



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CASE NO. 193 OF 2017**

**KENYA PRIVATE UNIVERSITIES WORKERS UNION.....CLAIMANT**

**VERSUS**

**KENYA METHODIST UNIVERSITY.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for resolution of a trade dispute. The Claimant union is a duly registered trade union under the law and within the meaning of the Labour Relations Act, 2007 to cater for the unionisable employees in private universities. In this dispute, the Claimant had written to the Respondent, a private university duly registered as such under the law and having various branches all over Kenya with the main campus at Meru. In the letter of 26<sup>th</sup> September 2016, the Claimant had sought to hold a meeting on 26<sup>th</sup> October 2016 to sensitize the employees of the Respondent on union activities and recruit them but the Respondent rejected the request. Upon rejection, the Claimant sought to invoke Section 62 of the Labour Relations Act, 2007 by reporting the dispute to the Minister for Labour. The dispute remained unresolved as the Respondent engaged a lawyer who was to act as the intermediary between the parties relating the requests to visit the premises for recruitment of members. The Conciliator appointed Mr. G. A. Omondi issued a certificate of disagreement in terms of Section 67 of the Labour Relations Act prompting the suit. The Claimant asserts that some of the Respondent's members have joined the Claimant by signing check off forms and the Claimant feared that the Respondent may victimize the members of the union. The Claimant was of the opinion that the Respondent had breached the workers' fundamental rights as enshrined in the Kenyan Constitution at Article 36 and 41 as well as Section 4 and 6 of the Labour Relations Act, 2007 and the ILO Convention No. 87, 98, 100 and 111. The Respondent is accused of having clearly indicted in the human resource manual that joining a trade union is not allowed at the University which action was deemed by the Claimant to be against Article 41 of the Constitution of Kenya. The Claimant compared this dispute to disputes in other universities which were enumerated and the case numbers cited including the case of an employee of the Respondent whose services had been terminated and whose case was pending before the ELRC court at time of filing the claim. The Claimant thus sought an order compelling the Respondent to allow access to the premises and compliance with Section 48 of the Labour Relations Act, 2007 by way of deducting union dues and remitting the same to the Claimant's gazetted account. The Claimant also sought an order restraining the Respondent and its agents from victimizing, coercing and or terminating the services of the Claimant's members on ground of trade union activities or affiliation; an order compelling the Respondent to sign a recognition agreement and enter into negotiation for a Collective Bargaining Agreement with the Claimant.

2. The Respondent denied that it had denied the Claimant access but that it sought the Claimant's cooperation in fixing a date that would not disrupt the activities of the Respondent. The Respondent asserts that the check off forms attached to the memorandum of claim are forgeries and that there were no members of the Claimant in the Respondent to warrant recognition of the Claimant by the Respondent. The Respondent denied breaching any provisions of the law and that the dispute between the Claimant and the Respondent was peculiar and could not be compared to disputes in other universities. It was asserted that each case should be determined on a case by case basis. The Respondent asserts that the suit referenced by Claimant related to acts of producing fake degrees and was not on account of the employee joining a trade union. The Respondent thus sought the dismissal of the Claimant's claim with costs to the Respondent.

3. Being a trade dispute, the parties consented to having the matter resolved via the provisions of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016. The parties submitted their final submissions. The Claimant submitted that the majority of the prayers sought in the dispute were granted by Ongaya J. and having not appealed and granted this Court's determination that court orders are to be obeyed unless set aside, the Respondent was bound to act in accordance with the directives from the Court. The Claimant submitted that the response filed by the Respondent was an afterthought and that the response did not disclose any defence and that it did not justify the Respondent's defiance of the rule of law and valid court orders issued on 30<sup>th</sup> May 2017. The Claimant denied that the check off forms were forgeries and submitted that no report was made to the investigative agencies for any investigations and that the allegations that these check off forms were forgeries were hollow and without factual foundation. The Claimant submitted that the court faulted the entire redundancy exercise and that the Respondent was aware the Claimant union had members before the purported redundancy which was irregularly executed. The Claimant submitted that the Respondent is still living in denial despite the union having submitted duly signed Form S containing the names of the employees who had joined the union for deduction. The Respondent was accused of refusing to comply with the law by failing to deduct the union dues and remit the same as required under Section 48 of the Labour Relations Act. The Claimant urged the court to guard against those circumventing the orders in order to justify the same. The Claimant asserts that the Respondent did not even

factor the union deductions in the final dues tabulated for the employees who received relief from court. The Claimant submitted that the Respondent had terminated employees services on account of their association and membership of the Claimant union. The Claimant in amplifying and in support of this submission cited the Respondent's Code of Conduct for Staff at paragraph 16 which reads *joining of associations, unions, etc. that cause problem at the University is discouraged. In case of such intention, advice should be sought*. The Claimant submits that the provision of this regulation offends the provisions of Article 36 and 41 of the Constitution of Kenya as read with Section 4 of the Labour Relations Act, 2007. The Claimant submitted that it is a principle of equity that he who comes to equity must do so with clean hands. The Claimant submits that it was incumbent upon the Respondent to deduct and forward union dues and does not require an existing recognition agreement for the deductions to be permitted or for access to the premises of the Respondent. The case of **Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers v B.O.G Chilchila Secondary School [2015] eKLR** where D. K. Njagi Marete J. held that under Section 48(2) Labour Relations Act set the threshold of employees required before deductions can be made. The Claimant relying on the decision submitted that the Respondent should be compelled to pay the deducted sums from their own pockets. The Court was urged to find in favour of the Claimant as prayed for in the memorandum of claim.

