



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 785 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2020)

KENYA ENGINEERING WORKERS UNION.....CLAIMANT/APPLICANT

VERSUS

M/S PROTO ENERGY LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant, Kenya Engineering Workers Union filed a Notice of Motion application dated 8th June 2020 seeking to be heard for orders that:-

1. Spent.

2. Interim order be issued against the Respondent to fully comply with Section 48 of the Labour Relations Act, 2007 by way of remittance of already deducted union dues since the month of March, 2020 amounting to about Kshs. 1,350,000/= with interest at the Court's rate to the Claimant with immediate effect and continue with compliance till the hearing and determination of this suit.

3. The Honourable Court deem fit to issue interim Orders against the Respondent from victimizing the Applicant members on ground of Trade Union activities/affiliation and or on the basis of this suit by way of termination, redundancy, dismissal, and or change of current contracts pending the hearing and determination of this suit.

4. The Honourable Court deem fit to grant interim orders against the Respondent for already unprocedural, unfair and unlawfully Applicant members whose contracts have been prematurely terminated be reinstated back to their duties without loss of any benefit or paid the period of their remaining full contracts.

5. The Respondent be ordered to pay the fine as stipulated at section 82 (2) of the Labour Relations Act, 2007.

6. For the purpose of Justice the parties be allowed to proceed by way of written submission on the main suit.

7. Any other Order the Honourable Court deem fit to grant.

8. The cost of this application be met by the Respondents herein.

2. The Application is premised on the reasons that:-

a) The same is provided for under Section 74(a) of the Labour Relations Act, 2007.

b) The Respondent is in breach of the mandatory provision of the Law i.e. Section 48 of the Labour Relations Act, 2007.

c) In the month of March 2020, the Respondent started partially to comply with section 48 of the Labour Relations Act, 2007 by deducting union dues from the duly recruited 457 members of the Claimant/Applicant union but kept the same to herself with no remittance as required by the law.

d) The Respondent in the month of January, 2020 did extend the contracts of the Claimant members for one (1) year but on 25th February, 2020 the same was unprocedurally, unlawful and unfairly terminated.

e) The Claimant has written to the Respondent over the unfolding events of unprocedurally, unlawfully, and unfairly holding the already deducted union dues from her members and termination of her members with no response to date.

f) After the allegation in the Respondent replying affidavit to the claim and Memorandum of response the Claimant went ahead and recruited more members to a current number of 457 which is over and above 51% simple majority which the Respondent is currently trying to reduce to less than the required number by way of termination.

g) The actions of the Respondent herein are in violation of Article 36, 41 and 47 of the Constitution on freedom of association, fair labour practices and fair administrative action.

h) If orders sought are not granted, the Claimant/Applicant and her members stand to lose irreparable damages.

3. The Claimant/Applicant also filed a Supporting Affidavit sworn on 8th June 2020 by its General Secretary Wiccliffe Nyamwata who avers that the Respondent has terminated the Shop level representatives and threatened them at their residential places, which has forced some to start withdrawing their members. He annexes samples of the Claimant/Applicant's members' payslips, contracts, termination letters and withdrawal letters in support of their case.

4. The Respondent, M/s Proto Energy Limited filed its Grounds of Opposition dated 6th July 2020 opposing the Application herein on the grounds that the Application is res judicata as the issues raised are already subject of the Notice of Motion Application dated 21/11/2019 pending Ruling before this Court. It prays that the application being an abuse of the court process should thus not be entertained and should be dismissed with costs to the Respondent.

5. The Respondent also filed a Replying Affidavit and Supplementary Affidavit both dated 6th July 2020 and sworn respectively by its Senior Human Resource Officer, Abednego Muema and its Head of Security, Retired Major Samuel Leparakuo Ole Tolu.

6. Mr. Abednego Muema avers that the Respondent has a current workforce of 773 unionisable employees out of which 325 are union members. That the union has therefore only managed to recruit 42% of their unionisable workforce which falls below the threshold of 50% +1 and that the said number has since reduced owing to withdrawal from the union by some staff. That cognizant of the freedom of association and obligations arising therefrom, they have nevertheless diligently deducted and remitted the member employees' union dues beginning March 2020. He contends that the sample payslips produced by the Claimant appear to be forgeries and that they urge this Court to expunge the same and further penalize the Claimants for perjury. He annexes a sample payslip of their employees marked **AM2** for references purposes.

7. Mr. Muema further avers that the termination of 3 employees referred to by the union was necessitated by ongoing restructuring of the Respondent's operations and that any alleged unlawful and unfair termination of the 3 is open for litigation before court. He contends that all terminations undertaken by the Respondent for both unionisable and non-unionisable employees have been effected legally and procedurally. In annexure marked **AM**, he has attached 34 letters of withdrawal from the union by some of their employees who were union members and avers that it affects the dues remitted to the union from month to month. He further prays that since the Claimant/Applicant has failed to set out a prima facie case warranting grant of the orders sought, the instant application be dismissed with costs to the Respondent.

8. Retired Major Samuel Leparakuo Ole Tolu denies threatening Baraza S. Ezekiel at his home as alleged or at all and avers that the said ex-employee left in February 2020 when his contract came to an end. Further, that he has never been summoned by the Police or informed of any complaint against him on the same and believes the claim by the union is unsubstantiated and aimed at misleading this Court.

9. The Claimant/Applicant filed its response opposing the Respondent's grounds of opposition on the grounds that the prayers sought in the Application herein are not the same as those in the Application dated 21/11/2019. That the Application emanates from new illegal, unfair and unprocedural actions by the Respondent of not furnishing the Claimant with information and further unlawfully declaring the Claimant members redundant in violation of Court Orders. That the Application was filed in good faith as the Claimant was and is at liberty to file contempt proceedings against the Respondent's Managing Director but chose not to for future industrial relations. The Applicant prays that the grounds of opposition be dismissed with costs.

Claimant/Applicant Submissions

10. The Applicant submits that banking slips and transfer slips should be forwarded to the union which the Respondent has not been doing hence this Application and it requests to have the Respondent be Ordered to produce the required documents for verification of the figures deposited/transferred as stipulated under **Section 48 of the Labour Relations Act**. It submits that the prayer for parties to proceed by way of written submissions in the main suit should be granted to enhance the spirit of **Section 74 of the Labour Relations Act**, which stipulates that Recognition Agreement be filed under certificate of urgency and save the Court's time. That the Respondent should meet the costs of this application as the Respondent's actions has necessitated this Application.

Respondent's Submissions

11. The Respondent submits that the instant application is res judicata and the Applicant is wasting precious judicial time by relitigating the same questions as in the Application dated 21st November 2019, which is pending determination before this Court. That the instant application should thus be dismissed with costs for being an abuse of the court process. That however, should the Court be inclined to consider the same then it also fully relies on its written submissions dated 9th March 2020 in opposition thereto.

12. It submits that the claim for remittance of deducted dues is unfounded as the Applicant union has failed to disclose names of persons, the figure of deductions attributable to each of such members and the exact total figure due. That it is trite law that special damages must not

only be specifically pleaded but also specifically proved and that there is nothing in the annexures marked "*Claimant's list of document*" to support this position. Further, that the Respondent has demonstrated it remitted deductions for March 2020 amounting to Kshs. 123,991.45 on 8th April 2020 into the Applicants Bank Account as shown at **Annexure AM1 to the Replying Affidavit of Abednego Muema sworn on 6/07/2020**. That the Respondent is therefore in compliance with **Section 48 of the Act** in so far as deductions are concerned and ought not to be penalized.

13. The Respondent submits that letting go of 3 staff out of 773 unionisable employees does not amount to victimisation and it urges this Court to dismiss the allegations of victimisation as there is no proof even by way of an Occurrence Book entry to the contrary. It relies on the case of **Transport Workers Union –v- Trans Trade Ltd (lc) 2016 eKLR**. The Respondent also submits that the Applicant is further seeking reinstatement of members who are not named nor are particulars of the alleged unprocedural, unfair and unlawful termination pleaded to enable the Respondent suitably respond or to enable this Court make an informed decision. That in any event, the existing avenues for redress of the same have not been initiated by the Claimant/Applicant.

14. With regards to payment of a fine, the Respondent submits that **Section 82(2) of the Labour Relations Act, 2007** provides for a general penalty not exceeding Kshs. 40,000 and that it is not clear what offence the Respondent is to be fined when it complied by remitting deductions. It also submits that directions to proceed by way of written submissions can only issue upon conclusion of the two applications pending before Court, unless the Applicant abandons the same in favour of proceeding with the main suit.

15. The Respondent concludes that the Claimant/Applicant has failed to prove the allegations raised and is therefore undeserving of the orders sought and the instant Application should therefore be dismissed with costs to the Respondent.

16. I have considered the averments of the Parties herein. The Applicant contends that the Respondent though having deducted membership dues for Claimant's members have failed to remit the same.

17. The Respondents did not respond to the issue of union dues deduction but only maintain that the issue is *res judicata*.

18. I note that indeed the Applicants filed an application before this Court on 21/11/2019 seeking similar orders as the ones in this application. It is not clear why they did not pursue it. That notwithstanding, there is no prejudice suffered by the Respondent by the Applicants choosing to pursue the current application.

19. The Respondents have not denied that they have deducted union dues from Applicants' members.

20. Section 48(3) of the Labour Relations Act provides as follows:-

“An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction”.

21. The law obligates the employer served with a notice in Form S to deduct union dues and remit to the union within 30 days.

22. It is not clear why the Respondents have not commenced remittance of the deducted union dues. In the circumstances, I find the prayer to order remittance of the deducted union dues is proper and I allow prayer 2 of the application.

23. I also find prayer 3 is in order and I order that the Respondents should not victimise the Applicant's members on ground of trade union activities as prayed. The rest of the prayers sought will be handled in the Main Claim.

24. Costs in the cause.

Dated and delivered in Chambers via zoom this 16th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Weru holding brief Bonyo for Respondent – Present

No appearance for Applicants