



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 639 OF 2016

DOCK WORKERS UNION (K).....CLAIMANT

- VERSUS -

ASSOCIATED VEHICLE ASSEMBLERS LIMITED.....1ST RESPONDENT

AMALGAMATED UNION OF KENYA METAL WORKERS.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th October, 2021)

JUDGMENT

The claimant filed the statement of claim on 02.09.2016. The 1st respondent filed a memorandum of response on 10.07.2019 through the Federation of Kenya Employers. The claimant filed an amended statement of claim on 13.08.2019 in person and signed by Leonard Rufus Ochieng. The nature of dispute is stated thus:

- 1) Unlawful termination of service of thirty-six employees (grievants).
- 2) The 1st and 2nd respondent operating on an illegal recognition agreement and collective bargaining agreement signed between the 1st respondent and the 2nd respondent.

The claimant's case is based upon the following facts.

- a) There exist a collective agreement and a recognition agreement concluded between the respondents.
- b) The 1st respondent has terminated 26 grievants by letters dated 19.07.2016 and further 10 grievants by letters dated 18.08.2016. The terminations were on account of redundancy. The redundancy decision became known to the employees at close of work on the date of the redundancy letter.
- c) The unionisable employees of 1st respondent being aggrieved with the deduction of the wages disguised as trade union membership fees and remittances in favour of the 2nd respondent filed HCCC No. 166 of 2004 in Mombasa between the employees and the respondents. The employees urged in that case that they had withdrawn from being members of the 2nd respondent herein effective 06.05.2004; they had notified the respondents about their resignation from the union; but the employer had continued to deduct their earnings and remitting the same to the union. Maraga J (as he then was, later JA and subsequently CJ) found that the employees were entitled to their money, the union could only receive dues from its members, and, the employer had no interest in the deductions made from earnings of employees. The Judge further found that the real dispute as to entitlement of union dues would be resolved between the employees and the trade union and he ordered that pending the determination of the suit the employer would pay every month the total union deductions of earnings of the employees into an interest earning account to be opened in the names of the advocates for the plaintiffs (employees) and the employer. Subsequently by consent order given on 24.11.2011 (Mwongo J) the suit was determined with orders on the mode of payment of the monies held in account under the interim orders and with orders that the employer being the 1st Defendant therein to cease deducting union dues from the employees not being members of the union therein. After the consent judgment, the unionisable employees of the 1st respondent herein moved to apply for registration of their own union to the registrar of trade unions by an application dated 05.05.2012. The application was declined and the employees filed ELRC Cause 322 of 2014 in Mombasa and which is pending before the Court. The employees in issue have not signed a fresh check off form to rejoin the 2nd respondent herein and give the 2nd respondent mandate to act for them as a trade union on matters touching on their terms and conditions of service.
- d) The majority of the employees of the 1st respondent are members of the claimant union and have been remitting their monthly subscriptions through collectors' receipts because the 2nd respondent obtained orders in ELRC Cause 393 of 2015 stopping the 1st

respondent from implementing deduction and remittance of union dues per check off forms. ELRC Cause 393 of 2015 was filed by the 2nd respondent against the claimant herein alleging that the claimant had encroached on the 2nd respondent's sector of trade union representation by recruiting the 1st respondent's unionisable employees. The claimant herein, while ELRC Cause 393 of 2015 was pending before Court, filed Miscellaneous Application No. 19 of 2015 alleging that the respondents herein had colluded to have 100 employees' contracts terminated on redundancy. The ELRC Cause 393 of 2015 and Miscellaneous Application No. 19 of 2015 were consolidated. On 18.07.2016, Rika J delivered a ruling in the two matters as consolidated with orders:

- i. Miscellaneous Application No. 19 of 2016 filed by the 1st respondent is rejected.
- ii. The dispute on recognition be processed for hearing under the regular procedure.
- iii. Costs shall be in the cause.

