



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 850 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF HAIR AND BEAUTY WORKERS.....CLAIMANT

VERSUS

BLACK AND BEAUTY PRODUCTS LIMITED..... RESPONDENT

RULING

The applicant is a trade union registered under the Labour Relations Act to represent employees in beauty products, manufacturers of hair piece, wholesale and retail salonists and barbers, hair and beauty training institutions and employees in sectors dealing with hair and beauty products in Kenya.

The respondent is a limited liability company registered in Kenya and a manufacturer of synthetic hair products such as weaves, braids, wigs and hair additions.

By application dated 16th December 2018, the claimant seeks the following orders against the respondent –

1. This Application be certified urgent, it be heard ex parte and service thereof be dispensed with in the first instance.
2. Pending the hearing and determination of this Application interpartes, the Court be pleased to issue an order restraining the Respondent from victimizing, intimidating, harassing, disciplining or terminating on account of union membership any of the Claimant's members appearing on the check off forms annexed to this Application.
3. Pending the hearing and determination of this Application interpartes, the Court be pleased to issue an order compelling the Respondent to effect deduction and remission of union dues for the Claimant's members appearing on the check off forms annexed to this Application.
4. Pending the hearing and determination of the suit filed herewith, the Court be pleased to issue an order restraining the Respondent from victimizing, intimidating, harassing, disciplining or terminating on account of union membership any of the Claimant's members appearing on the check off forms annexed to this Application.
5. Pending the hearing and determination of the suit filed herewith, the Court be pleased to issue an order compelling the Respondent to effect deduction and remission of union dues for the Claimant's members appearing on the check off forms annexed to this Application.
6. This suit be fixed for hearing and determination on a priority basis.
7. Costs of this Application be borne by the Respondent.

The grounds upon which the application is anchored are that the claimant is by its constitution authorised to represent the employees of the respondent, that the claimant has recruited 69 out of 80 unionisable employees of the respondent and submitted check off forms to the respondent but the respondent has declined to recognise the union or to make deduction of union dues. That Section 54(7) and 74(a) of the Labour Relations Act provide for recognition disputes to be heard as a matter of urgency. It is further pleaded that there is apprehension that due to the respondent's reluctance to recognise the claimant union, it may start to victimise, harass or terminate unionised employees to defeat union membership and recognition.

In the supporting affidavit of Cecily Mwangi the Secretary General of the claimant union, she reiterates the grounds on the face of the application.

The respondent was served but did not file a response to the claim or the application. It only filed a notice of appearance on 28th January 2020, the day that the application was fixed for hearing. On that day counsel for the respondent arrived in court late with the notice of appointment after the application had been heard. At the hearing of the application, Mr. Mburugu for the applicant submitted that he will be seeking orders that the respondent be compelled to remit union dues, secondly that the respondent be compelled not to intimidate workers on account of union membership. He referred the court to schedule forms annexed as appendix CM4 at pages 11 to 20 of the supporting affidavit which confirms that the claimant union has recruited 69 out of 80 employees. He submitted that the parties had gone through conciliation and the conciliation found in favour of the union. That the respondent did not challenge the findings of the conciliator.

Mr. Mburugu submitted that the respondent is not challenging the recruitments but the manner in which the recruitments were carried out. He referred to the submissions of the respondent before the conciliator annexed to the supporting affidavit as appendix CM8. He submitted the reason the claimant union seeks orders that employees not be harassed is because the respondent insists recruitment of employee should be done in the presence of the employer yet there is no lawful basis for such a demand.

It was submitted by Counsel that the acts of the respondent was denying the claimant union much needed revenue as the schedule forms were sent in February 2019.

He submitted that the union has demonstrated that it has qualified for the prayers sought and urged the court to grant the said orders.

Analysis and Determination

I have considered the application filed by the claimant union together with the affidavit and documents filed therewith. I have further considered submissions by Counsel for the claimant union.

The issue for determination is whether the union has met the threshold for grant of the orders sought.

The right to association and to joining union membership is anchored on Articles 36 and 41(2)(c) of the Constitution which provide respectively for freedom of association and the right to form, join or participate in the activities and programs of a trade union.

Section 4(1) and (2) of the Labour Relations Act further provides for the right to union membership as follows –

4. Employee's right to freedom of association

(1) Every employee has the right to—

- (a) participate in forming a trade union or federation of trade unions;**
- (b) join a trade union; or**
- (c) leave a trade union.**

(2) Every member of a trade union has the right, subject to the constitution of that trade union to—

- (a) participate in its lawful activities;**
- (b) participate in the election of its officials and representatives;**
- (c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and**
- (d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.**

Further Section 5 of the Labour Relations Act protects employees from victimisation for joining or participating in union activities as follows –

5. Protection of employees

(1) No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act.

(2) Without limiting the general protection conferred by subsection (1), no person shall do, or threaten to do any of the following—

- (a) require an employee or a person seeking employment not to be or become a member of a trade union or to give up membership of a trade union;**

(b) prevent an employee or person seeking employment from exercising any right conferred by this Act or from participating in any proceedings specified in this Act;

(c) dismiss or in any other way prejudice an employee or a person seeking employment—

(i) because of past, present or anticipated trade union membership;

(ii) for participating in the formation or the lawful activities of a trade union;

(iii) for exercising any right conferred by this Act or participating in any proceedings specified in this Act; or

(iv) for failing or refusing to do something that an employee may not lawfully permit or require an employee to do.

