



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1087 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 22nd October, 2020)

KENYA PRIVATE UNIVERSITIES WORKERS UNION.....APPLICANT

VERSUS

UNITED STATES INTERNATIONAL UNIVERSITY.....RESPONDENT

RULING

1. The Claimant/Applicant, Kenya Private Universities Workers Union filed a Notice of Motion application dated 15th November 2019 against United States International University under *Section 12 of the ELRC Act, Section 48, 56 and 74 of the Labour Relations Act* and all other enabling provisions of the laws.

2. The Applicant seeks for orders that:-

1. Spent.

2. The Honourable court issue an order against the Respondent to comply by mandatory provision of the law (Section 48 of the Labour Relations Act, 2007) by way of deducting and remitting union dues from the Applicant members who have duly signed the check off forms pending the hearing and determination of this suit.

3. Prohibitory order be issued against the Respondent restraining herself and or her agents from victimizing her unionizable employees and or Application members on ground of Trade union affiliation/activities till the hearing and determination of this suit.

4. Any other order the Honourable court may deem fit to grant.

3. The Application is premised on reasons that the Respondent is in breach of the workers' fundamental rights as enshrined in the Constitution as it is frustrating its efforts to recruit union members from the Respondent employees. That the Respondent's agent, Mr. Sande Joel who is the manager in the human resource office refused to receive the Claimant's members' check-off forms on behalf of the Vice Chancellor on 12/11/2019 while directing that the workers hand in the said forms individually. That this was intended to victimize the Applicant's members and that the union's officials have never been told to hand in the form S in the said manner. That on 22/11/2018, parties signed consent in court that the Respondent will permit the Claimant union to access and recruit union members in accordance with law.

4. That however, while some of the Respondent's employees have joined the Applicant/Claimant Union by signing the check-off forms which were to be forwarded to the Respondent, the Respondent has been coercing them to withdraw from the union. It is the Applicant's fear that the Respondent might victimize the said new members on their Trade Union activities if it forwards the forms without protection. That even though deduction and remittance of Union dues is mandatory, considering the Respondent's actions it may need intervention of this Court for the Respondent to comply. That this Honourable Court has a duty to protect the said workers by granting the Orders sought herein and that if the said orders are not granted, the Applicant and her members shall suffer irreparable damages.

5. The Applicant filed a Further Affidavit sworn on 18th February 2020 by its General Secretary, Peter Owiti who avers that the Union recruited members on various dates in October 2019 and November 2019 totalling to 49 members. That while the Honourable Court granted the Applicant interim prohibitory and restraint orders on 15/11/2019, the Respondent's agents namely; Madam Hellen Abasa (the Respondent legal officer), Mr. Joel Sande and Mr. Yusuf both from the HR Office are busy victimizing/coercing the Applicant members to withdraw from the union. That the Union forwarded check-off forms to the Respondent on 21/11/2019 for it to effect deduction of union

dues but the Respondent chose to deduct from only 4 members without consulting the Union. That the total amount of union dues not deducted by the Respondent for November 2019, December 2019 and January 2020 including Court interest at 14% is **Kshs. 158,570.09**

6. He further avers that the Respondent has refused to deduct union dues from 44 members and that since the Respondent refused to deduct dues when check-off forms were served upon them, the undeducted union dues ought to be recovered directly from the Respondent's account. That the Respondent continues to dishonour the orders of this Honourable Court which has led to poor recruitment of members by the Applicant/Claimant and that there is no alternative but to cite the Respondent for contempt.

7. The Respondent filed a Replying Affidavit sworn on 18th May 2020 by its Director – Administration, Night Nzovu who avers that the Applicant has on numerous occasions been allowed access to the Respondent and further allocated various rooms for engagement with the Respondent's employees in line with the Respondent's policy guidelines on use of facilities and grounds. That the said check-off forms were indeed received at the Respondent's VC's office and that payment of the union dues for the active Applicant's members has always been appropriately and constantly effected. That the Respondent has never threatened or intimidated its employees to leave the Applicant and that it is some of the employees who voluntarily sent emails and letters to the Respondent's Human Resource giving notice of their membership withdrawal from the Applicant.

8. She also avers that it is the Respondent's contention that the Union has failed to establish the Respondent did not observe and respect the provisions of the applicable laws and further, that the Application is ill-conceived as the Respondent has complied with the Court's directions. That in any event it would be unfair to remit union dues on behalf of employees who have withdrawn their membership from the Applicant and that the Respondent does not gain anything from denying the Applicant any dues due to it. She avers that the issues in the application are *res judicata* as they are anchored on a suit that was settled as per the Order of 22/11/2018.

9. The Respondent also filed a Notice of Preliminary Objection dated 20th August 2020 on the ground that since the Application herein is *res judicata*, this Honourable Court is *functus officio* and which renders the Application untenable. Further, that the Claimant/Applicant's remedy, if any, lies in the proceedings other than the ones advanced through the current Application and that the Application should thus be struck out/ dismissed with costs.

