



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION 88 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLES 10, 22, 27, 36, 41 AND 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT 2007**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT 2016**

**AND**

**IN THE MATTER OF THE ALLEGED VIOLATIONS OF ARTICLE 27, 36, 41 AND 47 OF THE CONSTITUTION**

**BETWEEN**

**KENYA AVIATION WORKERS UNION.....PETITIONER**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**DR. ELIZABETH KALEI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Petitioner and the 1<sup>st</sup> Respondent entered into an Agreement on Recognition and Negotiation Procedure on 22<sup>nd</sup> April 2014. Consequently, they signed a CBA and had it duly registered.

Vide Gazette Notice of 16<sup>th</sup> December 2016, the Petitioner was deregistered pursuant to the decision of this Court delivered on 2<sup>nd</sup> December 2016 in Nairobi ELRC Judicial Review Application No. 1 of 2013. However, this judgment was stayed pending the Petitioner's appeal to the Court of Appeal on 3<sup>rd</sup> February 2017 in Civil Appeal No. 274 of 2016.

Aviation and Airport Services Workers Union (AASWU) appealed to the Supreme Court against the Court of Appeal stay orders following which a consent was recorded between the Petitioner and AASWU before the Supreme Court on 7<sup>th</sup> April 2017, wherein both unions, AASWU and the Petitioner, were allowed to continue carrying on with their activities.

Nevertheless, the 1<sup>st</sup> Respondent through its Managing Director wrote to the Ministry of East African Community, Labour and Social Protection on 21<sup>st</sup> March 2017, in a bid to stop deductions of union dues but the same was declined as the Ministry stated it could not do so in the absence of court orders.

On 31<sup>st</sup> August 2017, the 1<sup>st</sup> Respondent terminated negotiations with the Petitioner and issued a termination notice of the Recognition Agreement. On the same date the Respondents purported to recognize the rival Union AASWU. The Petitioner was aggrieved and instituted

this Petition on 13<sup>th</sup> October 2017 seeking the following reliefs:

1. A declaration that the decision by the 1<sup>st</sup> Respondent to issue a termination notice through the letter dated 31<sup>st</sup> August 2017 to the Petitioner is procedurally unfair, inefficient, unlawful and unreasonable and in breach of Article 47 of the Constitution.
2. A declaration that the Respondents breached Article 27 of the Constitution and violated and infringed the right to equality and freedom from discrimination of job grade S5 members of the Petitioner.
3. A declaration that the Respondents breached Articles 36 and 41 of the Constitution by preventing employees from freely associating with the Petitioner.
4. A declaration that the Respondents engaged in unfair labour practices and breached Article 41 of the Constitution by intimidating and coercing members of the Petitioner in job grade S5 employees to withdraw from membership of the Petitioner.
5. A permanent injunction restraining the 1<sup>st</sup> Respondent from terminating the Agreement on Recognition and Negotiation Procedure with the Petitioner dated 22<sup>nd</sup> April 2014 without following due process.
6. An order for certiorari to bring to this Court and quash the decision of the 1<sup>st</sup> Respondent to issue a termination notice of the Agreement on Recognition and Negotiation Procedure to the Petitioner without following due process.
7. Orders that the Respondents bear the costs of this Petition.

It is the Petitioner's case that the Respondents have made procedurally unfair, unlawful and unreasonable administrative actions which have substantially interfered with its operations and activities. The petitioner avers that the 1<sup>st</sup> Respondent failed to issue a 3 months' termination notice of the Recognition Agreement to the Petitioner, contrary to Clause 14 of the Recognition Agreement.

The petitioner avers that upon terminating the Recognition Agreement the respondent signed a recognition agreement with a rival union, AASWU without ascertaining that the rival union had a simple majority of members or that the petitioner did not have a simple majority.

That despite requesting the Petitioner and the AASWU to present their list of members to determine who had the simple majority for the purpose of recognition, the Respondents instead engaged in machinations of intimidating members of the petitioner to resign and or join the rival union. That the Respondents further failed to update the Petitioner's list of members which would have ensured it had a simple majority of 869 members.

Further, that the Respondents have discriminated against its employees of job grade S5 who are the petitioner's members by denying them the opportunity to join the Petitioner and by failing to deduct and remit their union dues, despite them signing a check off form. That the respondent has further failed to upgrade their salaries and benefits in accordance with the CBA yet there was a court order directing them to deduct and remit union dues as well as upgrade their salaries and benefits.