(3) No person shall give an advantage, or promise to give an advantage, to an employee or person seeking employment in exchange for the person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act:

Provided that nothing in this section shall prevent the parties to a dispute from concluding an agreement to settle that dispute.

The respondent did not file any grounds of opposition or replying affidavit to rebut the averments of the claimant union to the effect that its constitution permits it to represent employees of the respondent.

Section 48(3) of the Labour Relations Act provides as follows in respect of deduction of union dues –

(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.

Section 50 of the Act provides the manner in which such funds are to be managed as follows –

50. General provisions applicable to deductions

(1) Any amount deducted in accordance with the provisions of this Part shall be paid into the designated trade union, or employers' organisation account within ten days of the deduction being made.

(2) The Minister may revoke or suspend a notice issued in accordance with this Part if the Minister has reason to believe that—

(a) the order was obtained by misrepresentation or fraud;

(b) the money is not being paid into the designated account; or

(c) the money is being used for a purpose other than the lawful trade union or federation activities.

(3) No amount deducted from the wages of an employee in accordance of this Part may be recovered from the employer by that employee.

(4) Any amount deducted from the wages of a member of a trade union by the member's employer in accordance with this section discharges the liability of the member to pay trade union dues.

(5) An employer may set off against any sum payable to a trade union in accordance with this section, the amount of any money over paid by the employer into the account designated by the Minister.

(6) No employer shall make a deduction from the wages of an employee for the purposes of making a payment to any trade union, except in accordance with the provisions of this Part.

(7) A trade union or a trade union federation shall acknowledge receipt of any monies paid to it within fourteen days of receiving the money.

(8) No employer shall—

(i) fail to comply with an order or a notice issued under this Part;

(ii) deduct any money and not pay it into the account designated in the notice issued by the Minister; or

(iii) pay money into an account other than the account designated in the notice issued by the Minister.

Further Section 19 of the Employment Act allows an employer to make deductions from the wages of an employee inter alia, as follows –

(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;

(g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

From the foregoing it is clear that membership of a trade union is a constitutional right that may only be limited in the manner provided under Article 24 of the Constitution provides that t-

24. Limitation of rights and fundamental freedoms

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

In the instant application the claimant has demonstrated that it is the correct trade union as its constitution permits it to recruit employees of the respondent.

The claimant has further demonstrated that it has recruited a simple majority as is evident from the check-off forms, a fact that is admitted by the respondent in its submissions as reflected in the conciliation report at page 35 of the claimant's bundle of documents where it is stated that the management (the employer) submitted that the claimant union had recruited (as at that time on 1st October 2019) a simple majority of 57 out of 80 employees.

The objections to remittance of union dues by the respondent as expressed in the submissions to the Conciliator are as follows –

“Submission by the Management

In their verbal and written submissions, the Management stated that: -

· That the Union had recruited 57 employees out of 80 employees through a dubious means by telling the employees that were entitled to service pay upon termination from the company yet the company was registered with NSSF as a provident scheme.

· That the Union was charging each employee Kshs.250/- which the company felt was not a legal requirement and yet employees had been informed that to join the Union was free without any charges,

· That the company is challenging the check off list as some of the employees did not sign the check off list as their signatures were

forged.

- *That there has been a long standing dispute over Recognition Agreement from 2013 to 2016 which culminated into a court case.*
- *That the union had filed a case in 2016 in court of having recruited seventy (70) employees but the case was dismissed in December 2018. At that time there was also a rival Union that was also seeking Recognition Agreement with the company.*
- *That the Union should be denied a Recognition Agreement because the employees were forced to join the Union and the terms and conditions of the check off system needs to be varied.*
- *Due to the above submissions, the Management was not willing to sign a Recognition Agreement with the Union because they did not come with clean hands to do the official recruitment and instead misled the workers with all kinds of promises; hence the workers do not want to join the Union as per the Worker's committee."*

Section 48 requires that an employer remits union dues for any employee who has signed check-off forms. There is no legal foundation for the respondent to supervise the manner in which the claimant union recruits or relates with its members. Indeed, it is a requirement under the Industrial Relations Charter as defined under Section 2 of the Labour Relations Act that employers do not interfere with affairs of trade unions. Such interference as demanded by the respondent is interference with union matters and would be interpreted as intimidation of employees who may feel threatened to sign into union membership in the presence of the employer for fear of victimisation.

The respondent having failed to rebut the averments of the claimant union and having admitted that the claimant union has recruited a simple majority of its employees, it is obligated under Section 48(3) to deduct and remit union dues in the manner provided therein. Having admitted receipt of check-off forms, it is under statutory obligation to deduct and remit union dues as provided in the check-off forms it received from the union. It is not the respondent's business to inquire into the manner in which the employees were recruited or to question the amounts to be paid to the union by employees as this has been authorised by the Minister for Labour vide Gazette Notice No. 16484 as reflected in the letter accompanying the check-off forms.

For the foregoing reasons, I make the following orders –

1. Pending hearing and determination of the suit herein, the respondent be and is hereby directed to deduct and remit union dues to the claimant/applicant in the manner provided in the letter accompanying the check-off forms and in Section 48(3) of the Labour Relations Act.
2. Pending hearing and determination of the suit herein, the respondent be and is hereby restrained from victimizing, intimidating, harassing, disciplining or terminating on account of union membership, any of the Claimant's members appearing on the check off forms annexed to the Application.

The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE