



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1244 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

KENYA TERTIARY AND SCHOOLS

WORKERS' UNION (KETASWU)..... CLAIMANT

VERSUS

HELTZ INSTITUTE OF ADVANCED DRIVING.....RESPONDENT

JUDGMENT

The Claimant herein is a trade union registered under the Labour Relations Act to represent workers in the sectors covered under its constitution. It avers that it has recruited 42 unionisable employees of the respondent and forwarded check off Forms S dated 24th and 31st May, and 9th and 16th July 2018 respectively to the respondent for deduction and remittance of union dues in terms of Section 48 of the Labour Relations Act. That it further served a copy of recognition agreement upon the respondent for purposes of collective bargaining.

It avers that instead of the respondent complying with the check off forms by making and remitting union dues to the union's account, it has resorted to arrogantly and violently discriminating and victimising the employees who signed the check off forms in a bid to coerce them to withdraw from union membership.

The claimant further avers that the respondent has persistently underpaid its employees' salaries and wages and subjected the employees to terms and conditions of employment that are in contravention of the minimum terms set out under the Regulation of Wages (General) Orders within the meaning of Section 48 of the Labour Institutions Act and Section 54(1) of the Labour Relations Act.

That the claimant union having failed to be allowed access to communicate with the respondent opted to report the existence of a trade dispute to the Minister under Section 62(1) of the Labour Relations Act. In the letter dated 4th June 2018 which is at appendix 5 of the statement of claim, the claimant union reports a dispute on the following issues –

- (1) Recognition of trade union by employer and
- (2) Deduction of trade union dues.

The claimant avers that the respondent has contravened Article 2 of the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, Article 36 and 41 of the Constitution of Kenya 2010 on Freedom of Association and Labour Relations respectively and Section 54(1) of the Labour Relations Act on recognition of trade unions for purposes of collective bargaining.

The claimant prays for the following orders against the respondent in its statement of claim dated 23rd and filed on 25th July 2018 –

1. A declaration that the Respondent herein by its Directors, Managers and Agents, are hereby forthwith restrained and/or prohibited from harassing, intimidating the Claimant union members and infringing on their constitutional rights of fair labour practices and their opportunity to freely join or participate in the activities and programmes of a trade union of their choice.
2. A declaration that the Respondent is hereby ordered forthwith to effect trade union dues deductions from the salaries of its unionisable staff employees who have voluntarily acknowledged their union membership with the Claimant Union on the Check-off Forms S; dated 24th and 31st May, and 9th and 16th July, 2018, and pay the moneys so deducted to the Claimant Union.
3. A declaration that the Respondent is hereby forthwith ordered to pay the Claimant Union from its kitty, all accrued sums of moneys due and owed to the Claimant Union as trade union dues, which the Respondent would had deducted and remitted regularly

from the employees who had acknowledged their union membership on the Check-off forms thereof.

4. A declaration that the Respondent is hereby ordered forthwith to harmonise salaries of all staff employees and upgrade their terms of conditions of employment to qualify the lawful standard under Section 48 of The Labour Institutions Act, 2007, Laws of Kenya.
5. A declaration that the Respondent is hereby ordered to sign a “*Recognition Agreement*” with the Claimant Union forthwith for the purposes of collective bargaining.
6. A declaration that, service of this application and suit be effected by the Registrar of the Court upon the Respondent herein.

Simultaneously with the statement of claim, the claimant filed a notice of motion under certificate of urgency seeking the following orders –

1. That, the application is certified as urgent and the same do proceed for an ex- parte hearing as soon as practicable. That, the Respondent herein by its Directors, Managers and Agents, are hereby forthwith restrained and/or prohibited from harassing, intimidating the Claimant Union members and infringing on their constitutional rights of fair labour practices and their opportunity to freely join or participate in the activities and programmes of a trade union of their choice.
2. That, the Respondent is hereby ordered forthwith to effect trade union dues deductions from the salaries of its unionisable staff employees who have voluntarily acknowledged their union membership with the Claimant Union on the Check-off Forms S; dated 24th and 31st May, and 9th and 16th July, 2018, and pay the moneys so deducted to the Claimant Union.
3. That, the Respondent is hereby forthwith ordered to pay the Claimant Union from its kitty, all accrued sums of moneys due and owed to the Claimant Union as trade union dues, which the Respondent would had deducted and remitted regularly from the employees who had acknowledged their union membership on the Check-off forms thereof.
4. That, the Respondent is hereby ordered forthwith to harmonise salaries of all staff employees and upgrade their terms of conditions of employment to qualify the lawful standard under Section 48 of The Labour Institutions Act, 2007, Laws of Kenya.
5. That, the Respondent is hereby ordered to sign a “*Recognition Agreement*” with the Claimant Union forthwith for the purposes of collective bargaining.
6. That service of this application and suit be effected by the Registrar of the Court upon the Respondent herein.
7. That costs be provided for.

