



**REPUBLIC OF KENYA**

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

**CAUSE 644 OF 2019**

(Before Hon. Lady Justice Hellen S. Wasilwa on 23<sup>rd</sup> June, 2020)

**KENYA ENGINEERING WORKERS UNION.....CLAIMANT**

**VERSUS**

**M/S AUTO INDUSTRIES LIMITED.....1<sup>ST</sup> RESPONDENT**

**M/S CAREER DIRECTIONS LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this Court is the Claimant's application dated 1/10/2019 and the Respondent's Grounds of Opposition dated 28/10/2019.

**The Application**

2. The Claimant seeks interim orders against the Respondents to deduct and remit union dues as well as restrain them from victimizing their members for being affiliated to them by way of termination, dismissal, redundancy, variation of contracts or unfair outsourcing, pending the hearing and determination of this suit. They also seek any other order that this Court may deem fit to grant and that the costs of the Application be provided for.

3. The Application is based on the grounds set out therein and the supporting affidavit of Wycliffe A. Nyamwata. The Claimant avers that the Respondents have failed to deduct and remit union dues despite the Claimant recruiting and forwarding duly signed check-off forms of 65 of their employees.

4. It is averred that, instead, the Respondents have resorted to victimizing the Claimant's members by varying the contract with terms that are inconsistent with the provisions of the law and locked out those who questioned the variations, without proper reasons.

5. The Claimant avers that there is a pending trade dispute before the labour ministry of the Respondents refusal to sign a recognition agreement. Finally, the Claimant urges that failure to grant the orders sought will cause its members to suffer irreparable damages.

6. In the Replying Affidavit of Charles Wainaina sworn on the 1<sup>st</sup> Respondent's behalf, the Affiant admits that the 1<sup>st</sup> Respondent outsourced the 2<sup>nd</sup> Respondent's services but contends that the outsourcing was limited to providing personnel in the factory, assembly point and warehouse.

7. The 2<sup>nd</sup> Respondent was also required to provide human resource functions, recruitment services, payroll management and administration services, onward remittance of statutory payments, management of work-related injuries amongst others.

8. The Affiant contends that the Respondents are two different companies who have separate control and management processes to handle all the matters pertaining to their employees. They also have separate systems for payroll management, employee payment and remittance of statutory deductions.

9. It is the Affiant's averment that the consolidated payments made for the outsourced services rendered do not include labour union remittances or any other statutory deductions save for tax deductions.

10. Further, that the employees the Claimant seeks to represent are the 2<sup>nd</sup> Respondent's hence there is no employment relationship between those employees and the 1<sup>st</sup> Respondent. The Affiant contends that the Claimant is guilty of failing to disclose to this court that the employees it seeks to represent report to the 2<sup>nd</sup> Respondent's supervisors only.

11. It is contended that the Claimant has not recruited and if it has, has not attained a simple majority required for a union to be recognized for CBA negotiations. In the absence of a recognition then there cannot be a CBA. It is averred that the 1<sup>st</sup> Respondent was not included in any correspondences between the Claimant and the 2<sup>nd</sup> Respondent.

12. It is the Affiant's position that the 1<sup>st</sup> Respondent does not have the authority to deduct and remit trade union dues to the Claimant as it only makes consolidated payments to the 2<sup>nd</sup> Respondent for services rendered. Further, that the 1<sup>st</sup> Respondent is not aware of the 2<sup>nd</sup> Respondent's disciplinary actions or is it involved in the same. As such, it has not breached any contractual or statutory rights hence wrongfully joined to this suit and ought to be struck out.

13. It is his position that the Claimant has not established a *prima facie* case with a probability of success to warrant granting of the orders sought at an interlocutory stage. Further, that no special circumstances exist to warrant the issuance of temporary injunctive orders.

14. Lastly, the Affiant avers that the orders sought are untenable as against the 1<sup>st</sup> Respondent hence the application is unmeritorious and an abuse of the court process.

15. In the Replying Affidavit of Rodgers Wafula sworn on the 2<sup>nd</sup> Respondent's behalf, it is averred that the Claimant's application fails to disclose any instance of the alleged breaches. He denies introducing any new contracts or any instances of victimization of the Claimant's members by the 2<sup>nd</sup> Respondent.

16. It is his contention that the Claimant has failed to meet the threshold set in Section 54 (1) of the Labour Relations Act as it has only recruited 65 of the 2<sup>nd</sup> Respondent's employees yet they have 354 employees. The Affiant support the 1<sup>st</sup> Respondent's Preliminary Objection on the ground that the Claimant's members are its employees hence no orders under Section 48 of the Labour Relations Act can issue against the 1<sup>st</sup> Respondent.

### **The Preliminary Objection**

17. The 1<sup>st</sup> Respondent's Preliminary Objection is based on the ground that they were unaware that the Claimant had recruited members from their employees, and if so, the Claimant had not attained a simple majority to qualify for recognition. Consequently, the two parties were strangers there being no CBA to govern their relationship.

