



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1330 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 8th October, 2020)

KENYA TERTIARY AND

SCHOOLS WORKERS' UNION.....CLAIMANT

VERSUS

ROCKY DRIVING SCHOOL.....RESPONDENT

RULING

1. The Claimant filed a Statement of Claim on 24th August, 2018 seeking the following reliefs:-

1. THAT the Respondent herein by its directors, managers and agents are hereby forthwith restrained and/or prohibited from harassing, intimidating the Claimant Union members and infringing on their constitutional rights of fair labour practices and their opportunity to freely join or participate in the activities and programmes of a trade union of their choice.

2. THAT the Respondent is hereby ordered forthwith to effect trade union dues deductions from the salaries of its unionisable staff employees who have voluntarily acknowledged their union membership with the Claimant Union on the Check Off Form S dated 24th, & 31st May and 9th & 16th July, 2018 and pay the moneys so deducted to the Claimant Union.

3. THAT the Respondent is hereby forthwith ordered to pay the Claimant Union from its kitty, all accrued sums of money due and owed to the Claimant Union as trade union dues, which the Respondent would have deducted and remitted regularly from the employees who had acknowledged their union membership on the check off forms thereof.

4. THAT the Respondent is hereby ordered forthwith to harmonise salaries of all staff employees and upgrade their terms and conditions of employment to qualify the lawful standard under section 48 of the Labour Institutions Act, 2007.

5. THAT the Respondent is hereby ordered to sign a Recognition Agreement with the Claimant Union forthwith for the purposes of collective bargaining.

6. THAT costs of the application and suit be provided for by the Respondent.

2. The Respondent filed a response to the Statement of Claim on 19th September, 2018. The suit proceeded by way of written submissions with each party filing its submissions.

Claimant's case

3. The Claimant avers that it has mobilised, organised and recruited 109 unionisable staff employees within the meaning of mandatory provisions of section 48 of the Labour Relations Act on the check off Forms dated 15th May, 15th June, 16th & 18th July and 7th August 2018.

4. It avers that it served a copy of a Recognition Agreement upon the Respondent but the Respondent has introduced a tactical delayed mechanism towards compliance. It further avers that the Respondent has preferred to discriminate, victimise its unionisable staff for their trade union activities and continues to under pay its employees.

5. It avers that the Respondent was duly served with the signed check-off forms and a copy of the Recognition Agreement but has failed or refused to comply with the mandatory provisions of Sections 48 (3) and 54 (1) of the Labour Relations Act. It contends that it thereafter reported the existence of a trade dispute under section 62 (1) of the Labour Relations Act.

Respondent's case

6. The Respondent avers that it has a total of 201 employees out of which 25 are managers hence only 176 are unionisable employees. It avers that upon receipt of the check off forms, it embarked on an exercise to verify the names contained therein and established that the list of employees recruited by the Claimant included names of persons who were not in its employment, employees in management level and employees who had left its employment under different circumstances.

7. It contends that the verification exercise found that the Claimant has recruited 73 of the possible 176 unionisable employees, which is equivalent to 41.4% which does not meet the legal threshold of 50+1% for the Claimant to be granted recognition.

8. It further contends that it would be against the spirit of the Labour Relations Act and the Industrial Relations Charter if the Respondent's management staff is allowed to join and participate in union activities. Additionally, management staff would not represent employees' interests.

9. It contends that it called for an "Introduction Parties meeting" with the Claimant on 17/7/2018 with a view of airing out its concerns and to be furnished with copies of the order from the Cabinet Secretary.

10. It denies having denied its employees the right to join a trade union of their choice. It avers that it has always been willing to amicably reach a compromise with the Claimant by calling for meetings but the Claimant has failed to attend the meetings. It avers that the Claimant has been interfering with the running of its day to day activities by being confrontational over its lawful transfers and deployment of its workers.

Claimant's submissions

11. The Claimant submits that workers have a right to establish and subject to the rules of the organisation, to join organisations of their own choosing without previous authorisation as envisioned under mandatory provisions of Articles 1, 2 and 3 of the Constitution and Section 4 of the Labour Relations Act.

12. It avers that is clear and within the limits of Section 48 (2) of the Labour Relations Act, that it had duly recruited more than 110 unionisable employees through Check off Forms. It argues that there no contestation over the membership of its members thus the Respondent is fully obligated to comply and deduct union dues from all registered members as provided under Section 48 (3) of the Act.

13. It argues that the Respondent did comply with deduction and remittance of union dues from 87 employees as per the Ruling delivered on 3/12/2018 despite the fact that at the time it had recruited 115 unionisable employees.

14. It is its submission that it is mandatory under section 54 (1) of the Labour Relations Act that the Respondent herein do accept and accord recognition to the Union having surpassed the simple majority requirement. In support of this, it relies on **Kenya Union of Domestic, Hotels Educational Institutional Hospital and Allied Workers v Commission for Higher Education [2013] eKLR** where the Court set out the requirements for recognition.

