



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 57 OF 2017

TRANSPORT WORKERS UNION.....CLAIMANT

VERSUS

MODERN COAST COACHES LTD.....1ST RESPONDENT

MODERN COAST EXPRESS LTD.....2ND RESPONDENT

JUDGMENT

Introduction

1. This dispute arises from alleged refusal by the Respondent to effect deduction of trade union dues in favour of the Claimant.
2. The Claimant also makes a claim that the Respondent has been intimidating and threatening its employees who are members of the Claimant.

The Claimant's Case

3. By an amended Memorandum of Claim filed in court on 27th July 2017, the Claimant states that it has recruited employees of the Respondent as its members and that there is no rival union claiming representation of the Respondent's employees.
4. The Claimant further states that it forwarded check off forms to the Respondent on 23rd November 2016 for purposes of effecting monthly deduction of trade union dues in accordance with Sections 48 and 50 of the Labour Relations Act.
5. The Claimant avers that the Respondent has declined to effect deduction of union dues and is instead discriminating against, intimidating and threatening the unionised employees contrary to Section 5 of the Labour Relations Act.
6. The Claimant adds that the Respondent is in the process of forcing its employees to revoke their union membership thus denying the employees their constitutional right and freedom to union membership.

7. The Claimant's prayers are as follows:

- a) An order directing the Respondent to effect monthly deduction of trade union dues effective November 2016 in accordance with the check off forms submitted by the Claimant;
- b) That the Respondent's employees be protected from unfair termination on account of unionisation.

The Respondents' Case

8. In their Response dated 17th July 2017, the Respondents state that the Claimant Union is unknown to the Respondents and that the Union does not have any members under the Respondents' employment. The Respondents therefore maintain that the Claimant lacks *locus standi* to institute this claim.
9. The Respondents add that the Claimant has never had any engagement with them and that the Claimant does not represent any of the Respondents' employees.
10. The Respondents aver that they are an equal opportunity employer, employing over 600 Kenyans who all have the liberty to choose and

join any union of their own choice. The Respondents further aver that none of their employees is a member of the Claimant Union.

11. The Respondents deny receiving any signed check off forms from the Claimant. The Respondents therefore state that they have no mandate to deduct any portion of the salaries of their employees.

12. The Respondents go on to state that following deliberate and consistent harassment of some of their employees by the Claimant, the said employees through letter dated 5th December 2016 addressed to the Claimant Union and copied to the Labour Office notified the Respondents that they were not members of the Union and that the Respondents should not deduct their salaries for remittance to the Claimant.

13. The Respondents add that they do not have either a Recognition Agreement or a Collective Bargaining Agreement with the Claimant and the Claimant remains a stranger to the Respondents. The Respondents point out that the Claimant has never attempted to make contact with them.

14. The Respondents take the view that the Claimant's claim is ill conceived and an attempt by the Claimant to harass the Respondents.

Findings and Determination

15. The Claimant's complaint is that the Respondents have failed to deduct and remit union dues on account of their employees who are members of the Claimant Union.

16. In its final submissions filed in court on 27th January 2020, the Claimant asserts that because the Respondents failed to deduct the union dues from as far back as November 2016, then the Respondents themselves ought to pay the union dues in arrears to the tune of Kshs. 2,188,800. The Claimant relies on Section 19(6) of the Employment to make this claim.

17. The Respondents have taken the position that the Claimant Union does not have the *locus standi* to bring this claim because first, there is neither a Recognition Agreement nor a Collective Bargaining Agreement between the parties and second, the Claimant does not have members within the Respondents' establishment.

18. Regarding the first issue, the Court of Appeal in its decision in *Modern Soap Factory v Kenya Shoe and Leather Workers Union (Civil Appeal No 37 of 2019)* affirmed that the right to union representation is distinct from the right to collective bargaining, which is based on recognition of a trade union. It follows therefore that an employer cannot refuse to deduct union dues just because the union has no Recognition Agreement with the employer.

19. This case therefore turns on the question whether the Claimant has members within the Respondents' establishment. If the answer to that question is in the affirmative, then the Respondents would, under Section 48 of the Labour Relations Act be obligated to deduct and remit union dues.

20. To support its case, the Claimant filed check off forms dating as far back as November 2016. Union membership is by nature a fluid moving target. This is because employees will move out of an establishment either through normal exit or natural attrition.

21. With this in mind, the Claimant ought to have presented current check off forms to show the present union membership status within the Respondents' establishment. There is no way the Court can determine the issue of union membership in the year 2020 using data obtained in 2016.

22. The Court therefore finds and holds that the Claimant has failed to prove its claim which is consequently dismissed.

23. Each party will bear their own costs.

24. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and

affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this judgment has been delivered during the court recess.

LINNET NDOLO JUDGE

Appearance:

Mr. Ndege (union representative) for the Claimant

No appearance for the Respondents