It is the Petitioner's position that the Respondents through their actions, have violated the petitioner's fundamental freedoms and rights and that of its members as enshrined under Articles 27, 36, 41 and 47 of the Constitution. The petitioner urges this court to grant the reliefs as sought.

Simultaneously with the petition, the Petitioner filed the Application dated 13<sup>th</sup> October 2017 seeking an injunction restraining the Respondents from terminating the recognition agreement signed on 22<sup>nd</sup> April 2014, an order of stay of execution of the letter dated 31<sup>st</sup> August 2017 and an order directing the Respondents to maintain the existing relationship with the Petitioner. The orders were granted in the interim on 13<sup>th</sup> October 2017. The Application was consolidated and argued together with the petition.

The Respondents oppose the Petition vide the Replying Affidavit and Further Affidavit of Dr. Elizabeth Nekesa Kalei. It is their case that the Petitioner is forum shopping on multiple *sub judice* matters pending before this Court hence the Petition is an abuse of the Court process. Further, the Aviation and Airport Services Workers Union has filed a suit in Court contending that the Petitioner does not have the simple majority of the 1<sup>st</sup> Respondent's employees and to have the Recognition Agreement and CBA in issue revoked.

They aver that the matters raised in the Petition are purely allegations of violation of private law obligations and not violations of fundamental human rights or freedoms. Particularly, they contend that the Petitioner does have simple majority membership within the 1<sup>st</sup> Respondent.

The Respondents aver that contrary the Petitioner's assertions, the CBA expired on 31<sup>st</sup> December 2015 and efforts to negotiate another CBA have been frustrated by the pending civil suits.

The Respondents contend that from the 367 check off forms for Job Group SG-5 issued by the Petitioner, they realized that only 329 were valid. The 329 employees were informed of the intended deductions of union dues and 322 of them voluntarily objected to the intended deductions and payments to the Petitioner between August and September 2017 on the grounds that they never subscribed to membership or signed any check off forms. They contend that the total members of the Petitioner are 565 and not 869 as alleged in the Petition while the rival union has 755 members thereby satisfying the simple majority threshold.

They aver that the unionization of job group S5 employees is a matter pending in court as these employees are part of the management and

were not supposed to have been unionisable. Further, the CBA does not confer any benefit to the said employees.

The Respondents deny intimidating its employees or violating their rights. They aver that the 1<sup>st</sup> Respondent temporarily locked inter-union transfers to allow the finalization of the census of unionisable employees as it had realized that some employees were subscribing to both unions. It is their position that the decision was reasonable, fair, justifiable and in the best interests of all parties. They further aver that the Petitioner has distorted the sequential correspondences in order to mislead the Court.

The Respondents denies victimizing the employees, refusing to pay union dues, discriminating in respect of job group S5, breaching the provisions of the CBA or giving the rival union an unfair advantage. They contend that termination notice issued to the petitioner is regular and lawful and the *ex parte* orders issued to stay the termination notice is prejudicial to the 1<sup>st</sup> Respondent and its employees. They urged this Court to dismiss the Application and Petition.

The Petitioner filed a rejoinder vide the Supplementary Affidavit of Moss Ndiema filed on 14<sup>th</sup> September 2018 denying the averments by the Respondents and contending that it never received the resignation letters. The petitioner contended that the Respondents had not challenged the Witness Affidavits of James Kabare, Loyford Nkonge and Jared Masinga in which they detailed incidents of intimidation, harassment and coercion to withdraw from membership of the Petitioner.

The Respondents also filed a rejoinder to the same vide the Further Affidavit of Dr. Elizabeth Kalei denying the allegations set out in the Affidavits and contended that the resignation letters had not been challenged. They further contended that the allegations raised in the Affidavits were vexatious, baseless, incompetent, untenable and inadmissible as they are not backed by evidence and raised issues on matters which were pending before court.

### **Submissions by the Parties**

The parties filed their written submissions and highlighted them in open court. The Petitioner submitted that the letter terminating the recognition agreement was contrary to Article 47 of the Constitution. It further submitted that paragraph 37 of the Respondent's Replying Affidavit was an admission of discrimination against the Petitioner's members in job grade S5.

The petitioner avers that the termination notice issued by the 1<sup>st</sup> Respondent through the letter dated 31st of August, 2017 (marked MN-27) was not a notice of termination but rather a termination of the Agreement on the Recognition and Negotiation Procedure by the Respondents as in the same letter; the Respondents went ahead and named the rival union as having majority of members without indication they had the majority by how many. In the said letter the Respondents did not acknowledge the check-off forms they had received from the Petitioner.

That the Respondents in their response have not disputed that the letter recognised the Rival union as having the majority despite there being a valid Agreement on the Recognition and Negotiation Procedure between the Petitioner and the Respondents.

That the Respondents cannot benefit from their own unlawful actions. They cannot coerce members of the Petitioner to resign, fail to forward the resignation letters and then terminate the Agreement on the Recognition and Negotiation Procedure on the basis of their unlawful and unconstitutional actions.

That the letter marked MN-27 refers to Section 54(1) of the Labour Relations Act, which provides:

***“An employer, including an employer in the public sector, shall recognize trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.”***

That Section 54(1) of the Labour Relations Act, does not provide a ground for the termination of a valid Agreement on the Recognition and Negotiation Procedure where there is one in place. The Petitioner had a valid Agreement on the Recognition and Negotiation Procedure and the actions by the 1<sup>st</sup> Respondent were contrary to Article 47(1) and (2) of the Constitution.

That the actions by the 2<sup>nd</sup> Respondent were inconsiderate and amounted to unfair administrative action. She had the power to receive the check-off forms forwarded by the Petitioner but refused to do so and informed the Petitioner that they had locked the process of recruiting members all amounted to the contravention of Article 47(1) and (2) of the Constitution.

That the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent subjected the Petitioner to unfair labour practices in blatant disregard of the Constitution and the Labour Relations Act. The 2<sup>nd</sup> Respondent has refused, neglected and ignored to approve check-off forms for new members joining the Petitioner in disregard of her professional duties and without giving reasonable explanations to the petitioner. The letters marked as MN-20 and MN-47 were a clear indication of the same.

That in the letter marked as MN-27 the 1st Respondent did not include the number of grade S5 members, while they were issuing the notice to terminate recognition agreement & negotiation procedure.

That the 2<sup>nd</sup> Respondent selectively and intentionally misread and misinterpreted the ruling of 6<sup>th</sup> September 2016 only in terms of union subscriptions but not in terms of benefits and increments as per the Collective Bargaining Agreement. The 2<sup>nd</sup> Respondent maliciously informed the members that the Petitioner was only interested in union subscriptions and not fighting for the welfare of the members.

That the 2<sup>nd</sup> Respondent maliciously portrayed the Petitioner as a burden to grade S5 members as the 2<sup>nd</sup> Respondent threatened to deduct and remit union subscriptions backdated to September 2016 but there was no communication on the crucial second limb of the ruling which

ordered the 1<sup>st</sup> Respondent to pay grade S5 members their salary increments as per the Collective Bargaining Agreement.

That the 2<sup>nd</sup> Respondent maliciously and unprofessionally acted in bad faith and in an unfair manner and in bad taste towards the Petitioner by punishing members who belonged to the Petitioner.

On their part, the Respondents submitted through their learned counsel that the Petitioner lost *locus standi* to file this Petition as there was no existing recognition agreement, pursuant to the letter of 31<sup>st</sup> August 2017. They rely on the case of **Kenya Union of Employees and Charitable Organizations vs. Board of Governors Maina Wanjigi Secondary School [2015] eKLR** at page 58 of the Respondent's List of Authorities, where it was held that the instant remedy available to the Petitioner in such a scenario was that provided under section 54(3) and (6) of the Labour Relations Act and the case of **Kenya Shoe and Workers Union vs. Modern Soap Factory Limited [2017] eKLR**.

Counsel further submitted that the Respondent had the right to terminate the recognition agreement under clause 14 of the same. The termination was justified because the Petitioner's membership had fallen below the legal threshold. Counsel stated that in the Ruling delivered by Wasilwa J. on 23<sup>rd</sup> October 2018, the Petitioner was directed to conduct fresh recruitment in order to obtain a simple majority.

