



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 524 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 15th October, 2020)

KENYA ELECTRICAL AND ALLIED WORKERS UNION...CLAIMANT

VERSUS

WARTSILA EASTERN AFRICA LIMITED.....RESPONDENT

RULING

1. The Application before this Court is the Amended Notice of Application amended on 23/10/2019 seeking the following prayers:-

a. THAT this Honourable Court certifies this Application as urgent, be heard ex parte in the first instance. [Spent]

b. THAT the service of this Application on the Respondent be dispensed with in the first instance. [Spent]

c. THAT this Honourable Court do issue orders directing the Respondent to commence deduction and remittance of union dues from their employees who have already acknowledged membership with the Claimant/Applicant.

d. THAT this Honourable Court do issue orders restraining the Respondent, its servants, employees and/or agents from victimizing, intimidating, coercing, harassing, terminating, dismissing or disciplining on account of their union membership the unionisable employees and the Claimant members.

e. THAT this Honourable Court do issue orders directing the Respondent to sign Recognition Agreement in accordance with section 54 of the Labour Relations Act, 2007.

f. THAT costs of this Application be provided for in favour of the Claimant/Applicant.

2. The Application is supported by the grounds set out therein and the Supporting Affidavit of Kosgey Kolil sworn on 23/10/2019. The Respondent has opposed the Application vide the Replying Affidavits of Salome Ngeene sworn on 24/9/2019 and 27/11/2019.

The Applicant's case

3. The Applicant avers that since their constitution allows them to recruit members of the Respondent's unionisable employees, they recruited 69 out of 129 of the Respondent's unionisable employees between January 2015 and April 2019. This represents 54.76% hence exceeds the simple majority requirement under Section 54 (1) of the Labour Relations Act 2007.

4. The Applicant avers that in 2015 they submitted fully signed check-off forms to the Respondent in order to effect deduction and remittance of union dues. However, the Respondent has been selective in deducting the same alleging that some employees have resigned or declined to consent, so as to avoid exceeding the simple majority threshold that would require them to sign a recognition agreement.

5. The Respondent has refused to sign a recognition agreement despite the matter being referred to conciliation, which has disadvantaged the Applicant and their members and violated their freedom of association, right to fair labour practice and collective bargaining.

6. The Applicant is apprehensive that once the application is served upon the Respondent they might victimize, harass or intimidate the employees whose names appear in the check-off forms since they are adamant to deny their unionisable employees the right to trade union representation. Finally, the Applicant avers that there is no other union claiming representation of the same set of employees.

7. The Applicant further avers that the Respondent's employees are treated discriminatively compared to their colleagues working at Kengen

Company despite the existence of a co-terminus relationship between the Respondent and Kengen Company.

The Respondent's Case

8. On the other hand, the Respondent contends that they have 148 employees and that the number of the signed check-off forms as annexed by the Applicant are 45 and not 69 as alleged by the Applicant, and includes employees who have since left employment with the Respondent.

9. The Respondent further contends that the names provided by the Applicant have discrepancies as some have been repeated leaving the number of the Applicant's employees at 33 out of 111 unionisable employees.

10. The Respondent contends that despite recruiting employees, even non-unionisable employees, the Applicant has never attained a simple majority as required by Section 54 (1) of the Labour Relations Act. The Respondent avers that they have always abided by the law in their dealings with the Claimant and the only reason they have never signed a recognition agreement is because the Applicant has never attained a simple majority.

11. The Respondent denies refusing to act on the check-off forms and contends that they have been making the appropriate deductions from their employees' salaries and remitting the same to the Applicant. As such, the Applicant's allegation to the contrary is malicious and intended to deceive this Court.

12. The Respondent denies any allegation of discrimination and contends that employment contracts are not issued *en masse* and are drafted according to the terms agreed by the parties, hence the varying terms.

13. It is the Respondent's case that the conciliator made a recommendation that the Applicant had not attained a simple majority hence it was premature for the Applicant to seek recognition for purposes of collective bargaining. The Respondent therefore urged this Court to dismiss the Application with costs.

The Applicant's Rejoinder

14. The Applicant filed the Further Affidavit of Kosgey Kolil in response to the Respondent's Replying Affidavit sworn on 24/9/2019. The Applicant maintains that 69 out of 126 employees were recruited and duly signed check-off forms as well as a recognition agreement were served upon the Respondent for deduction of union dues and recognition respectively. However, the Respondent failed to do so despite there being a dialogue between the two parties and the matter being referred to conciliation.

15. The Applicant avers that they derived their members from the Respondent's employees at Gulf power plants, KIPVU 2 and 3. However, the Respondent has never presented any documentation to the Applicant specifying the type of employees or to acknowledge their membership to the Applicant.

16. The Applicant maintained that the Respondent ought to deduct union dues from its members' salaries and that they had met the threshold required for recognition hence ought to be recognized by the Respondent.