4. The Respondent submitted that the basis for the claim as can be discerned from the pleadings is that the Claimant asserts that it has been denied access to the Respondent's premises for purposes of recruitment of members. It is the Respondent's position that it never denied the Claimant access to the premises. Further it asserts that many of the staff who are stated to have joined the Claimant union have since left the Respondent in redundancies declared by the Respondent. The Respondent submits therefore that there is no basis for the deduction and remittance of union dues and that the court should find that there has been no curtailment of trade union activities. The Respondent asserts that the Claimant had a duty to make out a case in order to obtain judgment from the court in its favour. In that regard, the Respondent cited the decision in **Jacob Bundi Marete & Another v Chairman and Council Members Kenya Methodist University [2018] eKLR** where the court held that it is not the duty of the court to distil what the claimants' case is, if the claimants do not make out a clear case. The Respondent submits that Section 54 of the Labour Relations Act sets out the criteria for recognition by the employer. The Respondent submits that the Claimant had not attempted to show how many of the employees of the Respondent had been recruited by the Claimant union. The Respondent argues that the claim lacks merit and should be dismissed with costs.

5. The issue that was before court relates to labour relations. The dispute framed by the Conciliator was **Refusal to allow union officials talking to workers and recruit them to join the union, sack warnings to workers for distributing union materials and recruiting members to join the union**. As a point of call in the resolution of industrial disputes, the court is prompted in such a case by the Minister for Labour through a certificate when parties are unable to agree. In this case, the conciliator appointed by the Minister wrote a report dated 17<sup>th</sup> March 2017 reporting the non-resolution of the dispute. There was a report addressed to the court attached to his referral certificate. In the report he attached recommendations made albeit the said recommendations were not necessary for the certificate to be of legal effect. The matter was therefore properly before the court. Under the International Labour Organization, there is the ILO Convention 98 which relates to the right to organise and collective bargaining. ILO Convention 98 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98) was ratified by Kenya in June 1964. This Convention is concerned with the application of the principles of the right to organise and to bargain collectively. It is the premise upon which Part VII - Recognition of Trade Unions and Collective Agreements (Sections 54 to 61) of the Labour Relations Act, 2007 is founded. Under ILO Convention 98, various safeguards are given to workers and they are protected from anti-union acts. Under Articles 1 and 2 the Convention provides as follows:-

1. *Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.*

2. *Such protection shall apply more particularly in respect of acts calculated to-*

*(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;*

*(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.*

6. The Respondent from a clear reading of the code of conduct for employees paragraph 16 which reads *joining of associations, unions, etc. that cause problem at the University is discouraged. In case of such intention, advice should be sought* is a clear affront to Section 4 of the Labour Relations Act, Article 36 and 41 of the Constitution as well as Articles 1 and 2 of ILO Convention No. 98. In my considered view, this provision is discriminatory as against the employees of the Respondent who are unionisable and should not form part of the code of conduct of any self-respecting institution. If indeed there was dismissal or redundancy declared on account of union activities, that would be an affront to decency, the law of this land as well as international instruments which Kenya has ratified. However, in the matter before me, no specific case was cited where an employee was declared redundant or dismissed on account of union activities. The Claimant sought the following reliefs:-

a. the court deem fit and find that the action of the Respondent of refusal to allow the Claimant to either access her members or potential members to be null and void and order the Respondent to allow the Claimant to access her premises by meeting her members and potential members as stipulated by law

b. the Respondent be ordered to comply with Section 48 of the Labour Relations Act, 2007 by way of deducting union dues and remitting the same to the Claimant's gazette account

c. the Respondent and its agents be restrained from victimizing, coercing and or terminating the services of the Claimant members on account of union activities,

d. the Respondent be bound to sign a recognition agreement and enter into negotiation of a collective bargaining agreement

e. any other relief the court may deem fit to grant; and

f. costs of the suit.

7. No evidence was led to show that the Claimant met the threshold under Section 48. The Respondent led evidence that discounted the numbers the Claimant claimed as the employees either were no longer serving or were not actual employees of the Respondent and in some instance the employees recanted their membership of the union. In my findings, the Claimant did not prove much of the claim to permit it to be granted all the reliefs sought and only managed to show that the Respondent was engaged in anti-union acts contravening Article 41 and 36 of the Constitution of Kenya as well as the ILO Convention No. 98. As this infraction falls under the rubric of any other relief the court may deem just and fit to grant, the only outcome of the suit is to declare the code of conduct of the Respondent illegal, null and void to the extent it denied union membership to unionisable staff of the Respondent. Regarding access and other related matters, the Respondent and the Claimant have a way to resolve the issue without recourse to court. As social partners if there are union members in the Respondent, they have a right to representation by a union of their choice and deductions in terms of Section 48 would therefore be permitted if the threshold under the Act is met. Each party is to bear their own costs.

It is so ordered.

**Dated and delivered at Nyeri this 14<sup>th</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**