10. In response, the Claimant/Applicant filed a further affidavit sworn by Peter Owiti who avers that several offices from the Respondent's HR Office want to ensure that the Claimant/Applicant union does not attain CBA and denies that the union has been allowed to meet at the Respondent. He requests the Court to grant orders for the Respondent to pay undeducted union dues plus court interest from their own account.

Claimant/Applicant Submissions

11. The Claimant/Applicant submits that the Respondent cannot assert in their argument that a consent was arrived at when they have never complied with the said consent order issued by Byram Ongaya J on 21/11/2019. That the matter herein has been ongoing since 14th June 2017 and until compliance is arrived at, the Respondent's assertions of the two legal doctrines of *res judicata* and *functus officio* fail. It cites the case of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Saiama Beach Hotel Limited & 3 others [2017] eKLR**, where the Court of Appeal while relying on the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR**, discussed the elements of *res judicata* that must be satisfied on account of a former suit. That in this case, it filed an application under an existing suit that is still ongoing in Court.

12. It further notes that the Respondent has not presented any documentary evidence or complaint letter(s) from any member ascertaining that union dues were deducted without their consent. That there is however evidence of forced resignation from the union forwarded by the Respondent's Advocates in clear violation of **Section 48 of the Labour Relations Act, 2007**.

13. The Claimant/Applicant urges the Honourable Court to find the Application herein is meritorious and further proceed to issue a notice to show cause to the Respondent to justify why they have failed to obey the pronouncement of the court. In addition, that the Court should enter in favour of the Applicant an all-inclusive sum of **Kshs. 755,450/= (as at now)** being union dues deductions that the Respondent blatantly refused to deduct as required by the law plus the interest at Court's rate. The Claimant/Applicant further prays that the Respondent be compelled to sign a recognition agreement within 30 days.

Respondent's Submissions

14. The Respondent submits that *functus officio* is defined in the **Black's Law Dictionary, 5th Edition** as 'Having fulfilled the function, discharged the office, or accomplished the purpose and, therefore, no further force or authority.' That the same is to the effect that once a court renders a decision regarding a particular issue(s), then that particular Court lacks the powers to re-examine the same issue(s). That the Honourable Court should also note that the orders that were sought in the earlier application filed on 14/06/2017 are similar to those sought in the present application. Further, that there being an extracted decree, there is no live suit/claim the basis of which the current application can be anchored.

15. On the plea of *res judicata*, the Respondent cites the provisions of **sections 7 and 8 of the Civil Procedure Act** in urging the Court to strike off the present application from the record or dismiss it with costs to the Respondent. That it presented in its Replying Affidavit before this Court evidence showing it complied with the orders given by Byram Ongaya J and should not be subjected to further litigation of issues long settled; as to do so would be an abuse of the Honourable Court's process and also a waste of the Court's time. The Respondent also relies on **Civil Appeal No. 29 of 2015, Njue Ngai vs. Ephantus Njiru Ngai and another** and **Civil Appeal No. 296 of 2016 Consolidated with Civil Appeal No. 301 of 2016, Barclays Bank of Kenya Ltd and Another vs. Gladys Muthoni & 20 Others** on the doctrine of *res judicata*.

16. The Respondent implores the Honourable Court to accordingly uphold their Preliminary Objection and to strike off/dismiss the

application with costs to the Respondent.

17. I have considered the averments of the Parties herein. The Respondents have averred that the application is res judicata by virtue of this Court's order rendered by Judge Byram Ongaya dated 13/8/2018.

18. Indeed, on 21/11/2018 and not 13/8/2020, Judge Ongaya granted orders determining as application dated 15/11/2018 with orders that the Claimant be granted access to recruit union members in accordance with the law. The issue of access for recruitment is already determined and is therefore res judicata.

19. The issue in this application however relates to deduction and remittance of union dues and also an order to restrain the Respondents from victimising her unionisable employees on ground of Trade Union affiliation.

20. There is no indication that this has already been subjected to litigation. The Respondent avers that this is also sub judice. They aver that they have already been deducting and remitting union dues as per the check off forms.

21. The order of Judge Ongaya however seems to have determined the Claim and Application together as Judge Ongaya indicated on 21/11/2018 that there will be no costs for the Claim and Application. This shows that the Claim has been determined and the Respondents already directed to do what the Applicants now seek. The submission by the Respondent that the application is res judicata is correct and there is therefore nothing to add.

22. The only recourse the Applicants have is to pursue execution proceedings if the Respondents have not complied with the Court orders.

23. There will be no order of costs.

Dated and delivered in Chambers via zoom this 22nd day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mr. Owiti for Applicant - Absent

Ashitiva for Respondent – Present