Counsel also submitted that the constitutional remedies sought were not warranted as there were statutory remedies available to the Petitioner under section 54 of the Labour Relations Act. Counsel relied on the case of **John Atelu Omilia and Another -V- Attorney General & 4 Others [2017] eKLR** at page 24 of the Respondent's List of Authorities and **Maggie Mwauki Mtalaki vs. Housing Finance Company of Kenya [2015] eKLR** at page 36 of their Authorities. Counsel submitted that the Petitioner had not pleaded that the remedy was inadequate and had been sought in Cause 2204 of 2015 which matter was still pending before Court.

It was the Counsel's submission that Article 47 could not be invoked where there was no administrative action exercised by a judicial authority or quasi-judicial tribunal and relied on the case of **Judicial Service Commission vs. Speaker of the National Assembly & 8 Others [2014] eKLR** where the court defined what amounted to a quasi-judicial function. She posited that terminating the recognition agreement was a private contract issue and further relied on the case of **Communication Workers Union & Another vs. Communication Authority of Kenya [2015] eKLR** at page 115 of the Authorities and the case of **Humphrey Makokha Nyongesa & Another vs. Communication Authority of Kenya & 2 Other [2018] eKLR**.

Counsel also submitted that employees in job grade S5 were not discriminated against as the benefits cited in the Petition accrued from an expired CBA which was not effective at the time of filing the Petition hence cannot be relied upon as a source of right to the said employees. She concluded that the employees' rights under Article 36 of the Constitution were not violated as the impugned memo acted as a measure to ensure that the 1<sup>st</sup> Respondent did not deduct union dues to remit to a union that its employee had not subscribed to.

### **Analysis and Determination**

The issues for determination before this court are whether the petitioner has the locus standi to represent the 1<sup>st</sup> Respondent's employees, whether the Petitioner's rights and the rights of its members have been infringed as alleged and whether the Petitioner is entitled to the prayers sought.

### **Locus Standi**

Articles 22(2)(d) and 258(2)(d) allows an association acting in the

interest of one or more of its members to institute proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Further Article 4(5) provides that every union has right to engage in collective bargaining. Consequently, in so far as the Petitioner alleges that the rights of its members were infringed by the Respondents, the Petitioner has the *locus standi* to represent the interests of the members which it did by filing of this Petition. The petitioner further has a right in its capacity as a registered trade union with rights as set out under Articles 4 of the Constitution and Section 8 of the Labour Relations Act.

### **Violation of the Rights of the Petitioner and its Members**

The basis of the Petitioner's case is that the Respondents infringed on its rights as well as the rights of its members by attempting to terminate the recognition agreement, locking out members from joining its union, intimidating members to resign from its union and further by discriminating against its members in job group S5.

The basis of this Petition is the 1<sup>st</sup> Respondent's letter dated 31<sup>st</sup> August 2017 wherein it issued a Notice of Termination of the Recognition Agreement with effect from 1<sup>st</sup> September 2017, which was the next day. As rightly posited by the Petitioner, Clause 14 of the Agreement required any party wishing to terminate the Agreement to issue a 3 months' notice. By terminating the agreement without notice, the 1<sup>st</sup> Respondent breached the Agreement. A question therefore arises as to whether such termination was tantamount to a breach of a constitutional fundamental right or freedom. It is not contested that there was a recognition agreement between the petitioner and the 1<sup>st</sup> respondent. The right to enter into that agreement is protected by Article 41 of the Constitution and section 8 of the Labour Relations Act both of which were violated by the respondent's termination of the recognition agreement in the manner it did.

The arguments in the cases of **Communication Workers Union & Another vs. Communication Authority of Kenya [SUPRA]** and **Humphrey Makokha Nyongesa & Another vs. Communication Authority of Kenya & 2 Other [SUPRA]** are not relevant to this case as in the two cases there was no union membership while in the present case the petitioner has members, has a recognition agreement and had negotiated a Collective Bargaining Agreement (CBA).

Besides the rights referred to above the Respondents further violated the freedom of association of the Petitioner and its members under Article 36 of the Constitution.

The Petitioner has further accused the Respondents of intimidating its members into resigning from its membership and maliciously reduced its members in a bid to favour its rival, AASWW. The evidence on record supports the averments of the petitioner. As stated in the petition, between March and May 2017 the Respondents required the Petitioner and the rival Union, AASWW, to submit their membership for purposes of ascertaining which of the two unions had a simple majority. This is confirmed at paragraph 17 of the Relying affidavit of the 2<sup>nd</sup> Respondent. This was unnecessary as the Petitioner had a recognition agreement and did not have to prove itself. The Respondents ought to have demanded proof of majority membership only from the rival union which intended to dislodge the petitioner.

