



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 174 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA ENGINEERING WORKERS UNION

CLAIMANT

VERSUS

ORBIT ENGINEERING LIMITED

RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the Labour Relations Act to represent employees in the engineering sector. The Respondent is an engineering concern duly registered under the Companies Act, with its offices located at Nairobi's Industrial Area.
2. The parties have a valid recognition agreement. The parties negotiated their first Collective Bargaining Agreement (CBA) which was signed on 16th June 2005 and covered the period 1st January 2005 to December 2006.
3. It is the Claimant's case that after the lapse of the first CBA it forwarded proposals for review of the CBA to the Respondent who refused to negotiate the CBA and instead, stopped deduction and remittances of the union dues, alleging that all the Claimant's members had resigned from its membership.
4. The Claimant further avers that it was compelled to report a trade dispute to the Minister. The same was not resolved during conciliation and the Claimant filed Cause No. 1486 of 2014 on five issues being minimum wages, general wage increase, house allowance, sick leave and benefits, and effective date of the CBA.
5. It is the Claimant's case that before the Court could determine the dispute the parties negotiated and resolved all the pending issues which culminated in the registration of the parties second CBA which was registered by this Court on 24th July 2018 under RCA number 158 of 2018.
6. It is the Claimant's Case that the Respondent failed to implement the CBA even after it sent several reminders on 27th January 2018 and 8th August 2018.
7. The Claimant avers that the employees of the Respondent reaffirmed their membership by signing fresh check off forms (Form S) which were forwarded to the Respondent by letter dated 21st November 2019 with a reminder on 15th January 2020.
8. It is the Claimant's further averment that the Respondent persisted in its refusal to deduct and remit union dues in violation of Section 48 of the Labour Relations Act prompting it to invoke Section 62 of the Act in reporting the instant trade dispute to the Minister for Labour.
9. It is the Claimant's averment that the CBA registered on 24th July 2018 was effective for a period of 12 years from 1st January 2007 to run until 31st December 2018. That the Respondent has persisted in non-implementation of the CBA to date.
10. The Claimant further avers that after the employees reaffirmed their membership, the Respondent has threatened them within sackings unless they withdraw from the Claimant's membership.
11. In the memorandum of claim dated 21st April 2020, the Claimant sets out the issues in dispute as follows –

- (i) Non implementation of parties CBA, Clause 31 on General Wage Increase and 32 on House Allowance;

(ii) Non remittance of Union dues;

(iii) Victimization of employees on account of Trade Union affiliation/activities

12. The Claimant seeks the following remedies:

(i) That the Honourable Court deem fit and find the action of the Respondent herein to be unfair and unlawful.

(ii) That the Respondent be ordered to pay the Claimant accrued union dues arrears/agency fee of 2% of the monthly unionisable employees' wage bill from 2007 to date which amounts to Kshs.127,175,742/-.

(iii) That the Honourable Court deem fit and issue an order compelling the Respondent to pay the Claimant salary arrears amounting to Kshs.635, 863,145/- and house allowance arrears of Kshs.114,455,366/- totaling to Kshs.750,318, 511/- emanating from Appendix 7 of the Memorandum of Claim.

(iv) That the Honourable Court do issue an order against the Respondent to comply with section 48 of the Labour Relations Act 2007 with immediate effect.

(v) That the Honourable Court to issue an order against the Respondent on top of the amount at prayers (a) and (b) to be paid with interest at the court's rate.

(vi) That the Respondent be ordered to pay the grievants herein their current basic salary as per Appendix 7 of the Memorandum of Claim and house allowance of 18% of the same per month with immediate effect.

(vii) That the Respondent be restrained from any time of victimization of her employees on account of trade union affiliation/activities.

(viii) That any other relief the Honourable Court may deem fit to grant.

(ix) That the cost of this suit be met the Respondent.

13. Simultaneously with the memorandum of claim, the Claimant filed an application of even date in which it seeks the following orders:

(i) Spent.

(ii) That the Honourable Court deem fit to issue an interim order against the Respondent from victimizing the Claimant/Applicant's members by way of termination, dismissal and or redundancy on ground of trade union affiliation/activities.

(iii) That the Honourable Court be pleased to issue interim orders against the Respondent to comply with section 48 of the Labour Relations Act, 2007 by way of deduction and remittance of union dues monthly.

