



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 19 OF 2020

**KENYA LONG DISTANCE TRUCK DRIVERS AND ALLIED
WORKERS UNIONCLAIMANT**

V

MASTERS FABRICATORS LIMITED.....RESPONDENT

RULING

1. The Kenya Long Distance Truck Drivers & Allied Workers Union (the Union) instituted these proceedings against Master Fabricators Ltd (Respondent) on 16 January 2020 and it stated the Issues in Dispute as

- i. Failure/refusal to deduct union dues and remitting the same to the Claimant as from December 2019.
- ii. Unfair, unreasonable, unlawful and unconstitutionality denying and/or failing to engage in finalising the negotiations towards recording a collective bargaining agreement for the years 2019 to 2021.
- iii. Breach of the Claimant Union's members constitutional right to association, fair labour practices and consequentially to collective bargain.

2. Filed together with the *Memorandum of Claim* was a motion under a certificate of urgency seeking orders

1. ... (Overtaken by events).
2. ... (Overtaken by events).
3. ... (Overtaken by events).
4. ... (Overtaken by events).

5. **THAT** the Honourable Court be pleased to issue in the alternative, an order compelling the Respondent to remit union dues from its own funds to the Claimant's account an equivalent sum of Kshs 40,597.00 as at November 2019 pending the hearing and determination of this application and the main suit.

6. **THAT** the Respondent be ordered by this Honourable Court to comply with the mandatory provisions of sections 48 and 50 of the Labour Relations Act, 2007 Laws of Kenya by way of deducting union dues and remitting the same to the Claimant.

7. ... (Overtaken by events).

8. ... (Overtaken by events).

9. **THAT** this Honourable Court be pleased to grant such other or further orders as it may deem fit to grant.

10. **THAT** costs of this application and suit be met by the Respondent.

3. When the application was placed before the Duty Court, it directed it be served for *inter-partes* hearing on 30 January 2020.
4. However, the Respondent filed a *Preliminary Point of Law* on 28 January 2020 contending that the Cause and application violated the provisions of section 54(2) & (8) of the Labour Relations Act.
5. When the application came up for *inter partes* hearing on 30 January 2020, the Respondent sought an adjournment and leave to file a replying affidavit and the Court directed it to file/serve a replying affidavit before 7 February 2020. The hearing was rescheduled to 25 February 2020. The Union was also granted leave to file a further affidavit.
6. The Union filed the further affidavit sworn by its General Secretary on 1 February 2020 while the Respondent filed its replying affidavit sworn by its Human Resources Manager on 7 February 2020.
7. The Court took arguments on 25 February 2020.
8. The parties raised several issues which included lack of a recognition agreement.

Preliminary objection and Recognition Agreement

9. Section 54(2) of the Labour Relations Act provides for the threshold a union should meet to be granted recognition by an employer or group of employers while section 54(8) of the Act requires the Court to consider the sector an employer operates in while adjudicating over a recognition dispute.
10. In the view of the Court, it would be premature to consider at this interlocutory stage whether the Union has met the statutory threshold to be granted recognition as such an exercise involves production and testing of evidence.
11. Without determining the recognition agreement dispute at this stage, the Court notes that there is material on record to suggest that a Conciliator appointed by the Minister for Labour had on 24 December 2008 directed the Respondent to grant the Union recognition as it had recruited over 90% of the unionisable workforce.

Deduction of Union dues/subscriptions

12. Sections 48 and 50 of the Labour Relations Act provides for deduction of union subscriptions.
13. The statutory test under the section is that a Union ought to apply to the Cabinet Secretary responsible for Labour to issue an order to an employer of more than 5 employees to deduct from the wages of the employees' members of a union, subscriptions and pay the same into a designated bank account of the trade union.
14. In the present case, the Union had negotiated and entered into several collective agreements with *Nairobi Bus and Coach Body Builders Group of the Federation of Kenya Employers* for the years 2009/2011; 2011/2013 and 2013/2015.
15. The Copies of these agreements filed in Court do not show whether the Respondent was a member of *Nairobi Bus and Coach Body Builders Group of the Federation of Kenya Employers* during the currency of these agreements.
16. However, on or around 6 December 2017 the Union signed a collective agreement with the *Nairobi Bus and Coach Body Builders Group of the Federation of Kenya Employers* which expressly listed the Respondent as one of the members of the Group. The collective agreement was to last for 2 years (up to 2019).
17. It appears that the Respondent deducted and remitted union dues to the Union on the strength of the collective agreement (no recognition agreement was produced despite being referred to).
18. Upon the lapse of the collective agreement, the Union and the *Nairobi Bus and Coach Body Builders Group of the Federation of Kenya Employers* commenced negotiations for a collective agreement for 2019/2021.
19. After several meetings, no agreement was reached and on 5 December 2019, the Union issued a strike notice to the Respondent as the Union alleged foul play on its part.
20. In a response dated 9 December 2019, the Respondent denied stalling the negotiations and requested the Union to forward to it copies of recognition agreement between them and/or between the Union and the *Nairobi Bus and Coach Body Builders Group of the Federation of Kenya Employers*.
21. The Respondent also requested the Union to follow the right procedures before calling for a strike.
22. On 10 December 2019, the Chief Industrial Relations Officer responded to the Union's strike notice and noted that it had not formally reported a trade dispute as required by section 62 of the Labour Relations Act. The Chief Industrial Relations Officer asked the Union to suspend the strike.
23. On 24 December 2019, the Respondent wrote to the Union to notify it that since there was no recognition agreement between them, all

previous engagements were illegal and unprocedural.

24. This letter by the Respondent must have alarmed the Union, for the previous engagements included deduction of union dues which it risked losing. This prompted the Union to move to Court.

25. In declining to deduct and remit union subscriptions or engage further with the Union, the Respondent contended that a recognition agreement was a condition precedent.

26. In the view of the Court, such an argument is legally misplaced. The primary focus of a *recognition agreement* is to enable a union and an employer to recognise each other with a view to engage in negotiations governing the terms and conditions of employment.

27. What the Court is concerned with in the instant application is whether the Union fulfilled the requirements of section 48 of the Labour Relations Act.

28. The Union filed in Court copies of Form S (generally called check-off forms) and which were addressed to the Respondent setting out the particulars of employees who had joined the Union. In the copies, the Union also made reference to an order by the Cabinet Secretary issued on 1 October 2007.

29. The Form S also drew the attention of the Respondent to a designated bank account.

30. In consideration of the fulfilment by the Union of the conditions set out in section 48 of the Labour Relations that there is a Ministerial order, particulars of employees signifying membership of the Union, a designated bank account and that the Respondent has previously been deducting and remitting union dues to the Union, the Court is satisfied that the Union has demonstrated a *prima facie case* for an order directing the Respondent to continue deducting and remitting union subscriptions from its employees who have joined the Union.

31. It is of some significance to the Court at this stage that the Respondent had previously been deducting and remitting to the Union the regular subscriptions until the lapse of the collective agreement in 2019.

32. In any case, pursuant to section 19 of the Employment Act, 2007, an employee is free to dispose of his/her wages in any way the employee deems fit and by signing Form S, an employee is exercising the right of association and choice.

Conclusion and Orders

33. From the foregoing, the Court orders

i. The Respondent to comply with the mandatory provisions of sections 48 and 50 of the Labour Relations Act effective May 2020 in respect of the employees in its payroll who have signed the Form S.

ii. In default, the Respondent will pay from its own funds' such deductions not made and remitted backdated to November 2019.

34. Considering the previous, on-going and anticipated social partnership between the parties, costs in the Cause.

Dated, signed and delivered through video/email in Nairobi on this 8th day of May 2020.

Radido Stephen

Judge

Appearances

For Union Mr. Onyony instructed by Onyony & Co. Advocates

For Respondent Mr. Wati instructed by D.B. Wati & Co. Advocates

Court Assistant Judy Maina