



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 285 OF 2020**

**(Before Hon. Justice Hellen S. Wasilwa on 1<sup>st</sup> October, 2020)**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**KENYA CREDIT TRADERS LIMITED.....RESPONDENT**

**RULING**

1. This Ruling is in respect of 2 Applications which are the Applicant's Notice of Motion dated 3/7/2020 and the Respondent's Notice of Motion dated 20/7/2020.

**Notice of Motion dated 3/7/2020**

2. The Applicant seeks the following orders:

- a. THAT this Application be certified urgent and heard ex-parte in the first instance.*
- b. THAT service if this application/claim upon the Respondent be dispensed with.*
- c. THAT pending hearing and determination of this Application, this Honourable Court be pleased to issue an order restraining the Respondent from victimising, intimidating, coercing, harassing, terminating, dismissing or disciplining the Claimant/Applicant's members whose names appear on the check-off sheets on account of their Trade Union membership.*
- d. THAT pending hearing and determination of this application this Honourable do and hereby order the Respondent to deduct and remit union dues from their unionisable members who have already acknowledged their union membership through the prescribed check off sheets.*
- e. THAT thus Honourable Court do prioritise this matter for hearing and determination.*
- f. THAT costs of this Application be provided for in favour of the Claimant/Applicant.*

3. The application is premised on grounds that:-

- a. Between January and March 2019 the Claimant/Applicant recruited 168 of 260 unionisable employees of the Respondent this being 65% membership which is over and above 50% + 1 simple majority as required for purposes of recognition under Section 54 (1) of the Labour Relations Act, 2007.*
- b. On 11/3/2019, 14/3/2019, 19/3/2019, 26/3/2019 and 4/4/2019 the Applicant forwarded check off sheets to the Respondent for deduction and remittance of union dues but they have declined to deduct and have not remitted union dues as required.*
- c. On 2/4/2019, the Applicant forwarded to the Respondent a draft Recognition Agreement and sought a meeting with them 9/4/2019 for the purposes of signing the said Agreement but they declined the request.*
- d. The Applicant having recruited the requisite members for purposes of recognition, the Respondent still unfairly, unjustifiably and unlawfully refused to sign the Recognition Agreement.*

***e. The Applicant reported a recognition dispute to the Ministry of Labour in accordance with the provisions of the Labour Relations Act, 2007 as required.***

***f. Upon receiving the check off sheets, the Respondent has decided to harass, intimidate and coerce active union members by way of termination , vindictive transfers and through coerced salary reduction with intention to force them withdraw their union membership.***

4. The Application is supported by the affidavit of Mike O. Oranga, the Applicant's Assistant Secretary General sworn on 3.7.2020 in which he reiterates the averments set out in the grounds of the application. He further avers that the Respondent's employees do not have any avenue through which they can channel their grievances and that the "operating manual for shop staff" was drafted without their involvement.

5. In response to the Application, the Respondent filed a Replying Affidavit sworn by Alphonse O. Nyamrer its General Manager, on 20.7.2020. He depones that contrary to the averment by the applicant that it has recruited 168 unionisable employees, only 147 names were annexed to the supporting affidavit.

6. He avers that 4 names have been duplicated, 16 members disowned the forms and claimed that their signatures were forged and 21 members are managers thus they do not qualify to join the union. He therefore avers that 41 of the persons do not qualify hence the Applicant has only recruited 102 members which is equivalent to 39.2% of its employees. He avers that the Applicant has not failed to meet the threshold set out under Section 54 (1) of the Labour Relations Act.

7. He avers that some of the recruited staff have already written to the Respondent stating that no deductions should be made from their salaries. He avers that the Respondent is apprehensive that should the Court ultimately determine that the Applicant is not capable of being recognised as representing the employees, the union deductions will have been made in error and will not be reversible to the employees' loss and detriment.

8. He avers that no redundancies have been made, no employees been retrenched without notice and 3 employees shown in the Applicant's annexures 5 (a) – (c) were either terminated or suspended in the ordinary cause of disciplinary actions.

9. He contends that it is misleading for the Applicant to claim that disciplinary action taken against the 3 employees in the ordinary cause of disciplinary action could lead to a conclusion that the Respondent has victimised, intimidated, harassed and dismissed them on account of having signed the check off sheets.

10. He contends that the Respondent received the check off sheet but declined to honour them when upon scrutiny of the signatures it was evident that some had been duplicated, forged or the employees disowned the signatures. He further contends that the Applicant referred the dispute to the State Department of Labour and commenced Cause 272 of 2019, which was struck out, and an application for review dismissed.

11. The applicant filed a Supplementary Affidavit sworn by Mike O. Oranga on 27.8.2019. He denies that the check off sheets were sent to the Respondent on the stated dates. He avers that there is no expert evidence to attest to the alleged forgeries and that the Respondent intends that the Court does believe its statement without proof.

12. He avers that the Industrial Relations Charter spells out persons who should and should not join the union and other than those job categories in the charter, all other exclusions from union membership can only be by mutual consent.

13. He contends that the order aimed at protecting employees against all forms of victimisation on account of union members are in no way injurious, prejudicial or detrimental to the Respondent. He avers that evidence shall be adduced to prove that the Respondent coerced, victimised and intimidated active union members for massive punitive transfers and termination of employment.

14. He avers that the Court in Cause 272 of 2019 directed that the Claimant/Applicant does exhaust the conciliation process. He avers that this was done and a Labour Report and Certificate of Conciliation produced in Court.

#### **Notice of Motion dated 20/7/2020**

15. In its application, the Respondent seeks the following orders:-

***a. THAT this application be certified urgent and be heard ex parte in the first instance.***

***b. THAT pending the hearing and determination of this application, this Honourable Court be pleased to stay the ex-parte Orders made by the Court on 8.7.2020.***

***c. THAT this Honourable Court be pleased to set aside and discharge the orders made by the Court on 8.7.2020.***

***d. THAT the costs of this application be provided for.***

16. The application is premised on grounds that:-

***a. The ex-parte orders made on 8.7.2020 were drastic and have far reaching consequences especially the order with regard to***

*deduction and remittance of the union dues from the Respondent's employees' salaries as some of the employees who were allegedly recruited as union members have already denounced the union and claimed that their signatures were forged.*

*b. The Respondent's position is that the Applicant has not attained the 50% + 1 minimum threshold in its recruitment of the Respondent's unionisable employees, which is a critical issue and ought to be determined before substantive orders can be made in this matter. The Respondent's position is that the Applicant has only attained 39.2%.*

*c. Substantive orders cannot be made in this matter until the Court first determines that the Applicant has capacity to represent the unionisable employees of the Respondent as a trade union.*

*d. Some of the "recruited" staff have already disowned the signatures stated to have been appended by themselves in the check off sheets and have even written to the Respondent asking that deduction should not be made from their salaries on account of union dues.*

*e. There are no redundancies in issue and neither has the Respondent retrenched employees without notice which would be contrary to provisions of section 74 (b) of the Labour Relations Act wherefore the ex-parte urgent orders ought not to have been granted.*

17. The application is supported by the affidavit of Alphonse O. Nyamrer sworn on 20/7/2020, which contains averments similar to those in his Replying Affidavit, also sworn on even date.

18. The Applicant filed a Replying affidavit by Mike O. Oranga on 27.8.2019. He depones that the membership withdrawals were received by the Respondent between 2/4/2019 – 9/4/2019, the same were never forwarded to or served upon the Applicant until and were only availed in the application.

19. He depones that the alleged union membership withdrawals are inconsequential as the employees were party of the simple majority as at the date of filing the claim. He avers that the 152 members are not complaining that their signatures were forged yet they were recruited by the same union under the same circumstances thus the allegation of forgery was meant to reduce the requisite threshold.

20. He avers that Section 4 of the Labour Relations Act and Article 41 (2) of the Constitution guarantee every worker the right to join a trade union. He avers that the orders issued on 8.7.2020 are aimed at protecting employees against all forms of victimisation on account of union membership and are not injurious to the Respondent.

21. He avers that employees have a right of protection and of action under Section 48 of the Labour Relations Act. He contends that the Respondent's application ought to be dismissed with costs.

#### **Applicant's submissions**

22. The Applicant submitted that section 48 of the Labour Relations Act entails union dues and agency fees. It submitted that union dues are not subscriptions paid by the employer and that the role of the employer is to deduct and remit such dues as instructed by the employees in the check off sheets.

23. It submitted that seeking a stay of the orders is to suggest that employees have no right to union membership, which will expose them to victimisation. It argued that though the membership withdrawal forms were received by the Respondent between 2/4/2019 to 9/4/2019 they were neither forwarded to nor produced in Court. It was its submission that the union withdrawals are inconsequential as 55 more employees have joined the union.

24. It averred that the check off sheets served upon the Respondent have 161 names and only 16 signatures are alleged to be forgeries and that 161 members are not complaining that their signatures were forged yet they were recruited by the union in the same circumstances. It further submitted that there is no evidence of any report having been recorded at the police station complaining of the forgeries.

25. It contended that an order of deduction of remittance of union dues does not in any way affect the Respondent or cost them anything other than the cheque leaf paying union dues which are monies deducted lawfully from union members with no costs on the Respondent.

26. It contended that the claim is one that requires the calling of evidence to establish whether or not a simple majority under section 54 of the Labour Relations Act has been achieved. It argued that the State Department of Labour made an elaborate and conclusive conciliation report with findings and recommendations and that a certificate of conciliation is the end product of the conciliation process and is not in itself a labour report.

27. It argued that the ruling in Cause 272 of 209 directed that the Applicant exhaust conciliation process. In conclusion, it urged the Court to find that the Orders issued on 8.7.2020 are merited and lawful in nature and ought to be confirmed to subsist until the hearing and determination of the suit.

#### **Respondent's submissions**

28. The Respondent maintained that the Applicant has not met the 50% + 1 threshold under section 54 of the Labour Relations Act as only 147 names are in the list and not 168 as alleged. Further, that the 41 persons do not qualify due to duplication of names and forgeries. It is its submission that the Applicant has 102 members, which translates to 39.2%.

29. It submitted that the legal basis of exclusion of managers from joining the union is drawn from Clause B (10) of the Industrial Relations Charter 1984, which excludes certain management level cadres from joining unions. It relied on the case of **Kenya Chemical & Allied Workers Union v Bamburi Cement Limited [2017] eKLR**.

30. It argued that in determining whether or not a party has met the 50% + 1 requirement, the Court looks at the status quo as at the time the dispute was presented/ filed in Court. It submitted that in **Kenya Union of Commercial Food and Allied Workers (KUCFAW) v Home Africa Limited [2018] eKLR** and **Kenya Chemicals and Allied Workers Union v Base Titanium Limited [2016] eKLR** held that the claimants had not, at the time of presenting their disputes to Court, met the 50% + 1 threshold.

31. It argued that the Applicant has without leave sought to introduce new members recruited in the months of August and September 2020 yet the claim was filed in July 2020 and it has already filed its defence to the claim. It was its submission that new material which have the effect of altering the pleadings as initially filed cannot be introduced to the case without leave and hearing the Respondent's leave.

32. It submitted that it will be unfair to have it restrained generally via a blanket order from taking disciplinary actions on its employees in the ordinary course of its operations which is the input of the Order issued on 8/7/2020. It submitted that no evidence has been presented to the Court to warrant the grant of such drastic ex-parte orders.

33. I have examined the averments of the Parties herein and submissions filed.

34. From the averments of the Claimant/Applicant, they have check offs from members of the union who joined in and who the Respondent declined to deduct their union dues. The Respondent's contention is that some members disowned their signatures and only 102 members remained.

35. The Respondents have not explained why they have not started remitting dues for the 102 who they aver have no problem.

36. On issue of forgeries of the signatures of members as alleged, this is subject to evidence and which matter can only be resolved after the full hearing. The issue of recognition can only also be resolved after confirmation of total membership recruited and after hearing of the Main Claim.

37. In the meantime, however, the Respondent cannot victimise the employees who have joined the union.

38. In the circumstances, I return the follows orders:-

***1. That the Respondents are restrained from victimising, intimidating, coercing, harassing, terminating, dismissing or disciplining the Claimant/Applicant's members whose names appear on the check-off sheets on account of their Trade Union membership.***

***2. That the Respondents do immediately deduct and remit union dues from the unionisable employees who they have acknowledged signed off the check off forms being 102 uncontested members.***

***3. That rest of the issues on recognition be determined in the Main Claim.***

***4. Costs in the cause.***

Dated and delivered in Chambers via zoom this 1<sup>st</sup> day of October, 2020.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Nyumba for Claimant Union – Present

Muturi Kamande for Respondent – Present