



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO E637 OF 2021

**KENYA UNION OF COMMERCIAL FOOD AND
ALLIED WORKERS.....CLAIMANT**

VERSUS

KINANGOP DAIRY LIMITED..RESPONDENT

RULING

1. By its Notice of Motion dated 4th August 2021, the Claimant seeks the following reliefs:

- a. An order restraining the Respondent from threatening, harassing, intimidating, coercing, victimising and/or terminating the services of its employees on account of their trade union membership;
- b. An order restraining the Respondent from any action intended to force its employees who have already acknowledged their trade union membership to withdraw such membership unwillingly and involuntarily;
- c. An order restraining the Officer in Charge of Ndunyu Njeru Police Post in North Kinangop from questioning the Respondent's unionisable employees over their participation in trade union activities;
- d. An order directing the Respondent to deduct and remit union dues from its employees who have already acknowledged their union membership by signing the requisite check off sheets.

2. The Motion is supported by an affidavit sworn by Mike O. Oranga and is based on the following grounds:

- a. The Claimant is the right Trade Union to represent employees in Dairy and Milk Industries;
- b. The Respondent is engaged in processing and sale of dairy and milk products;
- c. The Respondent's unionisable employees registered their trade union membership with the Claimant between October 2020 and July 2021 by completing and signing the requisite check off sheets;
- d. The Respondent was served with the said check off sheets on 14th July 2021, to effect deduction and remittance of union dues;
- e. The Claimant also forwarded a draft Recognition Agreement to the Respondent and proposed a joint meeting on 27th July 2021;
- f. The Respondent's Chief Executive Officer did not avail himself for the meeting and stayed away from the Factory until the Claimant's representatives left;
- g. Upon arrival at the Factory, the Chief Executive Officer assembled all permanent employees and warned them against trade union membership;
- h. On 23rd July 2021, one employee by the name Samuel Kahiga Kariuki was sent on forced leave and on 26th and 27th July 2021, seven (7) others were forced to take leave over a feigned loss of an attendance register, while the real reason was to scare them over their union membership;

i. On 29th July 2021, the eight (8) union members who were on forced leave were asked to visit Ndunyu Njeru Police Post to record a statement over an alleged loss of an attendance register and at the end, were questioned over their trade union membership, with strict instructions to withdraw their union membership to avoid prosecution;

j. The Respondent has treated the employees unfairly, without allowing them to associate with a trade union of their choice and has subjected the said employees to the worst forms of unfair labour practices;

k. The Respondent's employees work at the mercy of their employer as they have no avenue at all to raise and have their concerns addressed;

l. All this is intended to scuttle trade union representation to deny the Respondent's employees their fundamental freedom of association;

m. The unfair labour practices were triggered by the Claimant's approach to the Respondent to sign a Recognition Agreement;

n. It is in the interest of justice that the reliefs sought herein be granted as the only means to meet the ends of justice.

3. The Respondent's response is contained in a Replying Affidavit sworn by its General Manager-Human Resources and Administration, Olivia Mwachofi on 17th September 2021.

4. Mwachofi terms the Claimant's Notice of Motion as an abuse of the court process since the Claimant has neither invoked nor exhausted the conciliation process provided under Section 54 of the Labour Relations Act.

5. Regarding the meeting proposed by the Claimant, Mwachofi explains that it did not take place because the Claimant had not served sufficient notice on the Respondent. Mwachofi adds that the Respondent had stopped all physical meetings at its premises due to a surge of COVID-19 cases among its employees.

6. Mwachofi states that the Respondent has not refused to engage the Claimant.

7. According to the Respondent, the Claimant has not met the statutory minimum threshold for recognition for purposes of negotiating a Collective Bargaining Agreement as provided under Section 54(1) of the Labour Relations Act.

8. Mwachofi depones that the Respondent has a total of 344 employees according to the payroll for August 2021.

9. Regarding the recruitment list provided by the Claimant, Mwachofi points out double entries on account of Richard Mwangi and Jason Kinyanjui Chege. She adds that the said employees had been terminated on 13th April 2021 and 19th June 2021 respectively, long before lodging of the Claimant's claim in court.