(iv) That the Honourable Court issue interim orders against the Respondent not to reduce the salaries of the Claimant/Applicant's members till the hearing and determination of the suit.

14. The application is supported by the grounds that –

(a) THAT, the Respondent has threatened her employees who are members of the Applicant/Claimant herein with redundancy/termination if they don't withdraw their membership.

(b) THAT, the Respondent stopped deduction and remittance of Union dues after the Claimant moved to Court in Cause No. 1485 of 2010 between parties herein on allegations that workers/Applicant members had withdrawn.

(c) THAT, the parties by consent did reach an out of Court settlement by signing a duly negotiated CBA with the help of (CPMU) Ministry of Labour of which they did append their signatures as witnesses.

(d) THAT, since the registration of the said CBA on 24th day of July 2018, the Respondent is yet to implement the same.

(e) THAT, in the month of January, 2019 the Respondent employees reaffirmed their membership by signing new check-off forms (Form 'S'). Refer to Appendix 5 of the Memorandum of Claim.

(f) THAT, the Respondent has threatened her employees who are members of the Applicant/Claimant herein with redundancy/termination if they don't withdraw their membership.

(g) THAT, the Respondent instead of increasing the Applicant/Claimant members' salaries she is forcing them to sign a salary reduction agreement or be terminated.

(h) THAT, the Respondent herein held meetings with her employees on 15th & 17th April 2020 asking them to withdraw from the Applicant Union and sign the aforementioned salary reduction agreement within a period of two weeks or risk termination.

(i) THAT, if orders sought herein are not granted the Applicant and her members shall suffer irreparable damages.

15. The application is further supported by the affidavit of Patrick M. Makale the Claimant/Applicant's Industrial Relations Officer sworn on 21st April, 2020 in which he reiterates the grounds on the face of the motion and in the memorandum of claim.

Respondent's Case

16. In response to the Claim, the Respondent filed a Memorandum of Response dated 10th October, 2020. It avers that even after signing the CBA registered on 24th July 2018, the Claimant did not have membership from its employees and it was not until 21st November, 2019 that the Claimant informed it that it had recruited 42 members. It avers that it immediately commenced deduction of union dues from its employees who were members of the Claimant. Further, that it engaged in negotiations with its employees even when the Claimant had no members. It denies threatening any of its employees with termination.

17. In response to the application the Respondent filed a replying affidavit of MITESH SHAH, the Managing Director sworn on 5th June, 2020. It avers that it had experienced various financial challenges as shown in the CPMU Report filed by the Claimant which indicated that while it was not making any losses, it was only able to break even marginally. In addition, that the Covid-19 pandemic had led to downscaling of its operations with some departments having no work thus compelling it to declare some of its employees redundant. It further avers that it discussed the redundancy with the Claimant and on 21st May, 2020 the Claimant authorized it to compute the redundancy pay on the basis of the current CBA. That it was on this basis that the redundancy pay for the employees was computed.

Claimant's Submissions

18. The Claimant submitted that a CBA cannot be implemented before registration as provided under Section 59 (5) of the Labour Relations Act. Hence, the CBA was enforceable after registration on 24th July, 2018 but took effect on 1st January 2007. It relied on Section 49(b) of the Labour Relations Act and submitted that it is entitled to union dues or agency fees from the time the Respondent stopped remitting Union dues or when the CBA came into force.

19. It argued that its members cannot write a collective letter to withdraw from the union. That the members should have written individual letters addressed to their employer who is obligated by law to forward a copy of the letter to the Union.

Respondent's Submissions

20. The Respondent relied on Section 48(3) of the Labour Relations Act and submitted that it was not required to pay union dues before it was notified that the Claimant had members amongst its employees. It cited the decision in **Kenya Union of Commercial Food and Allied Workers Union v London Distillers (K) Limited; Central Organisation of Trade Unions Kenya (Interested Party) [2021] eKLR** where the Court held that an employer is under obligation to comply with Section 48(3) once an employee signed Form S (the Check Off Form).

21. It was therefore its submission that its obligation to remit the dues only arose after the Claimant served the notice in the form of the check off form thus the union remittance only became due as at December 2019.

22. It further submitted that no salary and house was reduced and there are no arrears. It submitted that the Claimant had not adduced evidence on how the amount prayed for were arrived at. It relied on **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR**.

23. It submitted that it can declare redundancies whenever a circumstance warrants such action. In support of this position, it relied on **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where the Court of Appeal held that the decision to declare redundancy has to be that of the employer.

