



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO. 678 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th April, 2019)

TAILORS AND TEXTILES WORKERS UNION.....CLAIMANT

VERSUS

GLOBAL APPARELS EPZ LIMITED.....RESPONDENT

AND

FIDELIS OMWAMBA ONSONGO.....1ST PROPOSED INTERESTED PARTY

FELIX ALUSIOLA LUYAKHA.....2ND PROPOSED INTERESTED PARTY

MOSES NYANGENA.....3RD PROPOSED INTERESTED PARTY

NZILANI MUSYOKI.....4TH PROPOSED INTERESTED PARTY

MARGRET KEMUNTO MAGARA.....5TH PROPOSED INTERESTED PARTY

DUKE MASIRE NYAKINA.....6TH PROPOSED INTERESTED PARTY

JEREMIAH RAWINJI MIIKOBIA.....7TH PROPOSED INTERESTED PARTY

RULING

1. The Claimant/Applicant filed this Application on 9th May 2018 under Section 12 and 20 of the Employment and Labour Relations Court Act and Rule 6, 17 and 18 of the Employment and Labour Relations Court (Procedure) Rules 2016. The Claimant/Applicant seeks the following orders:-

1. ***THAT*** this Honourable Court be pleased to certify this application as urgent.

2. ***THAT*** this Court be pleased to order that this case be heard *ex-parte* and on priority basis.

3. ***THAT*** service thereof be dispensed with in the first instance.

4. ***THAT*** this Honourable Court be pleased to issue an order that the Respondent to deduct union dues from 1644 employees who have acknowledged that this union membership by signing the check off forms and remit to the Applicant/Claimant's designation and gazetted under Account Number.

5. ***THAT*** this Honourable Court be pleased to issue prohibitory and injunctive orders stopping the Respondent from victimising their unionised/unionisable employees through unfair, unjustified, unprocedural terminations, dismissals, redundancies, retrenchments due to their or intended union membership until this case is fully heard and determined.

6. ***THAT*** this Honourable Court be pleased to order the Respondent to submit the printouts of union dues deductions from their employees who are members of this union every month.

7. ***THAT*** the Court to issue any other order as it may deem fit, expedient and just.

8. ***THAT*** costs of this application be provided for.

2. The Application is supported by the Affidavit of Rev. Joel K. Chebii (OGW) and is premised on the following grounds:-

1. That the Claimant/Applicant have both a valid Recognition Agreement and the Bargaining Agreement with the Respondent for the last 15 years and the last Collective Bargaining Agreement has been subject of Court under Cause No. 168 of 2014.

2. That the Applicant/Claimant did recruit 431 employees in August 2016 and a further 1,644 employees in 2018 and submitted the same check off forms to the Respondent on 7th March 2018 to deduct union dues and remit the same to the Claimant/Applicant as required by law.

3. That the Respondent is frustrating and victimising their employees who have signed the check off forms in acknowledgment of the union membership through unfair, unjustified, wrongful and unprocedural terminations, dismissals, redundancies and retrenchments. The Respondent has further shortened their contract periods from 3 months to 1 month and has re-set high unachievable production targets for unionised employees who are later dismissed for not reaching the targets.

4. That shop stewards Mr. Joseph Ouko, Hillary Musau and Hosea Kakendo have been victimised and sacked due to their union membership and the case is before Mavoko Law Courts as Criminal Case N. 913 of 2014 Republic versus Maqsoud Alimrahi as they were physically assaulted in the process of victimisation.

5. That Mr. Vincent Ondiek Sibota, Raphael Naisiae Lenana and Risper Gesare Kangwana who replaced the victimised shop stewards have been threatened and earmarked for dismissal due to their union membership. Further, 49 union members and others have been victimised due to their union membership while new workers have been threatened not to join the union.

6. That the Respondent has refused to submit printouts of union dues deductions to the Applicant as required by the law despite our several request and demand letters for the same.

7. That the Respondent has engaged themselves in unfair labour practices by sacking pregnant women who are union members instead of sending them on maternity leave, non-payment of overtime to union members, refusal to review salaries of union members, denying access to union officials to the company and refusing to take and receive letters from the Applicant and non-payment of sick offs to union members.

8. That in Cause No. 168 of 2018, the Respondent has been ordered to review the parties Collective Bargaining Agreement within 30 days from 27th February 2018 but the Respondent has been victimising unionised employees.

9. That the Claimant/Applicant is apprehensive that unless this Honourable Court urgently intervenes and issues the orders herein, the grievants, Claimant/Applicant and its members will suffer irreparable loss and damage.

