



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 120 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**RIFT VALLEY RAILWAYS WORKERS UNION (K).....CLAIMANT**

**VERSUS**

**BUILDING AND CONSTRUCTION WORKERS UNION.....1<sup>ST</sup> RESPONDENT**

**CHINA ROADS AND BRIDGES CORPORATION..... 2<sup>ND</sup> RESPONDENT**

**AND**

**CENTRAL ORGANISATION OF TRADE UNION.....1<sup>ST</sup> INTERESTED PARTY**

**KENYA RAILWAYS CORPORATION..... 2<sup>ND</sup> INTERESTED PARTY**

**KENYA CONCRETE CERAMIC TILES**

**DESIGN WORKERS UNION ..... 3<sup>RD</sup> INTERESTED PARTY**

**RAILWAYS AND ALLIED WORKERS UNION..... 4<sup>TH</sup> INTERESTED PARTY**

**RULING**

The Claimant, Rift Valley Railways Workers Union (K) filed a Notice of Motion dated 10<sup>th</sup> April 2018 against Building and Construction Workers Union (K), the 1<sup>st</sup> Respondent and China Roads and Bridges Corporation, the 2<sup>nd</sup> Respondent and 4 Interested Parties. It seeks for orders that:

1. Spent.
2. Spent.
3. The 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Interested Party be directed to forthwith allow the Claimant access to their premises for purposes of conducting the legal activities as was registered to do, and or, be directed to accord the directives as shall be given by the Court in Causes 1409 of 2016 and 587 of 2014.
4. By virtue of the Concession Agreement being terminated by way of Consent Order, and the subsequent engagement by the 2<sup>nd</sup> Interested Party of all the employees as were employed by the Concessionaire, that the Court directs that the matters in Causes 1409 of 2016 and 587 of 2014 be consolidated and heard alongside Cause 120 of 2016.

The Application is based on the grounds that the Claimant Union which was duly registered in 2012 to conduct its activities in the railway commerce on behalf of the workers employed by the 2<sup>nd</sup> respondent sought access to the 2<sup>nd</sup> Respondent's premises, but was denied access alleging it already had a union. That it raised the issue with of the Registrar of Trade Union for clarification regarding the legitimacy and or its right to access the said premises and the Registrar responded in a letter to the Chief Human Resource of the 2<sup>nd</sup> Respondent. That the 2<sup>nd</sup> Respondent refused to accept the said letter or to allow the Claimant access to its premises. That a copy of the said letter was also given to the Chief Executive Officer of the 2<sup>nd</sup> Interested Party who similarly did not allow the Claimant access. That it is material that the said 2<sup>nd</sup> Interested Party engages the Claimant on matters of industrial relations and that the right to join or participate in lawful activities of any

union is not negotiable and is affirmed in **Articles 36 and 41 of the Constitution**.

In the supporting affidavit, the Applicant's Secretary General, Munayi Isaac Opondo avers that he is aware that once any five or more employees of an employer instructs the said employer to deduct and remit union dues to a union they have subscribed to, the said employer is obligated to commence deduction and remittance of the said dues. That it is therefore unprocedural and unlawful for the Respondent to refuse the same and give preference to one union against another by influencing and or cajoling the workers to associate with the said union. That the Claimant has no ill intentions as against the employer and neither is it seeking to organize the workers against the employer's interests.

The 1<sup>st</sup> Respondent filed a Replying affidavit on 14<sup>th</sup> May 2018 sworn by its General Secretary, Francis Murage who avers that the prayers sought relate to access of workers engaged in the running of the completed SGR at the Syokimau Railway Station. That the 1<sup>st</sup> Respondent does not represent workers within the Railway operations sector but only represents workers in the building and construction industries including construction of railway lines. That however, the 1<sup>st</sup> Respondent's interests ceased when construction of the SGR between Nairobi and Mombasa was completed and that in line with the Claimant's prayers, the 1<sup>st</sup> Respondent therefore has no interests. That the 1<sup>st</sup> Respondent is not a party and has no knowledge of *Causes 1409 of 2016* and *587 of 2014* referred to in the Claimant's application. That the present Cause has been overtaken by the completion of construction of the SGR. Mr. Murage prays that the 1<sup>st</sup> Respondent be discharged from this Cause.

The 2<sup>nd</sup> Respondent filed a Replying Affidavit dated 14<sup>th</sup> May 2018 sworn by its Human Resource Officer, Derrick Nyankuru who deposes that the 2<sup>nd</sup> Respondent's operations do not fall within the Claimant's sector as alleged in the application. That the issue of its employees' representation was previously determined by a Conciliator who recommended that the 1<sup>st</sup> Respondent retain jurisdiction to deal with the 2<sup>nd</sup> Respondent's employees engaged in the construction of the SGR. That it thus signed a CBA with the 1<sup>st</sup> Respondent pursuant to the findings of the Conciliator made on 8<sup>th</sup> January 2015, in accordance with Part VII of the Labour Relations Act and after the employees authorised the 2<sup>nd</sup> Respondent's to deduct and remit union dues to the 1<sup>st</sup> Respondent. That the application is an abuse of the court process as the Applicant is attempting to obtain orders sought in the Statement of Claim through the Application and further hijack and paralyse the operations of the 2<sup>nd</sup> Respondent.

He deposes that the 2<sup>nd</sup> Respondent is not a party to *Causes 1409 of 2016* and *587 of 2014* and that it would be premature and highly prejudicial to the 2<sup>nd</sup> Respondent's interests to be joined to proceedings it is not privy to and has no notice of. He denies that the 2<sup>nd</sup> Respondent has a preference towards one union as alleged by the Applicant contending that the 2<sup>nd</sup> Respondent has always engaged other stakeholders in the labour industry in a bid to safeguard the well-being of its employees who are allowed to join any federation/trade union as they wish.

The Claimant filed a Further Affidavit sworn by Munayi Isaac Opondo on 21<sup>st</sup> September 2018 in response to the 2<sup>nd</sup> Respondent's replying affidavit. He clarifies that this matter was subject of the court's determination through *Appeal No. 10 of 2011* where the Court observed that the activities of the 2<sup>nd</sup> Respondent encroached into the railways sector. That since the SGR has long been completed and operationalized, the 2<sup>nd</sup> Respondent's continued activities contravene the conciliator's ruling and offend the provisions of the Labour Relations Act. That the CBA alluded to by the 2<sup>nd</sup> Respondent is based on limited jurisdiction over construction employees and cannot be extended to cover employees in the Claimant's sector. He deposes that the Claimant has successfully recruited employees of the 2<sup>nd</sup> Respondent but has been prevented from engaging the employees for union representation. That the averments that access is preceded by a recognition agreement is a gross misrepresentation of the law and that the continued restriction of access by the claimant to the said employees contravenes their right to fair labour practices. That there can be no recognition agreement with the 1<sup>st</sup> Respondent devoid of there being any construction workers or at least 50% + 1 of the 2<sup>nd</sup> Respondent's employees within the construction and building sector.

## **Proceedings**

Submissions on the Application herein were highlighted in Court by the Claimant and 1<sup>st</sup> Respondent on 3<sup>rd</sup> June 2019 and 23<sup>rd</sup> July 2019. Mr. Munayi submitted that the Claimant had since been granted access by both employers and that in the course of time they would be signing recognition agreements. That the essence of the application appears to have dissipated. He asked for 30 days for further mention or to record Consent.

The 1<sup>st</sup> Respondent's advocate, Ms. Chege submitted that when they appeared before court for hearing in May 2018, she had stated that the suit had long been resolved as it was based on construction of 1<sup>st</sup> Phase of SGR and that the 1<sup>st</sup> Respondent had ceased representing the employees of the 2<sup>nd</sup> respondent and therefore the construction union had no interest in this case. That she had further stated that Kenya Railways Union had signed a recognition agreement with SGR. That the Court then directed that they file submissions on demarcation, which she did on 27<sup>th</sup> June 2018 but that the Claimant never served its submissions. She submitted that the application herein has enjoined other parties who were never parties to this suit, that is, Kenya Railways and Allied Workers Union and Kenya Concrete, Tiles and Design Workers Union. That the intent of this application was then turned into a battle between the Claimant and the Railway Union. She submitted that the Claimant ought to have filed another suit as the cause of action is totally different. She prayed that the suit is determined as per the Court's earlier directions.

The Claimant's Mr. Munayi responded that they did not envisage the events which have transpired with the Claimant being granted access and that the only issue is the dismissal of one employee on grounds of having joined the Claimant union. He agreed that the cause of action has since changed and confirmed that Respondents are remitting union dues. He also submitted that the Claimant seeks to have the application herein marked as spent with the only issue remaining being the unprocedural dismissal of one of the Claimant's members.

The 1<sup>st</sup> Respondent's advocate informed the court that as far as they were concerned, the Claimant was to confirm withdrawal. The Court then directed the matter to be mentioned on 30<sup>th</sup> September 2019 for the Claimant to confirm it was withdrawing the Claim.

On 30<sup>th</sup> September 2019, Mr. Munayi for the Claimant requested to have the matter mentioned in 7 days to have the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Interested Party and 3<sup>rd</sup> Interested Party removed from the suit as their interest has since dissipated. The 1<sup>st</sup> Respondent's advocate responded that the Claimant ought to have filed a fresh suit on representation of railway workers who the 1<sup>st</sup> Respondent does not represent. She prayed that the 1<sup>st</sup> Respondent is not removed until that question is determined. The Court then directed parties to address the court on the scope of representation as ordered on 23<sup>rd</sup> May 2018.

### **1<sup>st</sup> Respondent's Submissions dated 27<sup>th</sup> June 2018**

On demarcation between the Claimant and the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent submits the scope of representation covered by the Claimant is unknown because the Claimant union has not exhibited its constitution in the pleadings it has filed in this cause. That on its part, **Part C of the 1<sup>st</sup> Respondent's registered Constitution** which is also exhibited in its submissions, reads in part:

*"MEMBERSHIP; Membership of the Union shall be open to all employees engaged in the following activities and trades: -*

*i. Building construction and civil Engineering Industry, all activities covering and including structural engineering, maintenance alteration or repair of any building, structural repair, demolition of any building ... the construction of any railway line or siding..."*

The 1<sup>st</sup> Respondent submits that it has a recognition agreement and has negotiated several CBAs with the 2<sup>nd</sup> Respondent which is a civil engineering contractor for the construction of roads, bridges and railway lines. That during construction of the SGR Phase 1, the Railway Workers Union put a claim that it was the rightful union to offer representation to the construction workers but the 1<sup>st</sup> Respondent filed a complaint with the Labour Office. That the **Conciliator's Report dated 8<sup>th</sup> January 2015** made a recommendation which laid the matter to rest after making a finding that the 2<sup>nd</sup> Respondent's employees are governed by the **Building and Construction Industry (Wages) Order 2012** whose provisions have been domesticated in the 1<sup>st</sup> Respondent's Constitution with regard to membership. It submits that with completion of construction of the SGR Phase 1, it moved on to represent unionisable employees in the 2<sup>nd</sup> Phase of the SGR construction which is intended to run between Nairobi and Naivasha.

The 1<sup>st</sup> Respondent contends that the Claimant did not refer the dispute herein for conciliation as is mandatory in the first instance under **Section 62 – 72 of the Labour Relations Act** and that had it referred the same for conciliation, parties would have been duly advised. It submits that it is therefore the rightful union to represent unionisable employees of the 2<sup>nd</sup> Respondent engaged in the construction of the SGR line and is entitled to receive union dues from such unionisable employees whom it has recruited. It prays that the Claimant's Cause is dismissed with costs to the 1<sup>st</sup> Respondent.

### **Claimant's Submissions dated 7<sup>th</sup> October 2019**

The Claimant in its submissions denies that the directives issued by this Court on 23<sup>rd</sup> July 2019 were on the scope of representation or determination of the Application herein, stating that on the material date, the Court did direct the Claimant to consider standing down the 1<sup>st</sup> Respondent. That the 1<sup>st</sup> Respondent's Counsel arm twisted this Court to disregard its own due process and directives by having it revisit an issue that was long overtaken by events having transpired in court in July 2018. That Parties have been in court on several occasions thereafter and that the last directive issued by this Court was on the 23<sup>rd</sup> July 2019.

It submits that the Court has previously ordered that it was unlawful for the 1<sup>st</sup> Respondent to set foot within the Rail Sector and purport to conduct its activities therein and that in utter disrespect to this directive, the 1<sup>st</sup> Respondent went ahead and unlawfully operated within the said sector. That the said Order has never been appealed against nor set aside or varied to warrant the 1<sup>st</sup> Respondent address this Court on the same issue which it is in contempt of. That the 1<sup>st</sup> Respondent still has the liberty to file a dispute on Demarcation rather than reopening an issue whose application is not before court for this Court to make a determination on.

Further, that the 1<sup>st</sup> Respondent insisting not to be removed from this matter despite their interests having dissipated is eyebrow raising and indicates that the 1<sup>st</sup> Respondent may still have other interests in this matter. It reiterates that it seeks to have the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Interested Party and 3<sup>rd</sup> Interested Party removed from this suit with no order as to costs. That this Court for the interests of justice, ought to have granted it leave to file an application to have the said parties removed from this matter. That this Court should not entertain the 1<sup>st</sup> Respondent's 'application' as it is a waste of the Court's and Claimant's time.

### **Determination**

Pursuant to directions of this Court given on 23<sup>rd</sup> July 2019, the Claimant union confirmed on 30<sup>th</sup> September 2019 that they would be seeking to have the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Interested Party and 3<sup>rd</sup> Interested Party removed from the suit. However, the 1<sup>st</sup> Respondent's counsel requested that her client should not to be removed until the question of demarcation had been determined. This Court then directed that parties address it on the scope of representation between the Claimant and the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have both averred that the issue of representation was solved through Conciliation in 2015 and have attached the Conciliator's Report dated 08/01/2015 that recommended that the 1<sup>st</sup> Respondent retain jurisdiction to represent the 2<sup>nd</sup> Respondent's employees engaged in the construction of the SGR line with the 2<sup>nd</sup> Interested Party.

In my opinion, the 1<sup>st</sup> Respondent's scope of representation has been clearly defined. Further the Claimant union has since confirmed in court that having been granted access by both the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Interested Party, it was in the process of signing recognition agreements.

Prior to the last directions of this Court, parties were in agreement that the interests of the 1<sup>st</sup> Respondent, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties had since dissipated and the Claimant confirmed that it seeks to have the said parties removed from the suit instead of withdrawing the whole claim since it still has a pending issue with the 2<sup>nd</sup> Respondent.

The Claimant did not attach the pleadings in respect of Causes 1409 of 2016 and 587 of 2014 for parties to respond to and for this Court to be able determine whether the said Causes can be consolidated with this suit.

In view of the fact that the 1<sup>st</sup> respondent's interest in the employees in respect of whom the claim against it herein was made has dissipated following the completion of Phase I of SGR between Mombasa and Nairobi and access having been granted to the claimant by the 2<sup>nd</sup> and 4<sup>th</sup> Interested Parties, I find the application herein is spent and make orders accordingly.

There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF APRIL 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**