24. In conclusion, it submitted that the Claimant has not proved its case on a balance of probabilities and urged the Court to dismiss the Claim with costs and discharge the injunctive orders the Union was enjoying.

Analysis and Determination

25. The issues for determination are whether the Respondent withheld union dues and whether the Claimant is entitled to the orders sought.

26. Section 48(3), 6, 7 and 8 of the Labour Relations Act provide:

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

(6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.

(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

(8) An employer shall forward a copy of any notice of resignation he receives to the trade union.”

27. The Claimant alleges that the Respondent has violated Section 48(3) of the Labour Relations Act while the Respondent contends that for the period it did not deduct and remit union dues the Claimant had no members among its employees.

28. The Claimant has not adduced any evidence to controvert the averment by the Respondent that it had no members during the period when no union dues were remitted. On the contrary the Respondent has produced a letter dated 30th June 2012 addressed to the National Labour Board seeking to terminate the recognition agreement on grounds that the Claimant had no members among its employees.

29. The only check off forms (Form S) produced by the Claimant are dated 6th January 2019 and were submitted to the Respondent by letter dated 21st November 2019. The letter is reproduced below –

“The Managing Director

Orbit Engineering Limited

P. O Box 13476 – 00600

NAIROBI

Dear Sir

RE DEDUCTION OF UNION DUES

Enclosed herewith find Check Off System duly signed by forty two (42) employees of your company authorizing you to start deducting 2% of their individual current basic wage and Kshs.150/= for COTU (K) as Union dues every end of the month and remit accordingly.

Hoping for your total co-operation.

Yours faithfully

SIGNED

WYCLIFFEE A. NYAMWATA

GENERAL SECRETARY”

30. In a reminder dated 15th January 2020, the Claimant addressed the Respondent as follows –

“The Managing Director

Orbit Engineering Limited

P. O Box 13476 – 00600

NAIROBI

Dear Sir

RE: UNION DUES

Refer to our letter dated 21st November 2019. Where we enclosed a check off system (42) employees of your company authorizing you to start deducting the union dues and remit every end of the month. In view of the above we are demanding that you forward to us the union dues for November 2019 and December 2019 on or before 18th January 2020. Failure to which we shall follow the legal process to ensure that you pay the same with interest and penalty.

Therefore we urge you to remit as requested.

Hoping for your total co-operation and understanding.

Yours faithfully

SIGNED

WYCLIFFE A. NYAMWATA

GENERAL SECRETARY”

32. From the two letters, it is clear that the Claimant acknowledged that union dues were only payable after the date of the letter dated 21st November 2019.

33. According to Section 48(3) of the Labour Relations Act, union dues are payable within 30 days of the trade union serving notice. This means that the earliest that the Respondent could effect union deductions was in the salary of December 2019 thus payable in January 2020. I therefore agree with the Respondent’s submission that union dues only became due from December 2019 after receipt of the check off forms (Form S) by the Respondent.

34. The Claimant has not denied the Respondent’s averment that it commenced deduction of Union dues and remitted the same from the salaries of December 2019.

35. The Claimant has further not set out the amount payable or submitted any particulars by which the Corrupt can assess the amount of union dues payable from December 2019 to date.

36. Further, the Claimant has not adduced any evidence to support its claim for agency fees by adducing the particulars of the names of the employees who benefitted from its CBA but were not its members.

37. For the foregoing reasons, the prayer for payment of union dues and agency fees has not been proved. The same fails and is accordingly dismissed.

38. I have noted from the letter reporting the trade dispute that the only dispute reported to the Minister was on union dues. The other issues raised in the claim are therefore not properly before the Court as they were never reported as provided in Section 62 of the Labour Relations Act.

39. The foregoing notwithstanding, in view of the fact that the Claimant has not proved that it submitted names of its members prior to November 2019 to the Respondent, it has not proved that any of its members was entitled to payment under the CBA before the date it served the check off forms upon the Respondent.

40. For the foregoing reasons, the entire claim fails and is accordingly dismissed with no orders for costs.

41. The Respondent is however reminded that it is under obligation to comply with Section 48(3) of the Labour Relations Act and the Claimant is not precluded from filing another suit on the same subject matter should there any failure on its part to deduct and remit union dues and agency fees, if the same is proved.

42. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF NOVEMBER 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE