



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 272 OF 2019

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

-VERSUS-

KENYA CREDIT TRADERS LIMITED.....RESPONDENT

RULING

Introduction

1. The claimant union brought the suit herein on 25.4.2019 seeking the following reliefs:-

- i. Recognize the Claimant Union as a properly constituted and representative body and the sole labour union representing labour interests of their employees.
- ii. Deduct and remit union dues from all union members who have signed the Claimant's Check off Sheets and pay any other outstanding funds as Gazetted by the Minister with interest at court rates.
- iii. Engage the Claimant in collective bargaining within thirty (30) days upon signing Recognition Agreement.
- iv. Meet the costs of this suit in favour of the Claimant.

2. Simultaneously with the suit, the claimant filed the Notice of Motion dated 25.4.2019 under certificate of urgency seeking the following orders:-

1. THAT this Application be certified urgent and heard exparte in the first instance.
2. THAT service of this Application/Claim upon the Respondent be dispensed with
3. THAT pending hearing and determination of this matter, this Honourable Court be pleased to issue Orders restraining the Respondent from victimizing, intimidating, coercing, harassing, terminating, dismissing or disciplining the Claimant/Applicant's member whose names appear on the check-off sheets on account of their Trade Union membership
4. THAT pending hearing and determination of this matter this Hon. Court do and hereby orders the Respondent to respect employees' right of freedom of Association.
5. THAT this Honourable Court sets this matter for hearing and determination on priority basis.
6. THAT costs of this Application be provided for in favour of the Claimant/Applicant.

3. In response to the Notice of Motion, the respondent filed Notice of Preliminary Objection (P.O) dated 13.5.2019 praying for the striking out of the proceedings before the court on the following grounds:-

1. The dispute revolves around non recognition the Claimant by the Respondent as a Trade Union under Section 54(1) of the Labour Relations Act, 2007.

2. Under section 54(6) the dispute ought to have been referred to the Minister for conciliation under the provisions PART VIII of the Act.

3. The procedure provided under PART VIII of the Act ought to first be exhausted before resorting to Court under Section 74(1) of the Act, which has not been done.

Respondent's Submissions

4. The respondent submitted that on 2.4.2019, the claimant wrote to her a letter (Annexure 9) forwarding Recognition Agreement and requesting for a meeting on 9.4.2019 to execute the same. That the letter was copied to the Nairobi County Labour Officer among others. However, she protested by a letter to the Labour Cabinet Secretary (C.S) that the claimant was not the right union to represent her employees. She copied the letter to the claimant.

5. The respondent further submitted that, on 10.4.2019, the claimant wrote a letter to the Labour C.S reporting a Trade dispute between the two parties herein. The dispute reported was the same dispute herein, namely failure to recognise the applicant as a Trade Union, and refusal by her to deduct and remit union dues. That the letter amounted to reference under section 54(6) of the Labour Relations Act (LRA) because it requested the Labour C.S to set into motion the machinery of settlement of the dispute.

6. The respondent further submitted that upon reporting of the dispute to the Labour C.S, the latter had 21 days within which to appoint a conciliator under section 65(1) of the LRA or give reasons for not appointing one under section 65(3) of the Act. She submitted that, having referred the dispute to the Labour C.S, the claimant was barred from filing the instant suit because one cannot have two disputes running parallel before the court and the Labour C.S. He relied Kenya **Union of Printing, Publishing Paper Manufacturers and Allied Workers Union Vs Colour Creations Ltd** referred to in **Kenya Union of Printing, Publishing, Paper and Manufacturers, Pulp and Packaging industries Vs Raffia Bags (EA) Ltd [2014]eKLR** to urge that once parties have taken the route of pre-industrial court conciliation, the process should be exhausted before the parties move to court.

7. The claimant submitted that the P.O is misplaced because under section 74 and 57 (6) of the LRA, unions have a right to move to court under urgent referrals if dispute regarding Recognition of a trade union; Redundancy/Retrenchment of employees without notice; employer/employee, are engaged in essential services; and if a matter concerning a CBA remains unresolved after it has been referred to the Minister.

8. The claimant submitted that the justification for referring dispute to court under certificate of urgency is to protect the employees from any form of victimization arising from union membership which is rampant with most anti-union employers. She contended that the reason why the employer insists on the conciliation process is to provide her with opportunity to victimize the employees because of their union affiliation.

9. The claimant admitted that she reported the dispute to the Labour C.S under section 62 of the LRA but denied that she was barred from filing the suit under section 74 of LRA before the conciliation process was exhausted under section 69 of the Act. She concluded by stating that she properly brought the suit in compliance with section 74 of the LRA and prayed for the P.O to be dismissed with costs.

Analysis and determination

10. There is no dispute that the claimant referred the dispute herein to the Labour C.S under section 62 of the LRA for conciliation on 10.4.2019 before filing this suit in court on 25.4.2019. The issue for determination is whether the suit herein should be struck out for being brought filed prematurely.

11. Section 73 & 74 of the LRA deal with referral of dispute to this Court. Section 73(1) provides that:-

“(1) if a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.”

There are however exceptions to the foregoing where the dispute is one which involves unprotected strike or lockout; or if it involves essential service in which case the dispute may be referred to the court by a party and the Minister respectively.

12. Section 74, on the other hand provides;

“A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns:-

a. The recognition of a trade union in accordance with section 62; or

b. A redundancy were –

i. the trade union has already referred the dispute for conciliation under section 62(4); or

ii. the employer has retrenched employees without giving notice; or

c. Employers and employees engaged in an essential service.”

13. From the reading of section 74 of the Act, a trade dispute concerning recognition of a Trade Union can be referred to this Court under certificate of urgency even before referring it for conciliation under section 62 of the Act. It however, appears under section 73 of the Act that once a dispute is referred to conciliation under section 62, the same can only be brought to this court after the conciliation process is exhausted unless the dispute involves any of the exceptions set out under section 73. The said exceptions are if the dispute concerns unprotected strike or lockout referred to court by a party to the dispute or if the dispute involves essential service referred to court the Labour C.S.

14. In this case, the dispute is recognition of a trade union and the claimant has admitted that she referred the dispute to the Labour C.S for conciliation under section 62 of the LRA. It follows therefore that the suit herein ought not to have been brought until the conciliation process was exhausted as required under section 73 of the Act. The said finding is fortified by **Kenya Union of Printing, Publishing, Paper Manufacturers, Pulp and Packaging Industries Vs Bags (E.A) Limited [2014]eKLR** where Radido J. also found that section 74 of the LRA has not made conciliation of recognition disputes mandatory before urgently referral to the court but observed that:-

“But once the parties have taken the route of Preindustrial Court conciliation, the process should be exhausted before the parties move to court.”

15. In view of the foregoing, I return that the suit before the court is premature and should not proceed parallel with the conciliation process before the Labour C.S. I therefore strike it out with costs. If the employees’ rights are threatened while the conciliation proceedings are pending, the claimant will always be welcome back to court but in the appropriate way.

Dated, Signed and Delivered in Open Court at Nairobi this 20th day of September, 2019

ONESMUS N. MAKAU

JUDGE