



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 832 OF 2019

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

v

KITENGELA MEDICAL SERVICES.....RESPONDENT

RULING

1. The Kenya National Union of Nurses (the Union) moved the Court under a certificate of urgency on 13 December 2019 seeking orders
 1.
 2. **THAT** pending the hearing and determination of this application and the main suit this Honourable Court be pleased to issue an interim order directing the Respondent to immediately effect the deductions and remittance of union dues as per the check-off list of 5th November 2019 (SN 5780,5781,5783 & 5784) bearing 24 names and 21st November 2019 (SN 5782 & 5790) bearing 6 names making a total of thirty (30) members already served on them and others to be served in future and to continue in remittance as per the Legal Notice No. 160 of 2018.
 3. **THAT** pending the hearing and determination of this application and the main suit, this Honourable Court be pleased to issue an order directing the Cabinet Secretary in the Ministry of Labour and Social Protection to immediately appoint a Conciliator for purposes of an alternative dispute resolution as envisaged under Article 159(2)(c) of the Constitution of Kenya, 2010.
 4. **THAT** pending the hearing and determination of this application and the main suit this Honourable Court be pleased to issue an interim order directing the Respondent to immediately pay forty-five thousand shillings (Kshs 45,000) being the salary of the month of November 2019 owed to Walter Awino.
 5. **THAT** pending the hearing and determination of the main suit this Honourable Court be pleased to issue an interim order directing the Respondent either by themselves, their agents, assigns, servants and or representatives or any other person claiming through them or otherwise to immediately desist from any act and form of intimidation and harassment including forcing members of the applicant to withdraw from the Union.
 6. **THAT** upon hearing of this application this Honourable Court be pleased to issue an order directing the Respondent to immediately pay the Claimant/Applicant all the *undeducted* and unremitted accrued union dues from November 2019 from their own kitty.
 7. **THAT** upon hearing of this application this Honourable Court be pleased to issue an order directing the Respondent to immediately reinstate Walter Awino – employment No. 44, Mary Njeri – employment No. 194 and Palecia Awino Opiiti – employment No. 396 without loss of benefits and seniority.
 8. **THAT** upon hearing of this application this Honourable Court be pleased to issue an order directing the Respondent to immediately enter a recognition agreement with the Claimant/Applicant Union in favour of its members within 7 days from the date of granting orders hereof.
 9. **THAT** upon hearing of this application this Honourable Court be pleased to issue an order directing the Respondent to commence CBA negotiations with the Claimant/Applicant union within 30 days from the date of signing the recognition agreement.
 10. **THAT** the cost of this application and suit be paid by the Respondent.
 11. ...

2. The Duty Court certified the application urgent and at the same time directed the parties to attempt an out of court settlement pending *inter partes* hearing.
3. The negotiations did not bear any fruit and on 24 February 2020, the Respondent was directed to file and serve its response to the application within 7 days. A replying affidavit was thus filed on 4 March 2020.
4. When the application was placed before this Court on 5 May 2020, the Union sought for leave to file a further affidavit and pursuant to leave, the Union filed a further affidavit on 14 May 2020.
5. On 15 May 2020, the Respondent proposed that the application be determined based on the record and submissions. The Union indicated it would rely on the application and affidavits already on record.
6. The Court directed the Respondent to file and serve its submissions on or before 29 May 2020 ahead of the Ruling today (the submissions reached the Court on 16 June 2020).
7. The Court has considered the application, the grounds in support thereof, the affidavits, the submissions and isolated the Issues arising as examined hereunder.

Dismissals

8. The Respondent dismissed some three named employees on account of gross misconduct and unsatisfactory performance.
9. Whether the dismissals were based on the 3 named employees joining the Union, in the view of this Court, separate legal proceedings should be instituted as the law on unfair termination is anchored on the Employment Act, 2007.
10. The gravamen of the Union's case in the case at hand revolves around the rights of the Union *qua* union to organise, and the right of employees to association and to join and participate in the activities of a Union.
11. It is probable though that the Respondent has been exerting undue pressure on employees who had joined the Union.
12. In the circumstances, the Court declines to issue an order reinstating the named persons into employment at this interlocutory stage but will issue an order to protect the employees who have joined the Union from undue intimidation.

Recognition agreement

13. Section 74 of the Labour Relations Act envisages that a dispute relating to the recognition of a trade union may be referred to Court under a certificate of urgency.
14. However, the spirit and text of the legal framework governing industrial relations recognise the vital role of alternative dispute resolution (conciliation), in good faith.
15. The Union did not demonstrate that it had attempted and/or exhausted those mechanisms which have been given statutory underpinning in Part VIII of the Labour Relations Act.
16. Apart from alternative dispute resolution, a Court would need to hear evidence as to whether a Union has satisfied the statutory threshold for recognition and therefore it would be legally imprudent to grant an order for recognition through an interlocutory application as is sought herein.
17. The Court consequently directs the Union to pursue the recognition dispute in compliance with the requirements of Part VIII of the Labour Relations Act, by initially reporting a trade dispute to the Cabinet Secretary, Ministry of Labour.

Union dues

18. Sections 48 and 50 of the Labour Relations Act provides for deduction of union subscriptions/dues.
19. The statutory test under the section includes that a Union should demonstrate that it applied 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 who have joined a union subscription(s), and pay the same into a designated bank account of the trade union.
20. 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.
21. In the copies, the Union also made reference to Legal Notice No. 160 of 13 June 2018 made by the Cabinet Secretary for Labour and Social Protection.
22. The Form S also drew the attention of the Respondent to a designated bank account.

23. 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 and a designated bank account, the Court is satisfied that the Union has demonstrated a *prima facie case* for an order directing the Respondent to commence deducting and remitting union subscriptions from its employees who have joined the Union.

24. 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, the employees were exercising the right of association and choice.

Conclusion and Orders

25. From the foregoing, the Court will only allow the motion in the following terms

(a) **THAT** pending the hearing and determination of the main suit, this Honourable Court hereby issues an interim order directing the Respondent to with effect from 1 July 2020 commence deductions and remittance of union dues as per the check-off list of 5th November 2019 (SN 5780,5781,5783 & 5784) bearing 24 names and 21st November 2019 (SN 5782 & 5790) bearing 6 names making a total of thirty (30) members already served on them and others to be served in future and to continue in remittance as per the Legal Notice No. 160 of 2018.

(b) In default of compliance with (a) above, the Respondent to pay from its own funds the union dues payable to the Union by employees who have joined it.

(c) **THAT** pending the hearing and determination of the main suit, this Honourable Court issues an interim order directing the Respondent either by themselves, their agents, assigns, servants and or representatives or any other person claiming through them or otherwise to immediately desist from any act and form of intimidation and harassment including forcing members of the applicant to withdraw from the Union.

26. Considering the anticipated social partnership between the parties, the Court orders that costs abide the determination of the main Cause.

Delivered through Microsoft teams/email, dated and signed in Nairobi on this 19th day of June 2020.

Radido Stephen

Judge

Appearances

For Union Mr. Odongo, Industrial Relations Officer

For Respondent Mr. Balala instructed by Ndegwa, Balala & Partners, Advocates

Court Assistant Judy Maina