3. The Respondent in response to the Application filed a Replying Affidavit, on 6th July 2018, sworn by Godwin Shibachi Palapala, the Respondent's Human Resource Manager. He confirms that there is a valid Recognition Agreement and Collective Bargaining Agreement which is the subject of proceedings in Cause 168 of 2014 and that the suit has since been concluded.

4. He avers that the Respondent has always granted access to the Claimant to conduct recruitment drives amongst its unionisable employees. However, in August 2016, the Claimant forwarded 28 union dues check- off forms in respect of 431 of the Respondent's employees but the Respondent could not effect the check off as 64 of the alleged members were strangers to the Respondent as they weren't its employees, 60 names had the wrong identity card numbers, 24 members names were duplicated, 8 members' names did not have identity card numbers, 65 employees protested that they had been included in the list without approval, 34 employees stated that they had been coerced to join the union, 110 employees protested against the deduction of union dues on the basis of being misled by the union. 9 employees disclosed that they had been offered incentives such as money and free food to join the union and 55 employees stated that they did not want any deductions and would instigate a go slow should deductions be effected.

5. He avers that they could not proceed to deduct union dues against the express wishes of the employees. He denied that there had been victimisation, threat and undue influence and that the Claimant aimed at misleading the Court. He stated that the Claimant had annexed list of names whose contracts had already ended and they had left employment by the time of receipt of check- off forms.

6. He avers that the nature of the Respondent's work is seasonal based on work orders from other bigger companies therefore necessitating short term contracts which end due to effluxion of time and not termination, dismissal, redundancies or retrenchments as alleged.

7. He further avers that Joseph Ouko, Hillary Musau, Hosea Kakendo, Vincent Ondiek, Sibota Raphael, Naisaie Lenana and Risper Gesare Kangwana left employment as their contracts had effluxed. He contends that Criminal Case No. 913 of 2014 which was concluded was instituted in 2014 long before the recruitment drive and it is untrue that victimisation of shop stewards was perpetrated as alleged.

8. He avers that the Respondent grants both sick off and maternity leave and it always pays maternity pay. He states that some of its female employees opt not to return to work after delivery while others return to work after the lapse of their maternity leave.

9. In respect of Cause 168 of 2014, he avers that the Court ordered 5% wage increment effective from the signing of the CBA and in default within 30 days of 27th February 2018. Therefore, the Court having rendered its decision the parties cannot purport to review the CBA as alleged by the Claimant but can only give effect to the Court award.

10. He avers that several employees have withdrawn their membership from the Union and the Respondent cannot deduct dues from the 1644 employees listed in the check off forms as prayers by the Claimant since such action would prejudice the employees who withdrew from the union. He however stated that they have always, over the years, forwarded the dues to the union.

11. On 27th February 2019 the Counsel for both parties appeared before Court for the *inter-partes* hearing of the application. Counsel for the Claimant/Applicant, Ms. Guserwa argued that the Respondent has totally refused to effect the deduction of dues leading to the filing of this suit. She stated that the Applicant seeks prayer 4, 5, 6 and 7 of the Application. She argued that the Respondent in its Replying Affidavit sworn by Godwin Palapala admitted to having received check off of 431 and that he raises issues of wrong identity card numbers and further alleges that there is forgery. However, this is a police matter.

12. Counsel Guserwa argued that the Respondent at Page 96 to 425 of the Replying Affidavit the Respondent annexed a summary of the Human Resource Report and it confirms in the column of Union dues that no dues were deducted. She further stated that a quarter of the letters of withdrawal annexed to the Replying Affidavit at page 426 to 786 have no date and members have purportedly written to the employer not to the union. Further, all the letters annexed to the Replying Affidavit were written in August 2016, which is outside the period in question.

13. In conclusion, she stated that the Respondent has contradicted itself and prayed that the Court does order the Respondent to deduct union dues.

14. Counsel for the Respondent. Ms. Bonyo, stated that she relies on annexure to the Supporting Affidavit sworn by Rev. Chebii at Page 56 of the bundle which provides a letter forwarding the check-off forms. She argued that the letter is not stamped as received by the Respondent, as there is no signature on the face of it. She argued that as stated in the Replying Affidavit the Respondent received check off forms but the contracts of those employees had lapsed. She relied on annexure GS at page 31 to 391 in support of the argument that the Respondent does grant maternity leave and stated that the Claimant's allegations were unsubstantiated.