The motion was heard by the duty Judge ex parte on 25th July 2018 and prayer 2 granted.

On 6th August 2018 the respondent filed a replying affidavit in response to the notice of motion together with a notice of preliminary objection.

In the replying affidavit sworn by AHMED BACHAN, a Director of the respondent on 6th August 2018, he denies that the respondent has been served with any check off forms. He further denies that the persons named in the check off forms are employees of the respondent. He avers that the claimant has never undertaken any recruitment of its employees and that the signatures on the check off forms need to be authenticated.

Mr Bachan admits being served with recognition agreement sent through his personal email but states he could not act on the same as HELTZ DRIVING SCHOOL ACADEMY confirmed that the claimant was dealing with a different entity other than the respondent.

The respondent states that there is another union, the Transport Workers Union, which has filed a suit against the respondent being Cause No. 198 of 2013.

Mr Bachan denies knowledge of any trade dispute reported to the Ministry of Labour by the claimant union.

He deposes that the suit is incurably defective, incompetent, bad in law, lacks merit, is vexatious, frivolous and otherwise an abuse of court.

In the notice of preliminary objection dated and filed on 6th August 2018, the respondent raises the following grounds of preliminary objection –

1. That the application and the main suit are premature frivolous, vexatious, bad in law, incurably defective, incompetent and otherwise an abuse of court process.
2. That the application offends the provisions of Sections 73 and 74 of the Labour Relations Act for failure to exhaust/invoke alternative dispute resolution mechanism provided thereto before filing this suit in court.

When the claimant appeared before the duty Judge on 7th August 2018, the Judge determined that the application was not an urgent matter fit to be heard during vacation and fixed the same for inter partes hearing on 19th September 2018.

When parties appeared before me on 19th September 2019 for the hearing of the application, I directed that the motion, claim and preliminary objection be heard together by way of written submissions and gave directions on the filing of submissions.

Claimant's Submissions

In the claimant's submissions it states that the membership clause of its constitution defines schools to include driving, nursing, secondary, special, primary, nursery and academy, among others. It states that the respondent carries on business under the names Heltz Institute of Advanced Driving, Heltz Driving Academy and Heltz Driving School, all registered under business names.

It submits that having recruited 42 employees of the respondent, it is entitled to deduction of union dues from the said employees who have signed the check off forms. It relies on the decision in Cause No. 1150 of 2012 whose parties it has not disclosed. It has further not provided a copy of the decision to the court.

The claimant further submits that the dispute is properly before the court having been reported to the Minister under Section 62 of the Labour Relations Act.

On whether the claimant qualifies for recognition it submits that it has surpassed a simple majority as exhibited in annexure 2 of the statement of claim. It relies on the decision in **Kenya Union of Domestic, Hotels Educational Institutions, Hotels and Allied Workers v Commission for Higher Education, Cause 149 of 2010**, where the court set out the requirements for recognition being that the union's constitution must permit it to recruit employees in the Sector in which the respondent operates, the union must have recruited a simple majority and there must be no rival union representing the employees.

On the issue of minimum terms and conditions of employment, the claimant submits that the respondent has continued to pay its employees below statutory minimum wages, relying on annexure 3 of the statement of claim and Section 48 (1) and (2) of the Labour Institutions Act.

On the respondent's preliminary objection, the claimant submits that the respondent has failed to demonstrate that the facts support the preliminary objection as enunciated in the case of **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA**.

With respect to the Bill of Rights under Articles 20 and 21 of the Constitution of Kenya, the claimant submits that this court is empowered to intervene in situations where a person's rights or fundamental freedoms have been denied, violated or infringed, or is threatened. It submits that the respondent has violated ILO Convention No. 87, Articles 223. That the respondent has further violated Articles 36 and 41 of the Constitution of Kenya and Section 4(1) of the Labour Relations Act.

Respondent's Submissions

The respondent submits that the recognition agreement sent to the respondent by the claimant refers to a different party being HELTZ DRIVING SCHOOL ACADEMY and not the respondent herein who is named as HELTZ INSTITUTE OF ADVANCED DRIVING. Further that the recognition agreement was not discussed and agreed upon, contrary to Sections 54(2) and (3) of the Labour Relations Act. It further submits that the same having not been executed the claimant ought not to refer to it.

The respondent further submits that the recognition agreement does not provide for freedom of membership. The respondent relies on the decision in **Scientific Research International Technical and Allied Workers Union v Kenya Agricultural Research Institute and Another (2013) eKLR** where the court stated –

“Recognition of trade unions rests on freedom of association. Employees have the right to join and leave trade unions. Recruitment is a continuous process. Even where an employer has formally granted trade union recognition, employees belonging to that recognized trade union are not barred by any law from shifting allegiance to another trade union. Freedom of Association acknowledges the right to associate is co-joined to the right to dissociate; just as much as the right of recognition includes the right of de-recognition. Employees look at the trade union that is best placed to articulate their collective rights and interests of the moment, and do not take a lifelong vow of fidelity, by joining any one trade union.”

