



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2472 OF 2019**

**KENYA NATIONAL UNION OF NURSES (K.N.U.N).....1<sup>ST</sup> CLAIMANT/APPLICANT**

**VERSUS**

**KENYA MEDICAL RESEARCH INSTITUTE (K.E.M.R.I)..1<sup>ST</sup> RESPONDENT/DEFENDANT**

**UNION OF NATIONAL RESEARCH INSTITUTES**

**STAFF OF KENYA (UNRISK).....2<sup>ND</sup>RESPONDENT/DEFENDANT**

**CABINET SECRETARY FOR EAST AFRICA COMMUNITY, LABOUR**

**AND SOCIAL PROTECTION .....3<sup>RD</sup> RESPONDENT/DEFENDANT**

**JUDGMENT**

1. The Claimant brought this suit on 19.12.2017 seeking the following reliefs:

- a. That, the 1st Respondent be directed to pay the Claimant from its kitty all sums of monies owing to the Claimant as union dues which the 1st Respondent has neglected, failed and/or refused to deduct from its members' wages whose names appear in the check-off forms (Form S) from the date of receipt and remit the same in the Claimant's Bank Account and to continue in deduction.
- b. That, this Honourable Court issues an order directing the 1st Respondent to sign a formal Recognition Agreement with the Claimant Union.
- c. That, this Honourable court be pleased to issue an order directing the 1st Respondent to commence CBA negotiations with the claimant/application union within 30 days from date of signing the Recognition Agreement.
- d. That, this Honourable Court be pleased to issue an Order directing the 1st Respondent to immediately stop deductions and remittance of agency fees in favour of the 2nd Respondent.
- e. That, this Honourable court be pleased to direct the 1st Respondent to comply with the mandatory provisions of Section 48 & 54 of the Labour Relations Act, No. 14 of 2007, Laws of Kenya, with regard of trade union dues.
- f. That this Honourable Court be pleased to quash any Kenya Gazette Notice unlawfully issued by the 3rd Respondent in favour of the 2nd Respondent authorizing deductions of Agency Fees from the wages of the members of the Claimant herein.
- g. That, this Honourable Court be pleased to grant such orders or relief, as it deems fit and just in the circumstances.
- h. That, the cost of this suit be borne by the Respondents
- i. That the cost of this application be paid by the Respondent.

2. The 1st Respondent opposed the claim by the claimants and averred that she has a Recognition Agreement and signed a CBA with the 2nd Respondent which fully covers all cadres of her over 900 unonisable workforce, engaged in direct research and support staff to researchers. She further averred that the matter was referred for conciliation and the conciliator opined that the claimant should not be given recognition.

That the same opinion was reached when another union tried to represent the doctors working for her. She therefore prayed for the suit to be dismissed because the claimant is not adhering to the principles of orderliness in the labour market. She further contended that the claimant has not met the threshold of recruiting simple majority of her unionisable work force and she is only interested in the 31 nurses in the workforce.

3. The 2nd Respondent opposed the claim by the claimant both on procedural incompetence and merit. To begin with the 2nd respondent objected to the suit for being initiated by a person who is not the authorized representative of the claimant union as required by section 2(a) and 73 (3) of the Labour Relations Act. On the other hand she averred that the claimant has not recruited a simple majority of the 1st respondents 900 plus members of staff as required under section 54 (1) of the Act. She further averred that she has a Recognition Agreement and CBA with the 1st Respondent which covers all the 900 plus unionisable staff of the 1st respondent including the 31 nurses. Finally she averred that the Agency fees being paid to her by the staff who are not yet her members is lawful under section 49 of the Act and should not be stopped. She therefore prayed for the suit to be dismissed with costs.

4. The 3rd Respondent contended that he is wrongfully enjoined to the suit because no blame has been apportioned to him. He further contended that all what he did was to appoint a conciliator within his legal mandate. He therefore prayed for the suit to be dismissed with costs.

5. The suit was disposed of by written submissions on the strength of the pleadings, statements, affidavits and supporting documents.