18. The Preliminary Objection is also based on the ground that the Claimant has not disclosed any cause of action against the 1<sup>st</sup> Respondent hence the claim should be dismissed with costs.

19. The Claimant filed a reply to the PO contending that it lacked merit. It was their position that the purpose of a recognition under Section 54 of the Labour Relations Act was to pave way for collective bargaining, which is only possible after a recognition agreement has been signed. It is their further position that the 1<sup>st</sup> Respondent should be a party to this suit so as to assist this Court to make a proper, informed and just decision.

20. The application as well as the Preliminary Objection were disposed of by way of written submissions and the parties filed their respective submissions.

### **The Claimant's Submissions**

21. The Claimant submits that from the averments made by Respondents, the 2<sup>nd</sup> Respondent is its members' primary employer while the 1<sup>st</sup> Respondent is their secondary employer.

22. The Claimant further submits that the orders sought can be enforced against the Respondents as any negotiations will be based on the outsourcing agreement. As regards victimization, the Claimant avers that the 2<sup>nd</sup> Respondent can also occasion the same if it fails to renew the outsourcing contract which will result in the termination of its members employment.

23. It is the Claimant's position that there is no connection between Section 48 and 54 of the Labour Relations Act hence there is no requirement for the existence of a CBA for there to be deduction and remittance of union dues.

24. The Claimant submits that the 1<sup>st</sup> Respondent's Preliminary Objection is unmeritorious as the outsourcing contract has a deduction clause while the payment made comes from the 1<sup>st</sup> Respondent's funds.

### **The 1<sup>st</sup> Respondent's Submissions**

25. The 1<sup>st</sup> Respondent submits the Claimant's members are the 2<sup>nd</sup> Respondent's employees seconded to the 1<sup>st</sup> Respondent under an outsourcing contract a fact which has nor been disputed. The 1<sup>st</sup> Respondent contends that the employees were subject to the 2<sup>nd</sup> Respondent's control and management processes.

26. As such, there was no employer-employee relationship between the 1<sup>st</sup> Respondent and the Claimant's members and relies on the case of **Abysinia Iron & Steel Limited vs. Kenya Engineering Workers Union [2016] eKLR** where the Court held that it was the outsourcing company that was under the obligation to recognize the union and not the company that outsourced the services.

27. The 1<sup>st</sup> Respondent submits the Claimant has not adduced evidence to prove that they have recruited the 1<sup>st</sup> Respondent's employees hence the two parties cannot enter into a recognition agreement neither could the 1<sup>st</sup> Respondent deduct and remit trade union dues to the Claimant.

28. It is their position that the deduction and remittance of trade union dues was the 2<sup>nd</sup> Respondent's obligation hence they have been improperly joined to this suit. They urge this Court to dismiss the suit against it as their Preliminary Objection has met the threshold set in the case of **Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited [1969] EA 696.**

### **The 2<sup>nd</sup> Respondent's Submissions**

29. The 2<sup>nd</sup> Respondent submits that they were the employers of the Claimant's members and not the 1<sup>st</sup> Respondent hence not a proper party to these proceedings. It is their position that outsourcing is an accepted business strategy as was held in the case of **Kenya Airways Limited vs. Aviation & Allied Workers Union & Others.**

30. It is the 2<sup>nd</sup> Respondent's submissions that they never received an order from the minister as anticipated in Section 48 (2) neither as it been issued with the notice required in subsection (3) of the Labour Relations Act. As such, the suit herein is premature as the Claimant failed to follow the process as set out in law.

31. The 2<sup>nd</sup> Respondent submits that the Claimant has only recruited 65 of its 354 employees hence has not attained a simple majority necessary for a union to be recognized by an employer.

32. I have examined all the averments of both Parties herein.

33. The 2<sup>nd</sup> Respondent have admitted that they are the employees and the outsourced staff who are said to be members of the Claimant union. That being the position, the Claimant/Applicant are duty bound to show that they submitted check off forms to the 2<sup>nd</sup> Respondent and which the 2<sup>nd</sup> Respondent failed to honour.

34. The check off forms exhibited in Court are actually directed to both the Managing Director Career Directions Limited and the Managing Director of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent having agreed that they are the employers of the staff in question, union dues deductions must be deducted and remitted and this is not contingent upon recognition.

35. In the circumstances, I direct that the 2<sup>nd</sup> Respondent commences forthwith to deduct and remit union dues as per the check off forms submitted.

36. As to recognition, this is a matter for the main claim after Court establishes the presence of majority membership.

37. I will therefore direct that the Parties proceed and either negotiate on this issue of recognition or proceed to set down the main claim for hearing.

38. Costs in the cause.

Dated and delivered in Chambers via zoom this **23<sup>rd</sup> day of June, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for parties