It further relies on the decision in **Aviation and Allied Workers Union v Air Kenya Express Limited and Another** where the court need –

“The law acknowledges that freedom of association includes the right of an employee to belong, or not belong to a trade union. An employee can associate and dissociate. It is stated that the right to belong to the union must be accompanied by the right not to belong, just as much as freedom of expression must include the right to silence.”

It further submits that Section 5(2) of the Labour Relations Act provides for freedom of membership of union as follows –

(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;

On whether the respondent should be compelled to deduct union dues the respondent submits that the employees having resigned from the union membership, they are not eligible for deduction of union dues.

It prays that the suit be dismissed.

Determination

I have considered the pleadings and submissions herein. I note that the respondent did not file a defence. The replying affidavit however responds to all the issues in the claim and will be deemed to be the respondent's defence.

The issues for determination are whether the claimant is the appropriate union to represent employees of the respondent, whether there is a rival union as alleged by the respondent, whether the claimant has recruited a simple majority and whether the employees have resigned from membership of the union. The final issue for determination is whether the claimant is entitled to the orders sought.

I will start with the preliminary issue raised in the preliminary objection by the respondent that –

1. The application and the main suit are premature, frivolous, vexatious, bad in law, incurably defective, incompetent and otherwise an abuse of court process.
2. The application offends the provisions of Sections 73 and 74 of the Labour Relations Act for failure to exhaust/invoke alternative dispute resolution mechanism provide thereto before filing this suit in court.

As observed by the claimant, the issues raised in the preliminary objection do not qualify in terms of the decision in **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited** where the court defined a preliminary objection to mean–

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what it sought is the exercise of judicial discretion.

The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and occasion confuse the issues. This improper practice must stop.”

What the respondent has raised are not matters of law but procedural matters. In any event the respondent did not make any submissions in support of the preliminary objection in its final submissions. I thus take it that the same has been abandoned.

On the substantive issues, is the claimant the appropriate union? The claimant did not file a copy of the membership clause of its constitution. The respondent did not raise this issue either.

In view of the fact that the respondent did not raise any objection on this issue I will presume that the claimant is the proper union for the respondent's employees.

I however note that the respondent attempted to raise an issue of a rival union and filed documents in which it has been sued by Transport Workers Union. I note that there is no mention of a recognition agreement with the said union or even a mention of recruitment of members from employees of the respondent by the said Transport Workers Union.

I thus find that there is no evidence of a rival union claiming to represent the members who were recruited by the claimant.

The respondent has raised another issue about not having been served with check off forms. I however note that the respondent has at the same time filed copies of letters of resignation from the union by the employees. Employees cannot resign from membership of a union unless they have in the first place joined the membership of the union.

I thus find no merit in the averment of the respondent that it was not served with the check off forms.

Having found that there is no rival union and that the claimant is the proper union the next issue is whether the claimant has recruited a simple majority of the unionisable employees of the respondent. Again this fact is not contested by the respondent. The respondent did not contest that the 42 employees recruited by the claimant did not constitute a simple majority. I thus find that the claimant union has recruited a simple majority of the respondent's employees.

The next issue is the resignation letters by the employees that have been exhibited in the further affidavit of AHMED BACHAN sworn on 22nd October 2018. The letters are dated between 24th August and 14th September 2018. They are all typed with provision of space only for the name, signature and date to be filled by the employees. They were signed long after this suit had been filed and the respondent had filed its original replying affidavit. It is not difficult to conclude that the resignations are obviously manufactured to defeat this suit. The respondent has not stated why it did not deduct union dues from the date it received union check off forms to the date of the signatures.

I find the resignations not to be voluntary and that the respondent coerced the employees into signing the same by typing out the forms and making out the letters and causing the employees to fill them in violation of their right to association under Article 36 of the Constitution and the right to join and participate in union activities under Article 41 of the Constitution.

Right to recognition is not reckoned as at the date of the dispute coming to court or the date of judgment but as at the date of the union submitting a recognition agreement for signature. This is because it is at that moment that the union states it has recruited a simple majority.

From the foregoing, I find that the claimant union qualified for recognition by the respondent as at the time it submitted the recognition agreement to the respondent for signature.

There is however the final issue of the entity named in the recognition agreement forwarded to the respondent which is HELTZ DRIVING SCHOOL ACADEMY. This is not the respondent and is not the entity referred to in all documents for either the claimant or the respondent. All correspondence and the suit are in respect of HELTZ INSTITUTE OF ADVANCED DRIVING. On this I agree with the respondent that it has not been served with a recognition agreement to sign and that the one submitted to it is for a different entity other than the person named as the respondent in this suit.

On this ground alone the prayer to accord the claimant recognition fails, as the claimant has not served the respondent with a recognition agreement which it has refused to sign.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MARCH 2020

MAUREEN ONYANGO

JUDGE