15. Counsel Bonyo argued that it is not true that the Respondent had refused to remit union dues and referred to paragraph 9 of the Respondent's Replying affidavit and annexure GBS 4 at page 34 to 43 of the bundle which shows the remittance in 2016 to 2017. She argued that the Respondent had effected the 400 check-off forms received. She argued that there is no proof that the Respondent has procedurally dismissed union members. Further, no shop steward has been victimised as alleged under paragraph 6 of the Applicant's Affidavit.

16. In respect of the withdrawal letters she argued that the letters are notifications from various employees who did not wish to have the deductions made on grounds that they are not members of the union and the Respondent obeyed the employees desires. In conclusion, she urged the Court to dismiss the application.

17. Counsel Guserwa in response, stated that the Respondent had not denied the payroll annexed and it did not show the union dues had been deducted including the dues for the 1,644 members for the year 2018. In addition, the Respondent had confirmed that the withdrawal letters were received in 2016 and that the Applicant's application is based on the 2018 check-off. She stated that the Applicant had established that the check-off should be done hence the Court should grant the prayers sought.

18. I have examined all the averments of both parties.

19. Under Section 48(2) of the Labour Relations Act states as follows:-

(2) "A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to:-

(a) deduct trade union dues from the wages of its members; and

(b) pay monies so deducted:-

(i) into a specified account of the trade union; or

(ii) in specified proportions into specified accounts of a trade union and a federation of trade unions".

20. What is envisaged is that a trade union would recruit members to their union and submit the list in the prescribed form for deduction and remittance of the dues.

21. Under Section 48(3):-

(3) "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”.

22. Thus, once an employer receives the prescribed form requesting for deduction and remittance of the dues, the employer is obliged to do so.

23. The Claimant herein indeed did make the request in the prescribed form as per the check off forms acknowledged by the Employer Respondent listed from pages 56 to 154 of the Claimant’s documents. The request to deduct and remit the union dues was made vide letters dated from 19/8/2016 to 2018.

24. The Respondents contention is that they were unable to effect the deductions and remittances as requested for various reasons. They aver that 64 of the alleged members were strangers to them and 60 had wrong Identity Cards and others protested against deductions of their dues while others indicated they had been coerced to join the union. They therefore contend that they could not deduct the dues against the employees wishes.

25. Section 48 (6) states that:-

(6) “An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union”.

26. And 55(8) indicate that:-

“Every trade union, employers’ organisation or federation has the right to:-

a) subject to the provisions of this Act:-

i) determine its own constitution and rules; and

ii) hold elections to elect its officers;

b) plan and organise its administration and lawful activities;

c) participate in forming a federation of trade unions or a federation of employers organisations;

d) join a federation of trade unions or a federation of employers organisations, subject to its constitution, and to participate in its lawful activities; and

e) affiliate with, and to participate in the affairs of any international workers organisation or international employers organisation or the international labour organisation, and to contribute or receive financial assistance from those organisations”.

27. It is thus clear that an employer cannot deduct union dues from a member who has resigned from the union. The union members write these resignations to their employer and the employer has the extra duty to notify the union by forwarding a copy of the notice of resignation to the trade union.

28. There is no indication that the employer Respondent has written to the union since 2016 to inform them of the alleged resignation from the union by its employees.

29. The Respondent annexed certain letters purportedly written by employees who had resigned from the union. The letters are all dated in year 2016 August and September (pages 427 to 786 of the Respondent’s bundle.

30. The check off forms for the Applicants run from August 2016 to February 2018 and there is no indication that these check off forms requesting deduction of union dues have been objected to by any employee.

31. The Respondents have not demonstrated that those employees on these forms have indeed written to them indicating that they have resigned from the union. If there is such resignations, the same has not been notified to the union and the end result is that the Applicant have established a prima facie case to warrant issuance of orders sought. I therefore grant the following orders:-

1. THAT the Respondent to deduct union dues from 1644 employees who have acknowledged that their union membership by signing the check off forms and remit to the Applicant/Claimant’s designation and gazetted under Account Number.

2. THAT the Respondents be and are hereby prohibited from victimising their unionised employees through unfair, unjustified, unprocedural terminations, dismissals, redundancies, retrenchments due to their or intended union membership until this case is fully heard and determined.

3. THAT the Respondent to submit the printouts of union dues deductions from their employees who are members of this union every month.

4. THAT costs of this application be in the cause.

Dated and delivered in open Court this 30th day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Museve for the Claimant – Present

Miss Okeyo holding brief Bonyo for Respondents – Present