15. It argues that the Respondent has continued to perpetuate unfair labour practices to the extent of blatantly underpaying wages/salaries in contravention of the subsequent Wages (General) (Amendment) Order duly enunciated by the dictates of sections 48 (1) and (2) of the Labour Institutions Act.

16. It submits that the Respondent has placed an argument by its "Employees Report for September 2018" totalling 201 all inclusive of management staff which translates to 57.2% simple majority hence it qualifies for a recognition agreement.

17. In conclusion, it argues that it has proved its case on a balance of probabilities thus the Court should award the reliefs sought.

Respondent's submissions

18. The Respondent submits that the rights of a Union to represent employees stem from its constitution and recognition agreement. It argues that it is evident that the Claimant has not attempted to specify the category of employees to be included into the unionisable categories to be represented by the Claimant.

19. It submits that parties are bound by their pleadings and that the Claimant cannot amend its statement of claim through its submissions by purporting to have recruited 115 employees as opposed to the pleaded 109 employees.

20. It submitted that at the time of institution of the claim, it had 221 employees amongst them 25 were in management. It argues that the Appendix to the Industrial Relations Charter sets out the level of union participation by excluding certain persons from union membership including persons who formulate, administer and coordinate any aspect of the organisation's policy.

21. It further submits that a meeting chaired by the Minister of Labour and attended by a representative of the Federation of Kenya Employers and Central Organisation of Trade Unions (K), it was agreed on persons who are to be excluded from union representation.

22. It cites the case of **Kenya Union of Suagr Plantation and Allied Workers v Mumias Sugar Company Limited [2016] eKLR** where the Court held that Article 41 is not absolute and that there is a limitation to management staff rights to join a union. It is its submission that the Claimant has only recruited 59 employees and not 115 as alleged.

23. It submits that the claim offends the Industrial Relations Charter, Article 41 of the Constitution on fair labour practices, Sections 2, 54 (1), 74 (a) of the Labour Relations Act and the Industrial Relations Charter on union representation.

24. It submits that in the event the parties fail to reach an amicable settlement on the recognition agreement, there is a procedure set out under Section 54 (6) and (7) of the Labour Relations Act. It is its submission that the Court should be the last resort where a dispute between the parties has not been resolved by conciliation as Article 159 encourages alternative dispute resolution. It relies on the case of **Francis Gitau Parsimei and 2 Others v The National Alliance Party & 4 Others [2012] eKLR** where the Court held that where the Constitution and statute establish dispute resolution procedure, that procedure must be used.

25. It submits that the basis of being granted the interim order was on the allegation that it was discriminating the Claimant's members. However, the Claimant's in its submission did not submit with respect to this order and did not adduce evidence indicating that its members have been discriminated against. It submits that Section 24 of the Evidence Act provides that he who alleges must prove.

26. It argues that the Claimant did not specify the amount payable from the kitty and that it was also in its submission and Replying Affidavit to the application dated 23rd August, 2018 that union dues had already been deducted and remitted to it. It relies on the Court's decision in **Kenya National Union of Nurses v Kenyatta National Hospital Board [2018] eKLR** which held that members from whom deductions were to be made were not specified thus making it an ambiguous order that the Court could not grant.

27. It urges the Court to dismiss the claim with costs to the Respondent.

28. I have examined all the evidence and submissions of the Parties herein.

29. The main contention in this matter is whether the Applicant/Claimant has recruited the requisite number of members to warrant recognition by the Respondent.

30. The Applicant aver that they have recruited 109 unionisable employees of the Respondent and sent out check off forms on 15th May, 15th June, 10th, 18th July and 7th August 2018.

31. The Respondents on their part argue that of the recruited members, some are in management and some have denied willing to join the union.

32. They aver that others are not in their employment and others have already left their employment. That the members recruited are only 73, which is equivalent to 41.4% and therefore not enough to warrant recognition.

33. Indeed the Respondent submitted some termination letters for some of the staff and also some redundancies and resignation all dated August 2018 before this claim was filed.

34. It is therefore true that some of the employees who were unionisable had left the employment of the Respondent before the check off forms were send out.

35. In response to this, the Claimant did not offer any evidence. It is therefore still doubtful that the Claimants have recruited the requisite number of employees to warrant recognition of the number being at least 50% plus 1.

36. The Respondents however are obliged by law to deduct and remit union dues for uncontested members who they put at 73 as provided for under Section 54(3) of the Labour Relations Act which provides as follows:-

3) "An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union".

37. In the circumstances, I direct that the Respondent do immediately deduct and remit union dues in respect of 73 uncontested employees to the Claimant.

38. As concerns recognition, the Claimant are urged to continue recruitment and seek the same after they are satisfied that they have requisite members.

39. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this 8th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ondima for Respondent – Present

Japheth Agura for Claimant – Present