10. Mwachofi further depones that Stephen Maina had opted to withdraw from the Claimant's membership.

11. Additionally, Daniel Kimenju Njanja, Richard Chege Kabui, Joseph Ndegwa Mburu, Charles Kihia Murage, Joseph Meru Kabiru, Simon Wahome Maina and Jackline Wamaitha Kahoro had been terminated from the Respondent's employment at various times on various grounds.

12. Further still, Harrison Muraya Mwangi, Joseph Ndirangu Kuria, Geoffrey Iguta and Joseph Njuguna Mbuthia had resigned from the Respondent's employment.

13. Mwachofi contends that the foregoing terminations and resignations had depleted the membership list submitted by the Claimant from 72 to 56 members.

14. The Respondent denies harassing, intimidating or sending its employees on forced leave.

15. The Respondent further denies that some of the Claimant's members had been sent to Ndunyu Njeru Police Post on 28th July 2021. The Respondent maintains that the report made on the loss of an attendance register was made in good faith in the ordinary course of business.

16. The remedies sought by the Claimant fall within the province of interlocutory injunctions. In the well-known case of *Giella v Cassman Brown & Company Limited [1973] E.A 358*, the principles upon which such orders may be granted were established in the following terms:

“The conditions for the grant of an interlocutory injunction are now.....well settled.....First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

17. In the submissions filed on behalf of the Respondent on 8th November 2021, reference was made to the Court of Appeal decisions in *Kenya Commercial Finance Co. Ltd v Afraha Education Society Limited [2001] 1 E.A 86* and *Nguruman Limited v Jan Bond Nielsen & 2 others [2014] eKLR* where it was held that the triple conditions set in *Giella v Cassman Brown* (supra) are to be considered sequentially.

18. As to what constitutes a *prima facie* case, the Court of Appeal provided the answer in *Mrao Ltd v First American Bank of Kenya Limited & 2 others [2003] eKLR* by stating:

“...a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.....”

a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant’s case upon trial. That is clearly a standard that is higher than an arguable case.”

19. In its submissions filed on 8th November 2021, the Claimant abandoned its prayer for an order restraining the Officer in Charge of Ndunyu Njeru Police Post in North Kinangop from questioning the Respondent’s unionisable employees over their participation in trade union activities.

20. The Claimant also concedes that the issue of recognition is not a matter to be canvassed at this interlocutory stage.

21. That said, the only surviving prayers are the following:

a. An order restraining the Respondent from threatening, harassing, intimidating, coercing, victimising and/or terminating the services of its employees on account of their trade union membership;

b. An order restraining the Respondent from any action intended to force its employees who have already acknowledged their trade union membership to withdraw such membership unwillingly and involuntarily;

c. An order directing the Respondent to deduct and remit union dues from its employees who have already acknowledged their union membership by signing the requisite check off sheets.

22. The question to ask is whether in pursuing these prayers, the Claimant has satisfied the conditions set in *Giella v Cassman Brown* (supra).

23. Cumulatively, the Claimant accuses the Respondent of frustrating the Claimant’s efforts to establish union activities within the Respondent’s establishment.

24. There is evidence on record that the Respondent did not honour the Claimant’s request for a meeting. The Court also took notice of the abnormally high turnover of employees within the short life of this dispute. Additionally, the Respondent did not provide any evidence of deduction and remittance of union dues on account of the duly recruited employees.

25. Taking all this into account, I find and hold that the Claimant has established a *prima facie* case of harassment and victimisation of employees on account of union activities.

26. As to whether the Claimant is likely to suffer irreparable harm if the orders sought are not granted, I have this to say; harassment and victimisation of employees on account of union activities coupled with failure to deduct and remit union dues will result in haemorrhage in numbers thus defeating any claim for recognition.

27. In light of this I make the following orders:

a. The Respondent is hereby restrained from taking any action that may reasonably be construed as victimisation and/or intimidation of its employees on account of trade union membership;

b. The Respondent is directed to deduct and remit union dues to the Claimant Union on account of its employees who have been duly recruited into union membership.

28. The costs of this Motion will be in the cause.

29. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF DECEMBER, 2021

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyumba for the Claimant

Mr. Mudao for the Respondent