In that ruling the Court stated thus, **"15. The 1st respondent's (Dock Workers Union) intervention in the redundancy process is premature. It has not sought to have existing Labour Agreements held by the Claimant Union (Amalgamated Union of Kenya Metal Workers) and the 2nd respondent (Associated Vehicle Assemblers) invalidated. It is not recognized by the 2nd Respondent, and there is no justification to expect the 2nd Respondent engages the 1st Respondent in the redundancy process. The 1st respondent must first get over the obligations created by existing Recognition Agreement and the CBA, before it can legitimately intervene in the redundancy process."**

e) The claimant has instituted the present suit on behalf of the grievants per Article 22 of the Constitution of Kenya, 2010 as they are its members and are vulnerable. The claimant's case is that the respondents have continued to conclude collective bargaining agreements, fraudulently so, because the grievants are no longer members of the 2nd respondent. Rika J in the ruling referred to above held, **"14. The role of the Claimant Union as the sole collective bargaining agent, and the sanctity of the Labour Agreements in place, cannot therefore be wished away by other players, simply on the ground that the Constitution and the Labour Relations Act, allow Employees freedom to move in and out of Trade Unions. Collective rights, interests, and duties existing in concluded Labour Instruments, are jealously guarded under the law. This limitation on associational freedoms and labour relations is recognized under Article 24(5) (b) and (d) of the Constitution. There would be no industrial peace and harmony if Trade Unions are to freely, without the intervention of the Court, or the National Labour Board, trash valid Recognition Agreements and Collective Bargaining Agreements, concluded earlier by fellow Trade Unions. Article 22 of the Constitution, which was invoked by the 1st Respondent, grant Trade Unions associational standing in Court. It does not grant an unrecognized Trade Union the right to be involved in a redundancy process under section 40 of the Employment Act, or allow an unrecognized Trade Union to assume the rights conferred on another Trade Union by a Recognition Agreement."**

f) The 10 employees rendered redundant on 18.08.2016 were not members of the 2nd respondent because they were not deducted union dues but were deducted agency fees by the 1st respondent. The redundancy was based upon an agreement between the respondents concluded on 09.06.2016 but which was not binding upon the grievants because they were not members of the 1st respondent.

g) The Kenya Vehicle Manufacturers Association (employers' association) recognized the 2nd respondent on 30.09.1982 and was registered by the Registrar of Societies on 20.01.1984 and the certificate of registration could not operate retrospectively, so that, the respondents are not in a valid recognition agreement. Further the Labour Relations Act, 2007 only deemed employers' associations registered under the Trade Unions Act (Cap. 233 repealed) to become operational on 26.10.2007. Kenya Vehicle Manufacturers Association as registered on 20.01.1984 is not a valid employers' association – the CBA it may have concluded is therefore invalid. The Registrar of Trade Unions has confirmed that Kenya Vehicle Manufacturers Association is not a duly registered employers' association.

h) After redundancy on 19.07.2016 and 18.08.2016 the 1st respondent withheld wages due to the grievants for the period they were on lawful leave for 3 weeks. Further, as at redundancy the 1st respondent had unilaterally varied working days from 5 days to 3 days and withheld wages for the days consequential to that unilateral variation – in breach of sections 8 and 10 of the Employment Act, 2007.

i) There exists no valid recognition agreement between the respondents per sections 54 and 57 of the Labour Relations Act, 2007. Further, as at time of redundancies in issue, the 2nd respondent had lost majority of the unionisable employees in the 1st respondent's service and the recognition agreement lapsed on the date the membership collapsed to less than simple majority per section 54(1) of the Act. Further the 1st respondent took no steps under section 54(5) of the Act to end the recognition through the National Labour Board. Further, the respondents could not conclude valid CBA when the question of the recognition agreement is still in doubt.

j) The grievants were terminated because they refused to remain or rejoin the 2nd respondent's membership.

k) The redundancy was in breach of section 40 of the Employment Act and sections 41, 43, 45, 46 and 44 of the Employment Act, 2007. The grievants were not given a hearing prior to the redundancy in violation of Articles 47 and 50 of the Constitution of Kenya, 2010.

The claimant prayed for judgment against the respondent for:

- a) A declaration that the unionisable employees of the 1st respondent have inalienable right to leave the 2nd respondent's union and join another Trade union of their own choosing without any prior authorization by either the 1st or 2nd respondent.
- b) A declaration that the Collective Bargaining Agreement signed between the 1st respondent and the 2nd respondent breached the fundamental rights of the unionisable employees as the same did not comply with provisions of the Labour Relations Act, 2007 and Articles 36 and 41 of the Constitution of Kenya, 2010.
- c) A declaration that the termination of the contracts of employment of the 36 grievants on account of redundancy was procedurally and substantively unfair.
- d) A declaration that the recognition agreement and successive collective bargaining agreements which have been signed between the 2nd respondent and the Kenya Vehicle Manufacturers Association are null and void and any decisions that have been made pursuant to the said instruments or flowing from those instruments are invalid, null and void and the same have no consequence.
- e) An injunction compelling the 1st respondent to reinstate the 36 grievants with back payments without any loss of position, seniority and other benefits.
- f) An injunction for the 1st and 2nd respondents to refund to employees all deductions from their wages as agency fees, pursuant to unlawful CBAs.
- g) In alternative to (e) above, the respondent to pay the 36 grievants:
- i. Gross pay in lieu of notices as provided under the current terms of service.
 - ii. Payments for withheld wages, during the period the grievants proceeded to a permitted 3 weeks leave.
 - iii. Withheld wages for the weeks when 1st respondent rescheduled working days.
 - iv. Gratuity/ severance pay for all the years worked in accordance with the current terms of service.
 - v. Twelve (12) months gross pay for unfair loss of employment.
 - vi. Any other relief the Court would deem fit to grant.
 - vii. Damages for violation of the grievants' rights to a fair administrative action and hearing.
- h) An order compelling the 1st respondent to commence deductions of union dues from wages of all its unionisable employees who signed form S of the claimant and are still in employment and to remit and continue to remit to the claimant.
- i) Costs of the claim to be provided.

The 1st respondent filed on 27.11.2019 the response to the amended statement of claim and through the Federation of Kenya Employers. The 1st respondent's case is as follows:

- 1) Contrary to the ruling by the Court (Rika J) in Miscellaneous Application No. 19 of 2016 as consolidated with 93 of 2015 delivered on 18.07.2016, the claimant has filed a fresh suit instead of having recognition dispute determined under regular procedure. The matters in issue were substantially in issue in the consolidated suits subject of the ruling of 18.07.2016 and have been decided conclusively.
- 2) The 1st respondent is a member of Kenya Vehicle Manufacturers Association and whose other members are Kenya Vehicle Manufacturers and General Motors effective 1982. The association has negotiated CBAs for its members and relevant recognized trade unions since 1985. The association is not a trade union but an association of like-minded members. The association is not subject to terms and conditions imposed by the Registrar of Trade Unions. The claimant is therefore misguided in seeking to have a recognition agreement and CBA between the 1st respondent and the 2nd respondent nullified on the grounds of the association being unregistered under the trade unions.
- 3) That the 1st respondent has a valid recognition agreement with the 2nd respondent since September 1982. Since 1982 the respondents have negotiated CBAs and the latest one being for 2015/2016 and registered by the Court in January 2015.
- 4) All employees declared redundant including the 15 employees in issue herein were paid their dues in accordance with the prevailing CBA for 2015/2016 – and in event of dissatisfaction only a review or appeal and not a fresh suit was available path.
- 5) The 1st respondent and the claimant have no recognition or collective agreements. The Court should put to an end once and for all the claimant's continued suing of the 1st respondent.

6) The suit is frivolous, vexatious and an abuse of Court process.

The 1st respondent prayed that the suit be dismissed with costs. On 08.07.2021 the Court ordered by consent of the parties that the parties' respective cases to be determined on the basis of pleadings and documents on record. Final submissions were filed for the parties. The Court has considered the pleadings, documents on record and the final submissions. The Court makes findings as follows.

The 1st issue for determination is whether the respondents are operating on an illegal recognition agreement signed between the 1st and 2nd respondent. The respondents submit that the issue was determined by the Court in the ruling delivered on 18.07.2016 by Rika J in ELRC Cause 393 of 2015 and Miscellaneous Application No. 19 of 2015 as consolidated. In that ruling the Court held thus, **“10. In other words, the Recognition Agreement between the Claimant and the 2nd Respondent must be shown to be no longer sustainable, and declared so, either by the Parties to that Agreement, by the Court, or by the National Labour Board under Section 54(5) of the Labour Relations Act 2007. A process of derecognition must take place, before the 1st respondent's representational role, can be ranked above any other's.”**

It is submitted for the claimant that the present suit is the one under which the Court must make a finding that the recognition of the 2nd respondent has lapsed. The claimant has pleaded that the 2nd respondent was recognized by the Kenya Vehicle Manufacturers Association (employers' association) on 30.09.1982. The Kenya Vehicle Manufacturers Association is not a party to the present suit. The Court therefore finds that the present suit, looking at the named parties, cannot amount to a just proceeding to declare the recognition illegal because an undisputed party to the recognition agreement, the Kenya Vehicle Manufacturers Association will suffer a court finding in that regard without having been heard at all.

The Court finds that there is no established ground to depart from the earlier findings by the Court (Rika J's Ruling) that a dispute about recognition must be decided upon in accordance with the prescribed law. Subsection 54(5) of the Labour Relations Act, 2007 provides that an employer or employers' association or group of employers may apply to the National Labour Board to terminate or revoke a recognition agreement. Subsection 54(6) of the Act states that if there is a dispute as to the right of a trade union to be recognized for the purposes of collective bargaining in accordance with the provisions of section 54 of the Act or cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with provisions of Part VIII of the Act. Subsection 54 (7) of the Act then provides that if the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Employment and Labour Relations Court under a certificate of urgency. The Court finds that the claimant has failed to comply with the clear statutory provisions on the recognition or cancellation of the 2nd respondent's recognition in issue. The Court considers that the legitimate path was for the claimant to first refer the issue of cancellation of the recognition to conciliation per subsection 54(6). There was no evidence that the dispute had gone through conciliation. As relates the recognition of the claimant by the 1st respondent, it was not the claimant's case that such a dispute had accrued and if it had, similarly it would have to go to the conciliation process prior to invoking the Court's jurisdiction. The Court finds that the claimant is bound by the elaborate statutory provisions and procedure on resolving the recognition dispute at hand and the Court declines jurisdiction in the instant case for want of exhaustion of that statutory conciliation procedure.

The 2nd issue for determination is whether the termination of the 36 employees or grievants by way of redundancy was unlawful. The claimant's case is that the redundancy was unlawful because the respondents proceeded in agreement whereas the grievants had ceased to be members of the 2nd respondent and they were not informed accordingly. However, as submitted for the respondents, in the ruling delivered on 18.07.2016 by Rika J in ELRC Cause 393 of 2015 and Miscellaneous Application No. 19 of 2015 as consolidated, the Court found and held thus, **“12. The proposed redundancy is being undertaken within the framework of the law, and a CBA concluded between the Claimant Union and the 2nd Respondent. The recognized Union has been notified about the intended redundancy. The Chief Shop Steward, elected by the concerned Employees, has participated in the consultative process. The Employer and the Ministry of Labour have been engaged with the recognized Trade Union, in the process. The relevant CBA is authored by the Claimant and the 2nd Respondent. The 1st Respondent is a stranger to the CBA.”** And further **“13. Even assuming Employees have resigned from the Claimant union, and joined the 1st Respondent Union, their terms and conditions of service would still be subject to the CBA in place between the Claimant Union and the 2nd Respondent. They would continue to pay agency fees, as opposed to union subscription fees under section 49(5) of the Labour Relations Act. Implementation of the CBA is the work of the authors of that CBA.”** The Court considers that the material on record show that the redundancies in dispute in the current suit were indeed the subject of the Court's findings and holding in that ruling. The Court finds that the claimant's present suit was misconceived as it was an abuse of Court process in so far as it raises the same issues and between the same parties and that were conclusively decided by the Court in the said ruling – the issue of legality or otherwise of the redundancies in issue were therefore *res judicata*.

To answer the 3rd issue for determination, in view of the findings on the 1st and 2nd issues for determination, the Court returns that the claimant is not entitled to any of the remedies as prayed for. In any event, the particulars of the grievants and particulars of the liquidated claims flowing from the redundancy were never pleaded and strictly proved as required. The claims will fail as not justified and unfounded in view of the earlier findings by the Court.

The Court has considered the nature of the dispute and being a labour relations dispute, each party will bear own costs of the proceedings.

In conclusion, judgment is hereby entered for the respondents against the claimant for dismissal of the amended statement of claim with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 29TH OCTOBER, 2021.

BYRAM ONGAYA

JUDGE