no genuine check off signed by the employees/members of the Claimant union signifying their decision to join the Interested Party and be deducted union dues. It denies that the Interested Party has been receiving union dues from the Respondent stating that the Court Orders of 19th December 2016 which have never been varied/reviewed/appealed to date were to effect that:

“the interested party shall within 7 days open a bank account and remit all funds received from the Respondent with regard to its employees and continue to receive and keep such account separate and distinct without use or application in any manner until the final determination of the claim herein or upon further directions of the Court.”

6. The Claimant averred that as per the said Order of 19th December 2016, it is expected that the distinct account ought to have an accumulative figure of Kshs. 6,322,000/- as at March, 2021 being Kshs. 109,000/- per month x 58 months from July, 2016 to April 2021. The Claimant prays for the Statement of Response by the Interested Party to be dismissed with costs to the Claimant Union.

7. The Claimant submits that the Respondent has refused to forward a signed parties CBA for the period 2016/17 for registration by the Court, contrary to Sections 59 and 60 of the Labour Relations Act, 2007 (the Act). Further, that the intended termination of their Recognition Agreement by the Respondent is contrary to Section 54 of the Act which provides for recognition of trade union by employer. It submits that the Respondent has never applied to the Labour Board to terminate/voke the recognition agreement it has with the Claimant union as per Section 54(5) that the Interested Party and the Respondent therefore had no capacity to sign a recognition agreement. That the Claimant union referred the dispute to the Ministry of Labour as per Section 54(6) and that since the dispute was not settled, the matter was referred to this Court as under Section 54(7). It is the Claimant's submission that the said recognition agreement signed between the Respondent and the Interested Party is therefore null and void *ab initio*.

8. The Claimant also submits that the Respondent has refused to remit to it monthly union dues contrary to Section 48(2) of the Act. It refers the Court to pages 79-82 of the Claimant's Bundle and submits that as per the Court Order of 19th December 2016, union dues from July 2016 to date ought to be in a separate holding account in the name of the Interested Party awaiting the determination of this suit, and that the Court was clear that the cash was to be kept in an account “separate and distinct, without use or application in any manner”. It is also the Claimant's submission that the Respondent unprocedurally induced the Claimant's unionised members to withdraw their membership contrary to Section 5 of the Act and that its members did not actually and or lawfully join the Interested Party Union. The Claimant asserts that it expressly disputed the said resignations forwarded by the Respondent and indicated that the said documents were not resignation letters as contemplated under Section 48(6) of the Act, which provides that the employees ought to notify the employer in writing of their resignation from the union. The Claimant submitted that there are no letters of resignation addressed to the employer by the employees and none of the annexed letters show when they were received by the employer and that neither are the letters acknowledged. The Claimant submitted that the said documents also reveal they were not addressed to the employer (Respondent) or to anybody; they were not dated; they were generic, i.e. very comprehensive as pertaining large classes or characteristics and not individual or specific; meaning one person prepared the said forms for all 322 especially because they read that they were to take effect from 22nd April 2016. To this end the Claimant relies on the case of **Transport Workers Union v Saudi Arabia Airlines [2016] eKLR** where it was stated that “Section 48 (6) of the Labour Relations Act is clear, resignation letters from the trade union where an employee belongs shall be addressed to the employer.” The Claimant submitted that this was also the position of the Court in **Kenya Hotels & Allied Workers Union v Hotel Waterbuck Limited & KUDHEIHA Workers (Interested Party) [2021] eKLR** that went on to hold that the generic letter annexed by the claimant fell short of the statutory requirements outlined under section 48(8) of the Act. The Claimant also submits that the Interested Party Union is not the proper and appropriate union for the Respondent's unionisable employees to join. The Claimant submitted that as per the deductions forms

submitted by the Interested Party, only 50 of the union members allegedly signed the letters/ documents of resignation and since 50% constitutes 161 employees, the Interested Party has not recruited a simple majority as alleged. The Claimant relied on the case of **Kenya Scientific Research International Technical & Institutions Workers Union v Kenya Marine and Fisheries Research Institute [2014] eKLR** where the Court stated that Section 54(1) of the Act is clear that a trade union that does not recruit a simple majority does not qualify for any recognition by the employer for purposes of collective bargaining, and that the claimant in the case was thus not the proper and appropriate union to represent the respondent's unionisable workforce as at the time when the suit was filed. The Claimant also relies on the case of **Transport Workers Union v Saudi Arabia Airlines (supra)** where the Court analysed the issue of unionisation as set out under Article 41 of the Constitution being fundamental to employees achieving a collective within which they can negotiate terms and conditions of work. Further, that while Rule 4 of the constitution of the Claimant Union indicates its objectives and core industry or sector as Transport, Rule 3 of the constitution of the Interested Party provides objectives on long distance truck driving, thus dealing exclusively with drivers. The Claimant submits that its evidence before Court that the Respondent does not deal with long distance truck driving or drivers but only deal with instructors was not challenged. The Claimant submits that it therefore follows that the employees of the Respondent cannot join the Interested Party Union as their proper and most appropriate union is the Claimant Union. It relies on **Kenya Tertiary and Schools Workers Union (KETASWU) v University Council University of Nairobi; KUDHEIHA Workers (Interested Party) [2021] eKLR** where the Court said the petitioner must prove that its constitution permits the employees of the respondent to join its membership and that in the absence of such proof the prayer for an order compelling the respondent to enter into a recognition agreement with the petitioner fails. It is the Claimant's submission that as per Section 48 of the Act, union dues can only be deducted and remitted after recruitment of more than 5 members and preparation of Form S; meaning there must be a request for the Minister's Order which once issued must be gazetted and the deductions must then start one month up to the Minister's Order. That in the case of **Kenya Scientific Research International Technical & Institutions Workers Union v Kenya Marine & Fisheries Research Institute (supra)**, the court held that though it was satisfied that the claimant had recruited more than 5 unionisable employees from the respondent, the said claimant had not produced a copy of the minister's order given under Section 48(2) of the Labour Relations Act to be entitled to remittance of union dues from the respondent. The Claimant further submits that likewise in this case the Minister has not given an Order to the Respondent to deduct and remit any money from the allegedly resigned 322 employees/members of the Claimant Union to the Interested Party Union. The Claimant averred that the Interested Party Union should also not purport to claim to benefit from the Minister's Order of 2012 in 2016 for the 322 employees as the same was given to the Claimant Union and not the Interested Party Union. The Claimant union submits that it has proved its case on a balance of probability and the court should therefore award judgment in its favour as prayed in its Memorandum of Claim.