### **CLAIMANT'S SUBMISSIONS**

6. The Claimant submitted that she recruited as her members 22 out of 31 nurses employed by the respondent which represents a simple majority of the nurses in the 1st respondent's work force, as required by section 54(1) and (2) of the Labour Relations Act. She further contended that despite the foregoing state of affairs, the 1st respondent has refused to accord her recognition to pave the way for a Collective Bargaining Agreement, and has further refused to deduct union dues from the 22 nurses who signed check-off forms, and remit the same to her Gazetted Bank account. She further contended that under section 48 (1) (2) & (3) of the Act, the 1st respondent has no choice but to deduct union dues from the 22 members and remit to the union's Gazetted Bank account.

7. The Claimant further submitted that the findings and recommendation by the conciliator did not consider the fundamental principles of section 48 and 54 of the Act. She contended that the 1st respondent is denying the said members the right to join a union of their choice contrary to Article 36 and 41 (2) (c) of the Constitution. She annexed copy of her union constitution to confirm that she is the union registered to represent the interest of members in both public and private sectors. She therefore urged the court to grant her the reliefs sought.

8. She relied on **Kenya Union of Commercial food and Allied Workers vs Eastleigh Mattresses Limited (East Matt) [2017] eKLR** among others precedents where the courts held that every employee has a right to join a union of his choice by dint of Article 36 and 41 of the Constitution, and that with or without a recognition agreement, the employer is bound to remit union dues from employees who have joined the union to their union.

### **RESPONDENT'S SUBMISSIONS**

9. The 1st Respondent submitted that the wording of section 54 (1) of the Labour Relations Act provides that a union seeking recognition must show that it has recruited a simple majority of unionisable staff within the sector for which the union is registered. She submitted that out of 945 unionisable staff, the claimant has interest in only 31 nurses which cannot constitute a simple majority of the said 945 staff. She relied on **KPAWU v Kenya Chemical and Allied Workers Union and Another [2017]eKLR** and **Kenya Petroleum Workers Union v Kenol Mahail Service Station and another [2017]eKLR** where the court held that for recognition to be accorded, the union must prove that it has recruited a simple majority of unionisable employees in the sector in which it operates.

10. Finally the 1st Respondent submitted that the claimant perceived numbers have not yet resigned from the 2nd Respondent union as required by section 48 (6) of the Labour Relations Act. She therefore urged that the said nurses are still benefiting from the CBA negotiated by the 2nd Respondent and as such they ought to pay Agency fees once they shift allegiance.

11. The 2nd Respondent submitted that she enjoys recognition and CBA signed between her and the 1st Respondent. She further submitted that the said Recognition Agreement has not been revoked by the National Labour Board under section 54 (5) of the Act.

12. The 2nd Respondent further contended that the claimant has not proved by producing her constitution as exhibit, that she has the right to represent employees in the 1st respondent's sector as required by section 54 (8) of the Act. She therefore prays for the suit to be dismissed.

13. The 3rd Respondent reiterated the submission by the 1st and 2nd Respondent in opposing the recognition of the claimant as the union to represent nurses in the 1st Respondent's service. He further submitted that the nurses in the 1st respondent's service who joined the claimant should continue to pay Agency fees to the 2nd respondent under section 49 of the Act.

14. The 3rd Respondent relied on **Rift Valley Railway Workers Union v Rift Valley Railways (Kenya) Ltd and Another [2014]eKLR** where the court held that Agency fees is allowed under section 49 (1) of the Labour Relations Act as against unionisable employees who are not members of the union but are benefiting from a CBA negotiated by the union on behalf of its members.

### **ISSUES FOR DETERMINATION**

15. There is no dispute that the 1st and 2nd Respondent have signed a Recognition Agreement and CBA covering all the 945 unionisable

staff of the 1st Respondent. There is also no dispute that among the 945 unionisable members of staff, 31 are nurses and 22 of the said nurses have been recruited as members by the claimant. The issues for determination are:

- a. Whether the suit is incompetent and bad in law.
- b. Whether the 1st Respondent should accord recognition to the claimant to represent the 31 nurses in her workforce and negotiate CBA for them separately from the other staff of the 1st Respondent.
- c. Whether claimant is entitled to the reliefs sought in the suit.

