



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1312 OF 2017

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

VERSUS

KENYA HYDRAULICS LIMITED.....1ST RESPONDENT

PEOPLELINK CONSULTANTS LIMITED.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th October, 2019)

JUDGMENT

The claimant union filed the memorandum of claim on 12.07.2017 through its General Secretary Wycliffe Amakombo Nyamwatta. The claimant prayed for judgment against the respondent for:

- a) The declaration that the action of the respondent to outsource the core business unfair and unlawful and declare it null and void.
- b) An order against the respondent from replacing the claimant members by outsourced employees.
- c) An order against the respondent not to declare any member of the claimant redundant without following due process of the Parties' CBA.
- d) An order against the respondents that all unionisable employees who were in employment of the 1st respondent when the current CBA was negotiated and registered be remunerated on the same level without taking into account whether they are in employment of either of the respondents so long as they are working in the 1st respondent's company.
- e) The respondents be ordered to comply with section 48 of the Labour Relations Act, 2007 by way of deducting and remitting union dues.
- f) Any other relief the Honourable Court may deem fit to grant.
- g) The respondent to pay costs of the suit.

The claimant's case is that it has recognition and collective agreements with the 1st respondent. Both claimants employ workers in the sector the claimant union is entitled to recruit and represent employees. The claimant's further case is that its 15 members being employees of the 1st respondent are due to be absorbed by the 2nd respondent under some outsourcing arrangements between the respondents. 6 employees have already been moved to the 2nd respondent under such outsourcing arrangements. Further the respondents have failed to deduct and to remit union dues per section 48 of the Labour Relations Act, 2007. The 1st respondent has victimised some workers by way of unfair disciplinary or redundancy proceedings. After engagement by the 2nd respondent in the outsourced arrangements the previously 1st respondent's employees do the same job under less favourable terms and conditions of service as negotiated in the collective agreement between the 1st respondent and the claimant union. Such employees have re-joined the union and check-off forms served upon the respondents. A trade dispute has been reported to the Cabinet Secretary for labour in that regard.

The memorandum of claim was filed together with a notice of motion and the respondent opposed the application by filing on 27.09.2017 the replying affidavit of Balvinder Singh Sagoo through D.K. Githinji & Company Advocates. The respondent also filed submissions on the application on 27.09.2017. By consent of the parties the main suit was to be determined on the basis of the material on record hence this judgment.

The replying affidavit opposes the claimant's case upon the following grounds:

- a) The outsourcing arrangements are not aimed at denying any employee their respective jobs.
- b) Outsourcing has not precipitated discrimination, victimization, dismissals or redundancies.
- c) No dismissal or redundancy had been carried out in contravention of the applicable law and as per the details on affected employees in paragraphs 5 to 8 of the replying affidavit.
- d) The employees who have joined the 2nd respondent have done so after lapsing of their respective contracts with the 1st respondent. Such employees have continued to be paid by the 2nd respondent at the rate as they used to be paid by the 1st respondent as per paragraph 13 of the replying affidavit.
- e) The claimant served check-off forms for persons who had ceased to be the respondent's employees.
- f) The claimant is entitled to conclude recognition and collective agreement with the 2nd respondent as may be appropriate.
- g) The 1st respondent has continued to remit union dues to the claimant for its employees being union members.

The 2nd respondent did not file any papers in the suit.

The Court has considered the replying affidavit and the claimant offered no evidence to rebut the 1st respondent's case.

While making that finding the Court returns that the claimant has not shown that the 1st respondent has breached any of the principles for a credible outsourcing program as was held in **The Wringley Company (East Africa) Limited –Versus-The Honourable Attorney General & 3 Others [2013]eKLR**, thus:

- a) ordinarily, employers are not expected to outsource their core functions;
- b) an employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;
- c) an employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and
- d) outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.

The Court finds that the 1st respondent has explained the circumstances under which some employees left its employment. In absence of any other material on record there is no need to doubt the explanation and in any event such separations would constitute separate causes of action outside the scope of the present suit.

The Court considers that in furtherance of good industrial relations between the parties, each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the 1st respondent against the claimant for dismissal of the claimant's suit with orders each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 25th October, 2019**.

BYRAM ONGAYA

JUDGE