Further, the Respondents manipulated members of the Petitioner in Job Grade J5 to withdraw from membership of the union by deliberately miscommunicating the order of the court in cause 2204 of 2015 by threatening to make backdated deduction of union dues. The orders of the Court in Cause 2204 of 2015 were as follows –

- 1) *“The Respondent deducts and remits forthwith union dues from the Claimant/Applicants members in Job Grade 5 who have signed the check off forms.*
- 2) *The Respondent should not deny the said members of staff in Grade 5, the benefits and increments provided for within the CBA registered on 12<sup>th</sup> February 2015.*
- 3) *Respondent to pay cost of this Application.”*

In its Internal Memos dated 1<sup>st</sup> August 2017, 7<sup>th</sup> September 2017 and 19<sup>th</sup> September 2017 the 1<sup>st</sup> Respondent progressively threatened the members of the Petitioner with deduction of union dues backdated to September 2016. This is not a correct interpretation of the orders. This means that the deductions would be for a cumulative 12 months made in one month as a single deduction yet the order required remittance from date thereof. The memos further set out the personal numbers of all the employees who had signed check off forms to become members of the Petitioner numbering 329. The effect of this would have been financial embarrassment of the said employees who had obviously not budgeted for such a massive deduction from their salaries in one month. The consequence of this threat of deduction was the massive withdrawal of members. From 329 members at the time of writing the first memo the numbers reduced to 111 as at the time of the second memo and further to 21 as at the time of writing the third memo.

It was after this reduction of membership that the 1<sup>st</sup> Respondent purported to terminate the recognition agreement on grounds that the Petitioner did not have a simple majority of members.

This was further being done after the Respondents request to stop union deduction to the Cabinet Secretary, Ministry of East African Community, Labour and Social Protection (The CS) by letter dated 21<sup>st</sup> March 2017 had been rejected. The CS advised the Respondents that it would only act on a court order. The Respondents' further bid to achieve the termination of the recognition agreement through the National Labour Board by letter dated 5<sup>th</sup> September 2017 also failed.

With regard to the violation of the rights of the 1<sup>st</sup> Respondent's employees in job grade S5, the Respondents were bound by the Ruling of Wasilwa J. delivered on 6<sup>th</sup> September 2016. This is however a matter subject to Cause No. 2204 of 2015 and is best handled under that cause.

In light of the following, I find that the termination of the Recognition Agreement, besides breaching the said recognition agreement, infringed on the rights of the petitioner and its members under Articles 36 and 41(4) of the constitution as well as section 8 of the Labour Relations Act. I further find that the Respondents intimidated the Petitioners members into resigning from the membership of the petitioner with the aim of reducing its membership thereby violating the petitioner's and its members rights to collective bargaining and freedom of association. I also find that the Respondents coerced the Petitioners members into leaving its membership.

I further find that the Respondents gave unfair advantage to a rival union to the Petitioner's disadvantage instead of being a neutral party thereby discriminating upon the petitioner and its members. I further find that the Respondents actions amounted to unfair labour practice.

For these reasons I make the following orders-

1. A declaration be and is hereby issued that the decision by the 1<sup>st</sup> Respondent to issue a termination notice through the letter dated 31<sup>st</sup> August 2017 to the Petitioner is procedurally unfair, unlawful and unreasonable and in breach of Article 27, 36 and 41 of the Constitution as well as section 8 of the Labour Relations Act.
2. A declaration be and is hereby issued that the Respondents breached Articles 36 and 41 of the Constitution by preventing its employees from freely associating with the Petitioner.
3. A declaration be and is hereby issued that the Respondents engaged in unfair labour practices and breached Article 41 of the Constitution by threatening and harassing members of the Petitioner and job grade S5 employees.
4. A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> Respondent from terminating the Agreement on Recognition and Negotiation Procedure with the Petitioner dated 22<sup>nd</sup> April 2014 without following due process.

5. An order for *certiorari* be and is hereby issued to bring to this Court and quash the decision of the 1<sup>st</sup> Respondent to issue a termination notice of the Agreement on Recognition and Negotiation Procedure to the Petitioner without following due process.

Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**