**Whether the suit is incompetent and bad in law**

16. The 2nd Respondent objected to the suit on ground that it was initiated by a person who is not the authorised representative of the claimant union. I have carefully considered and perused all the pleadings, applications, affidavits and submissions and find that they are all signed by Mr. Odongo Odongo Okatch, Industrial Relations Officer of the claimant. The question that arises is whether he is the authorized officer of the claimant for purposes of initiating court proceedings under section 73 of the Labour Relations Act.

17. Section 2 of the Act defines the authorised representative as follows:

**“Authorised representative means-**

**a. The general secretary of a trade union**

**b. . . .**

**c. Any person appointed in writing by an authorised representative to perform the functions of the authorised representative.”**

18. Section 73 (3) of the Act provides that:

**“A trade dispute may only be referred to the Industrial Court by the authorised representative of an employers, employees’ organisation or trade union.”**

19. In this case, Mr. Odongo Odongo Okatch has not proved that the General Secretary of the claimant union has appointed him in writing to refer the dispute herein to this court. All what he has deposed in the supporting affidavit and verifying affidavit is that he is competent to swear the said affidavits. He did not file any written authority from the General Secretary of the union even after the 2nd Respondent raised the objection in paragraph 8 of her response to the claim filed on 22.2.2018.

20. In **Jophinus Musindi & 7 others, National Executive Council Committee Members, acting for Kenya National Union of Nurses v Seth Panyako [2014] eKLR** the Court held:

**“To run the affairs of a union there is an authorised officer in law or a person so authorised by the authorised officer. This is the nature of trade unions so as not to defeat the purpose of such organising. Even where a party has a claim against such an entity as a trade union, such a party can lodge an individual claim as of right but when making such a claim under the entity of the union, then by operation of the law, the authorised officer has to act in that regard.**

**The drafters of the law and equally by the same getting the requisite approval by Parliament must have made consideration to the facts that trade unions have for a long time flourished while engaged in the social dialogue. Such dialogue can only be commenced by an authorised officer of the union and to leave it open to all officials as it were would defeat the very rationale of having the position of General Secretary in taking the responsibility to commence and conclude such dialogue...”**

21. Further, in **Transport Workers Union v Consolebase Ltd [2015] eKLR** the Court held:

**“Section 2 of the LRA defines an authorized representative in the context of this case to mean the Secretary General of a trade union or any person appointed in writing by the authorized representative to perform the functions of the authorized representative. Mt. Johnson Katama has not produced any evidence to prove that he has written authority from the General Secretary of the union to swear affidavit to support the motion before the court. The motion is therefore incompetent and must fail.”**

22. Consequently, I return that the suit herein was referred to the court by an unauthorised person and it is therefore incompetent, bad in law by dint of section 73 (3) read with section 2 of the Labour Relations Act.

23. In view of the foregoing finding that the suit is incompetent I will not consider its merits but instead let it fall on its face because the default to comply with Section 73(3) of the Act is not a mere procedural technicality but it goes to the jurisdiction of the court to entertain the suit. The Legislature did not fathom a case whereby any person other than the authorised representative of a trade union would have the locus standi before this court on any trade dispute.

**Whether Recognition should be granted to the Claimant**

24. As a parting shot, I wish to hold that under section 54 (1 ) of the Labour Relations Act a simple majority of unionisable staff refers to the entire workforce and not separate interest groups in the said workforce. Consequently, if a union chooses to recruit members from the employer, it should target the simple majority of the entire unionisable workforce and not just simple majority of a fraction thereof like the Claimant herein. Allowing that would be amending the law unlawfully, and encourage disorder in in labour relations and burden employers with obligations that are not envisaged in the Act.

25. Section 54(1) of the Act provides:-

**“An employer including an employer in the public sector shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.”**

26. I therefore, strike out the suit with costs for the reasons stated above.

**Dated, signed and delivered in open court at Nairobi this 21st day of February, 2020.**

**ONESMUS N. MAKAU**

**JUDGE**