

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO E056 OF 2021

KENYA UNION OF ROAD CONTRACTORS & CIVIL ENGINEERING WORKERS.....CLAIMANT

VERSUS

CALE INFRASTRUCTURE CONSTRUCTION COMPANY LIMITED.....RESPONDENT

RULING

1. By Notice of Motion dated the 22nd day of January 2021, and filed on 25th January 2021 the Applicant, Kenya Union of Road Contractors and Civil Engineering Workers sought the following orders seeks orders of access in the Respondent and that the Nairobi County Police Commander does provide security to the Claimant during the exercise. The Application is expressed to be brought under Sections 56(3), 16 and 20, of the Employment & Labour Relations Court Act, Sections 41(1) of the Labour Relations Act 2007, Rules 12,16 and 20 of the Employment & Labour Relations Court (Procedure) Rules 2016 Sections 10 of the Judicature Act, and Rule 3(1) as well as Article 41 of the Constitution. The Application is premised on the grounds on the face of the application and the supporting affidavit of Charles Osicho. The Claimant Union asserts that it has been trying to have access into the Respondent's sites within Nairobi for the purposes of organising and recruiting employees of the respondent into the Union but the Respondent has been very uncooperative by denying access. The Claimant avers that letters to the Respondent seeking access to address the union members has not been heeded. The Claimant also asserts that efforts to recruit members have also been thwarted by the Respondent.

2. The Respondent opposed the application and it filed Notice Preliminary Objection dated 11th March 2021. The Respondent asserts that the Claimant Applicant has no *locus standi* to sue the Respondent under Section 56 of the Labour Relations Court Act for grant of access into the Respondent's premises for the purposes of recruiting members because they have not executed recognition agreement as required by Section 54 of the Labour Relations Act. The Respondent asserts that under Section 56(1) of Labour Relations Act, the right of a trade union to access employers' premises for the purposes of recruiting members is a matter to be provided for in the recognition agreement and that without the executed recognition agreement, the Respondent is not obligated to grant the Claimant access to the premises. The Respondent asserts that without the executed recognition agreement providing for the right of access, the Claimant has no right to sue the Respondent for right of access.

3. The Application was to be disposed of by way of documentation and submissions. The Claimant filed submissions reiterating the grounds on the application and affidavit and in addition submits that Section 56(1) of the Labour Relations Act does not limit grant of access for recruitment purposes only on the basis of the existence of recognition agreement as otherwise employees would never have the opportunity to join any trade union. The Claimant submits that in any event Section 56(3) of the Labour Relations Act 2007 provides that any dispute concerning access may be referred to the Industrial Court under certificate of urgency which is the reference before court. The Claimant submits that by denying access to the premises the Respondent is wrongfully making a choice on behalf of the employees whether or not to join the trade union. The Claimant cites the case of **Kenya Universities Staff Union v Masinde Muliro University of Science & Technology [2019] eKLR** for the proposition that denial of right of access to premises for trade union activities is unlawful. The Claimant submits that the recognition agreement as envisaged under Section 54 of the Labour Relations Act 2007 can only be entered upon successful recruitment of more than 50% plus one of the employees by the trade union which recruitment is being deliberately frustrated by the Respondent. The Applicant further submitted that Section 56(1) of the Labour Relations Act 2007 does not limit grant of access for recruitment purposes only on the basis of recruitment, otherwise employees would not have the opportunity to join trade union. No submissions were filed on behalf of the Respondent.

4. The dispute before the Court is on access. The provisions related to a recognition agreement under Section 54 and 56 under Part VII of the Labour Relations Act are focal. Section 56 provides as follows:-

56.(1) Without limiting the matters that may be dealt with in a recognition agreement, a recognition agreement shall provide for an employer to grant a trade union reasonable access to the employers premises for officials or authorised representatives of the trade union to pursue the lawful activities of the trade union, including but not limited to—

(a) recruiting members for the trade union;

(b) holding meetings with members of the trade union and other employees outside of working hours;

5. The arguments before the Court are the classical egg v chicken kind. What comes first? Is it the recognition agreement or is it the access? In my view where there is unfettered access to the employees or where there is an official (shopsteward) in the establishment then the question of access is moot. However, where the employer restricts entry to the premises as is the case in most establishments, the correct approach is to initiate the recognition agreement in terms of Section 56 of the Employment Act to facilitate the recruitment of members at the establishment. In this case, there being no access the recognition agreement is necessary as a prelude to recruitment as I do hereby find. Having so found, is the order for access merited? In my considered view, the Respondent should permit reasonable access and there shall be no need for the involvement of the National Police Service during the exercise which should be for 2 weeks and regulated by the employer as

it deems fit since Section 56 provides for meetings outside working hours which means the recruitment could be over lunch hour. In any event the Union has no impediment to recruit the members outside the premises.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE