



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 890 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th May, 2020)

BANKING INSURANCE

& FINANCE UNION (KENYA).....CLAIMANT

VERSUS

SMEP MICROFINANCE BANK LIMITED.....RESPONDENT

RULING

1. Pending before me for determination is the Notice of Motion Application dated 31st December, 2019. The same is brought under Certificate of Urgency under Articles 36(1) and 41 (2) (c) of the Constitution of Kenya, Section 10 of the Judicature Act, Rule 3 (1) and (2) of the High Court (Practice and Procedure Rules), Section 12 of the Employment and Labour Relations Court Act, Sections 4 and 5 and Sections 54 (1) and (7) of the Labour Relations Act seeking Orders that:-

1. This matter be certified urgent and its service in the first instance be dispensed with. (Spent).

2. Leave of the Court is granted that the Application proceed for hearing during Court vacation.

3. There be an Order restraining and/or prohibiting the Respondent by its directors, managers and agents 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.

4. There be an Order directing the Respondent to immediately or within 7 days of an Order herein to deduct and remit union dues from One Hundred and Twenty Two (122) employees, who are members of the Applicant union to its registered and gazetted account stated in the check off forms.

5. There be an Order directing the Respondent to enter into a Recognition Agreement with the Applicant union within 30 days of an Order herein.

6. There be an Order directing the Respondent forthwith to pay the Claimant union from its kitty all accrued monies due and owing to the Claimant union for the One Hundred and Twenty Two (122) members as from 19th October, 2019.

7. Costs of this Application be in the cause.

2. The Application which is premised on the grounds that:-

i. The Constitution decrees that all employees have a right to join a trade union of their choice.

ii. Section 48 (3) of the Labour Relations Act provides that an employer shall commence deducting trade union dues from the employees' wages within 30 days of the trade union serving check off forms signed by the employees in respect of whom the employer is required to make reductions.

iii. Despite this legal obligation, the Respondent has refused and/or omitted to deduct union dues from the salaries of One Hundred and Twenty Two (122) employees who have signed up membership with the Claimant union.

iv. Section 54 of the Labour Relations Act provides that a trade union should be recognized by an employer if it has recruited a

simple majority of all the unionisable employees of the employer.

v. Despite the Claimant/Applicant union satisfying this legal requirement the Respondent has refused and/or omitted to enter into a recognition agreement with it.

vi. These actions of the Respondent augur badly for sound labour relations and amount to a violation of its employees' and the applicant union's constitutional rights.

vii. The Respondent needs to be urgently and forcefully put into compliance with its legal obligations through an Order of this Honourable Court.

viii. We thus pray that this Application be allowed.

3. The Application further supported by the Affidavit of **ISAIAH KUBAI**, the General Secretary of the Claimant Union sworn on 31st December, 2019, in which he reiterates the averments made in the Notice of Motion Application.

4. In response to the Application the Respondent filed a Replying Affidavit deponed by **ROSE CHEPKEMOI BII**, the Head of Human Resource and Administration, in which she avers that out of the Respondent's 170 unionisable employees, the Claimant union has a total of 78 members and therefore fails to meet the simple majority of the unionisable employees to be recognized by the Respondent for purposes of Collective Bargaining.

5. The Respondent further averred that the Claimant Union is therefore not entitled to the reliefs sought in the instant Application and urged this Honourable Court to dismiss the Application with costs to the Respondent.

6. Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

7. The Claimant union submitted that it has managed to recruit a simple majority of the Respondent's members of unionisable staff and that it duly notified the Respondent of this position. It is further submitted that as at 13th November, 2019 it had recruited a total of 159 members which was a simple majority. It further submitted that it is entitled to a recognition agreement. For emphasis the Claimant cited the case of **KUCFAW Vs ELDOMATT Supermarket Limited (2014) Eklr.**

8. The Claimant further submitted that it was later agreed between the parties to exclude 38 employees from the union membership who the Respondent maintained were in management despite the Respondent not providing their letters of appointment as proof of their positions. It further contended that as at the time of filing the instant Application, the Claimant union was not aware of any resignations by its members contrary to the provisions of Section 48 (8) of the Labour Relations Act and as such, resignation is invalid. To fortify this argument the Claimant cited the case of **Kenya Plantation and Agricultural Workers Union Vs Expressions Flora Limited (2013) eKLR** where the Court found that there were no valid resignations, as the purported resignation letters were not served upon the Claimant union.

9. The Claimant further submitted that the resignations from its membership appear to have been motivated by a letter from the Respondent's HR seeking confirmation for the deductions from their monthly salaries.

10. The Claimant further submitted that the said communication from the Respondent's Human Resource was not proper as this action only served to intimidate the employees who were union members. To buttress this argument the Claimant cited and relied on the case of **Kenya Plantation and Agricultural Workers Union Vs Expressions Flora Limited (supra).**

11. The Claimant further submitted that at the time of filing this suit and the instant Notice of Motion Application it had not received any termination or resignation letters from the alleged 12 members of the Respondent who are alleged to have exited employment and that the resignation letters annexed to the Respondent's replying affidavit have no consequence as the letters have been filed after contention was raised in its Memorandum of Claim dated and filed on 31st December, 2019.

12. The Claimant further submitted that failure by the Respondent to deduct and remit union dues from all unionisable employees in the Claimant's membership is tantamount to interfering with the rights of its employees to join and participate in activities of a trade union of their choice. For emphasis, the Claimant cited and relied on the case of **Kudheiha Workers Union Vs Aga Khan University Hospital (2015) eKLR** where the Court held that failure by the Respondent to deduct and remit union dues of employees who joined the union infringed on their rights under Article 41 of the Constitution of Kenya, 2010.

13. The Claimant further submitted that having recruited a total of 122 of the unionisable members of the Respondent had attained an approximate of 69.7% of the total unionisable employees therefore meeting the threshold for recognition as provided under Section 54 of the Labour Relations Act.

14. In conclusion the Claimant maintained that it is entitled to the reliefs sought in the instant Application and therefore urged this Honourable Court to allow the same as prayed.

15. There were no submissions on record filed on behalf of the Respondent herein.

16. I have examined the averments and submissions filed herein. The main contention by the Applicant is that the Respondents have failed

to deduct and remit union dues and also failed to recognize them as a Union.

17. In their response, the Respondents aver that the Claimants have not recruited simple majority to warrant recognition. That does not however explain why they have not remitted dues for the members who have freely joined the Union.

18. In the circumstances, I order that the Respondents do henceforth deduct and remit union dues for members who have freely joined the Union pending the hearing and determination of this Claim.

19. Issue of recognition to be determined in the Main Claim. Costs in the cause.

Dated and delivered in Chambers via zoom this 28th day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kilonzo for Respondent – Present

Judy Kubai for Claimant – Present