17. The Application was disposed of by way of written submissions with both parties filing their submissions.

The Applicant's Submissions

18. The Applicant submits that it is their members' right under Article 41 of the Constitution to join a trade union especially having attained a simple majority of the Respondent's unionisable employees as required by Section 54 (1) of the Labour Relations Act.

19. The Applicant further submits that the Respondent ought to deduct and remit union dues from its employees' salaries and their failure to do so is an unfair labour practice and an infringement of their right under Article 41, and relies on the case of **Kenya Union of Commercial Food and Allied Workers vs. Eastleigh Mattresses Limited [2017] eKLR** and **Kenya National Union of Nurses vs. County Public Service Board Homabay [2018] eKLR** where the respective Courts observed that an employer was bound to remit union dues from employees who had joined a trade union with or without a recognition agreement.

20. The Applicant submits that it ought to be recognized having attained a simple majority of the Respondent's employees, as required by Section 54 (1) of the Labour Relations Act 2007.

21. The Applicant contends that the Respondent failed to prove their allegation regarding the repetition of names or that some employees had resigned hence the list annexed by the Applicant stands. The Applicant relied on the case of **Kenya Petroleum Oil Workers Union vs. Kenol Mahavir Service Station & Another [2017] eKLR**, to support their position.

22. Further that the letters of resignation annexed by the Respondent contain a misrepresentation of facts. For instance, 6 of the letters were written after the Respondent had issued the letter of 27.2.2019 while 4 letters were written before 27.2.2019. Additionally, the letters of Nathaniel Ochieng Wanyanga and Christopher Owiya Ragwel Apiyo were unsigned letters. It is the Applicant's submissions that if the letters are genuine then the Respondent coerced its employees to sign the same.

23. They further submit that there is no other union representing the Respondent's employees' needs to warrant the Respondent's refusal hence the failure to sign a recognition agreement is unconstitutional, illegal, null and void *ab initio*.

24. The Applicant submits that their members ought to be shielded from victimization as they are at a risk of the same in view of the Respondent's letter of 27.2.2019. She urged this Court to issue orders to the Respondent to allow its employees to engage in trade union activities.

25. As regards the terms of service for the Respondent's employees who were working at the Kengen company, the Applicant submits that it was discriminatory for the Respondent to have employees with different terms yet they were working in the same industry.

The Respondent's Submissions

26. The Respondent submits that no proof has been availed to support the Applicant's assertions that it has been harassing its employees. She is of the position that the freedom of association is conjoined with the freedom of disassociation hence employees can voluntarily resign from a trade union. As such, the Respondent submits that the Applicant is undeserving of the orders sought and relies on the case of **Transport Workers Union vs. Trans-Trade Limited (K) [2016] eKLR** where the Court declined to grant orders of injunction as no evidence was adduced to prove the Claimant's allegations of harassment, intimidation or dismissal.

27. The Respondent submits that it has deducted and remitted union dues as required by law and the only instance where the same was not deducted was where its employees had informed them that they had resigned from the union, as required by Section 48 (6) of the Labour Relations Act 2007.

28. The Respondent submits that the Applicant has failed to meet the simple majority required by law for a union to be recognized and contends that the names annexed by the Applicant are below 35 and not 69 as stated, and that some of the names are a repetition. The Respondent further contends that the Applicant has never recruited more than 52 employees hence not entitled to a recognition as envisioned in Section 54.

29. The Respondent relies on the cases of **Banking Insurance and Finance Union vs. Waumini Sacco Society Limited [2018] eKLR**, **Kenya Union of Printing, Publishing, Paper, Manufacturers, Pulp and Packaging Industries vs. Raffia Bags (EA) Limited [2014] eKLR**, **Kenya Hotels and Allied Workers Union vs. Lake Naivasha Sawela Lodge Limited [2019] eKLR** and **Kenya Chemicals & Allied Workers Union vs. Base Titanium Limited [2016] eKLR** to buttress their position.

30. The Respondent urged this Court to find in their favour.

31. I have examined the averments of the Parties herein. The Respondent presented check off forms served upon them showing the Applicant had recruited 45 members.

32. There are also letters showing withdrawal of some members from the union though some of the letters are not signed by its authors and therefore cannot be relied upon.

33. The Respondent had indicated that the matter had gone through a conciliation process and the conciliation came to the conclusion that the Applicants did not have a simple majority. The report of the Conciliator was however not presented before this Court.

34. There are many issues of contention in regard to whether the Applicants have a simple majority or not to warrant recognition. This matter can only be resolved after presentation of real evidence in the Main Claim. This application cannot resolve the said matter at this time.

35. As regards deduction and remittance of union dues, the Respondents are obliged by law to deduct and remit union dues for all members they aver are uncontested.

36. In this case, the Respondents are ordered to commence immediate deductions and remittance of union dues to the Applicant with a schedule of names they aver are uncontested.

37. The rest of the issues will be resolved in the Main Claim.

38. Costs in the cause.

Dated and delivered in Chambers via zoom this 15th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Onyugi holding brief Onyony for Claimant/Applicant – Present

Kipkemoi holding brief Mbugua for Respondent – Present