



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 30 OF 2018

(Formerly High Court Miscellaneous Application No.361 of 2018 at Nairobi in the Constitutional and Judicial Review Division)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

IN THE MATTER OF THE LABOUR RELATIONS ACT, 2007

BETWEEN

THE REPUBLIC

- VERSUS -

THE CABINET SECRETARY, MINISTRY OF LABOUR &

SOCIAL PROTECTION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

EX-PARTE-KENYA UNION OF SECONDARY SCHOOLS NON-TEACHING STAFF

(Before Hon. Justice Byram Ongaya on Friday 19th July, 2019)

JUDGMENT

The ex-parte applicant filed a notice of motion on 05.09.2018 through Were Lukoko & Company Advocates. The application was under section 8(2) (3) (4) Law Reform Act, Order 53 rule 1 of the Civil Procedure Rules, 2010, the Judicature Act Cap. 8, High Court (Practice and Procedure Rules (Part 1 rule 3) and all other enabling provisions of law and powers of the Court. The applicant prayed for:

- a. An order of mandamus directed at the 1st respondent to gazette the applicant's bank account held with Bank of Africa forthwith in compliance with provisions of section 48 of the Labour Relations Act 2007.
- b. That the costs of the application be provided for.

The application was based on the statutory statement, the verifying affidavit of Nahason Ndiemae and the annexed exhibits filed on 31.08.2018 and upon the following grounds:

- a. The applicant is a registered trade union as per section 19 of the Labour Relations Act, 2007.
- b. The applicant's financial base is trade union dues payable by the applicant's members.
- c. The applicant cannot get union dues deducted and remitted unless it applies to the 1st respondent to issue an order directing an employer of more than five employees belonging to the union to deduct trade union dues from the wages of its members; and pay monies so deducted into a specified account of the trade union.
- d. The applicant has necessary documentation and is seeking that the 1st respondent to issue the gazette accordingly.

- e. Despite numerous requests the 1st respondent has failed, refused or neglected to issue the relevant gazette notice.
- f. The respondent's conduct exhibits bias and partiality and is aimed at frustrating the applicant's legitimate expectation that due process and law will be followed.
- g. Nobody, including the respondents will suffer prejudice if the gazette is issued as prayed for.
- h. It is just and fair that the prayers made do issue.

The respondents opposed the application by filing on 28.11.2018 the replying affidavit of Isaiah B. Kirigua, the Ag. Labour Commissioner in the 1st respondent's Ministry. The grounds of opposition are as follows:

- a. The application is premature and it lacks merit and ought to be dismissed forthwith because the applicants have not complied with the relevant provisions of law.
- b. The 1st respondent received the applicant's letter WLC/KSSNT/01/DW dated 21.03.2018. The letter was processed towards ascertaining if the applicant had complied with provisions of section 48(2) of the Labour Relations Act for issuance of a requisite ministerial order. It was confirmed that the union was properly mandated under its registered constitution to represent all non-teaching staff in secondary schools. However section 48(2) had not been complied with since the request was to gazette a trade union bank account instead of the gazettement of an order by way of a legal notice for deduction of union dues.
- c. By the letter dated 23.04.2018 the applicant was advised through its advocates about the necessary steps and laid down procedures in section 48 of the Labour Relations Act, 2007.
- d. The applicant had failed to comply and the present suit was shocking as it lacks merits.

Section 48(2) of the Act provides that 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.

The issue for determination is first, whether the applicant has complied with the provision, and second, whether after such compliance, the 1st respondent has failed to issue the prescribed order on deduction of union dues.

The evidence is that before and in particular after the letter of 23.04.2018 the applicant had complied with all the requirements. The Act appears not to prescribe a particular form for making of an application for issuance of a gazette notice under section 48(2) of the Act. The parties appear to battle about the form. The 1st respondent says it is waiting for application in appropriate form. The Court finds that the making of the application should amicably resolve the dispute.

The Court returns that the applicant will apply in 7 days to the 1st respondent to issue a gazette notice in its favour as per section 48(2) of the Labour Relations Act, 2007 providing details of bank account and attaching certificate of registration, union constitution, and evidence of the recruited members; and the 1st respondent to issue the relevant order and published in a gazette notice by 01.09.2019. While making that finding the Court considers that the 1st respondent says it is waiting for such proper application.

Each party will bear own costs of the proceedings.

In conclusion the application is hereby determined with orders:

1. The applicant to apply in 7 days to the 1st respondent to issue a gazette notice in its favour as per section 48(2) of the Labour Relations Act, 2007 and the application to provide for details of the bank account and attaching the certificate of registration, union constitution, and evidence of the recruited members; and the 1st respondent to issue the relevant order and published in the gazette notice by 01.09.2019.
2. Each party to bear own costs of the application.

Signed, dated and delivered in court at Nairobi this Friday 19th July, 2019.

BYRAM ONGAYA

JUDGE