9. The Interested Party submits that Section 4(1) of the Labour Relation Act (the Act) provides that every employee has the right to join or leave a trade union at their own free will. The Interested Party submits that the Claimant did not rebut in evidence the numerous resignation letters proving the Respondent's employees resigned from the Claimant union and that the Claimant did not also provide any evidence of the alleged coercion of the said members to join the Interested Party. The Interested Party further submits that the allegations that the notices of resignation are not letters as contemplated by law are minor technicalities that should not be used to deny the employees their right to resign. It calls upon this Court to employ the principle of equity so that justice is not disregarded at the expense of technicalities and submits that the most important is the substance of the notices. The Interested Party submits that the Claimant has no membership with the Respondent's employees, did not share a list of its alleged 90% membership and did not also secure a single member to testify in support of its case. The Interested Party submits that as under Article 41 of the Constitution, it would be unfair to force employees to join a union that they do not want to belong to and that the Claimant has not provided material evidence to suggest that the Interested Party Union is not the sector Union for the kind of business carried out by the Respondent. The Interested Party submits that contrary to the Claimant's assertions, 'long distance driving' and 'transport' are in same sector and furthermore, the constitution of the Interested Party is clear that the Union not only caters for Long distance Driving but also the allied duties. The Interested Party also submits that it has produced evidence showing it recruited the Respondent employees between April, May and June 2016 when they did not belong to any union. It is further submitted by the Interested Party that it is a stranger to all the issues between the Respondent and the Claimant. The Interested Party submits that there was no Court Order issued to stop the Respondent and the Interested Party from signing the CBA and that the Interested Party followed the lawful procedure without knowledge of any other CBA signed between the Respondent and the Claimant. That the Interested Party is also unable to confirm whether the CBA 2014/2015 between the Claimant Union and the Respondent was revoked or not and it should not be punished for the omission of not knowing. The Interested Party further submits that the prayer seeking registration of the 2016 CBA has been overtaken by events as the employees are already enjoying the benefits of the CBA signed between the Interested Party and the Respondent, and which is already part and parcel of their terms and conditions of service. Furthermore, Section 60 of the Act places a primary obligation upon the employer to submit the CBA within fourteen days of conclusion to the Industrial Court for registration and that the Claimant herein opted not to submit the said CBA when the Respondent failed to. The Interested Party submits that Section 49(3) of the Act requires an employer to make deductions of trade union dues and remit to the relevant union upon receiving notice signed by the employee in respect of whom deductions are to be made. That as majority of the employees at the Respondent are members of the Interested Party Union, the Claimant has no basis to claim any dues from the Respondent and that the Interested Party has produced a list of its members with no member having recanted their membership. It further submits that since the Respondent's workers have been enjoying the benefits of the CBA signed between the Respondent and the Interested Party, the Interested Party is entitled to receive the Union dues. It is the Interested Party's submission that from the foregoing, the Claimant actually *lacks locus standi* to file and prosecute this matter for lack of members and the same should therefore be dismissed and the Claimant is condemned to pay costs to the Interested Party.

10. The Respondent incorrectly assumed the dispute is between the Unions instead of a matter involving it as the central actor. Having considered the matter is a demarcation dispute brought on by the Respondent and the Interested Party, the Interested Party and the Respondent shall meet the expenses of the Ministry of Labour Officials who will preside over a census of the Union members at the Respondent with the report being filed in Court within the next 60 days. The Respondent and Interested Party to comply with the order on costs to cover the census as soon as the Ministry of Labour issues the request for funds for its officials to undertake the exercise. The report to be filed by the Ministry of Labour within 3 days of completion of the exercise and parties to take a mention date within 4 days of the filing. The costs of this suit shall abide the outcome of the census to be undertaken.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2021

Nzioki wa Makau

JUDGE