



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 1915 OF 2014

**KENYA UNION OF ENTERTAINMENT &
MUSIC INDUSTRY AND EMPLOYEES.....CLAIMANT**

VERSUS

SPORT STADIA MANAGEMENT BOARD.....RESPONDENT

RULING

1. In my ruling delivered on 23rd June, 2017 I did order among others that: -

(a) The respondent did not validly revoke the recognition agreement between it and the Claimant as is required by Section 54(5) of the Labour Relations Act. The respondent lacked the capacity to enter into another recognition agreement with KUDHEIHA.

(b) There was however a registered CBA between the respondent and KUDHEIHA. The registration was done on 8th July, 2015. The court would not disturb the status quo but would order that KUDHEIHA do not negotiate a new CBA upon expiry of the current one and that the Claimant unless validly and procedurally replaced would continue to enjoy recognition for purposes of CBA negotiations with the respondent.

(c) The respondent should remit to the Claimant unpaid union dues and agency fees for the period of 2011 up to September, 2015 when the CBA with KUDHEIHA was registered.

2. Pursuant to this ruling the Claimant on 19th October, 2017 filed an application dated same day seeking an order that the respondent Director General Saima Ondima appear in Court in person to show cause why she should not be committed to Civil jail for contempt of Court. The basis upon which the application was brought was that the respondent had failed and or ignored to obey the orders of the Court issued in the ruling delivered on 23rd June, 2017. That is to say the respondent continues to recognize the Claimant for purposes of CBA negotiations until such time that the Claimant shall be validly be de-recognized in accordance with the Labour Relations Act and further that the respondent remits to the Claimant unpaid union dues and agency fees for the period 2011 up to September, 2015 when the CBA with KUDHEIHA was registered.

3. According to the Claimant the CBA lapsed in July, 2017 and the Claimant forwarded a proposal via a letter dated 1st September, 2017 proposing joint partes meeting on 25th September, 2017 at the respondent premises which the respondent declined.

4. The respondent never responded to the application and on 12th February, 2018 the Court granted the application dated 19th October, 2017 as prayed.

5. On 12th April, 2018 the Court ruled that in view of the affidavit sworn by Saime Ondima to which Mr. Muchuha for the respondent had not responded, the Court would dispense with the requirement that Saima personally appears before the Court and that the Court would proceed to determine the Contempt application dated 19th October, 2017 on merits.

6. In his affidavit in response to the application Mr. Ondima stated among others that the Claimant failed to disclose to the honourable Court that on 24th January, 2018 with regard to the same dispute between same parties the Court issued orders resulting with the Court condemning the respondent twice on the same dispute. He further stated that the respondent had complied with the orders of the Court and paid Kshs. 500,000/= on 14th August, 2015, via cheque number 1159, Kshs. 250,000/= via cheque number 11722 dated 14th October, 2015 and Kshs. 795,230/= via cheque number 15674 dated 20th February, 2018. The Claimant acknowledged the payment but stated that the respondent still owed agency fees.

7. According to the respondents, the amounts paid to the respondent were agency fees and union dues as per the Court order of 24th January,2018.
8. Regarding recognition Mr. Ondima stated that the Court directed that the dispute submitted to Court for determination had already been overtaken by events following the registration of the CBA between the respondent and KUDHEIHA and further that the respondent derecognized the Claimant union by writing to the National Labour Board informing the Board of the same. According to Ondima, in view of the above, the respondent had complied with the Court order.
9. In response to depositions by Mr. Ondima , Mr. Muchua for the Claimants stated among others that the Claimant was in agreement with paragraph 1,2(a) and (b) of Mr. Ondima's affidavit but stated that it should be understood that the issue in dispute in the main suit was CBA negotiation over which the Court issued orders directing that the respondent continues to recognize the Claimant for purposes of future CBA negotiations until such time as the Claimant should have validly de-recognized the Claimant in accordance with the Labour Relations Act.
10. Mr. Muchua conceded that to a certain extent that payments had been made but that they had requested for a breakdown so as to know whether the payment was in full since the CBA had expired. He further stated that the Union dues or agency fee was not the main issue in dispute in the suit before the Court but rather in cause number 781 of 2014.
11. According to Mr. Muchuha the CBA expired at the end of July,2017 but the Claimant had declined to negotiate with the Claimant hence going against the order of the Court.
12. On 19th of July,2018 I directed that the parties file submissions on two issues namely non-payment of Union dues and agency fees and second, the position of each party concerning negotiations for July 2017/2019 CBA.
13. Mr. Muchuha in his submissions stated that it was not in dispute that after filing the current application in Court, the respondent's CEO paid some agency fees but not all and that she had refused to sit down with the Claimant to put the records clear so as to agree on the right figure.
14. Concerning 2017/2019 CBA he submitted that the CBA between the respondent and KUDHEIHA had expired but the respondent had refused negotiate a new CBA with the Claimant as ordered by the Court.
15. Ms Kanyiri on the other hand submitted that the Claimant failed to disclose to Court that an application dated 6th August, 2015 had sought similar orders for citing the then respondent's Director General Mr. Gabriel Komora for contempt.
16. On 24th January,2018, Honourable Lady Justice Maureen Onyango directed the respondent to remit all monies deducted on account of union and agency fees within 30 days. According to Ms Kanyiri the respondent complied with the Court's direction to pay within 30 days of 24th January,2018.
17. According to Kanyiri the respondent complied with the Orders of the honourable Court with respect to outstanding payments and made the same. Further the Claimant vide a letter dated 26th February,2018 confirmed that the respondent had complied with the Court Order but indicated that the respondent owed the Claimant agency fees which amount or balance of was not tabulated or justified. The respondent on its part had provided a breakdown of all outstanding union dues and agency fees owing to the Claimant from the respondent's records for the year 2011 to 2015 amounting to Kshs. 1,295,229.86 which amount the respondent paid in full. According Mr. Kanyiri there has been no response from the Claimant challenging the said amount nor has the Claimant provided a contrary tabulation or information with regard to outstanding union dues.
18. Concerning recognition of the Claimant union Ms. Kanyiri submitted that the Court had already determined that the respondent having entered into a CBA negotiation with KUDHEIHA, the Claimant's prayers were overtaken by events. Ms. Kanyiri further submitted that the respondent derecognized the Claimant union by writing to the National Labour Board as almost all employees of the respondent had joined KUDHEIHA and negotiated CBA agreement thereby complying with the Court order.
19. The application herein dated 19th October, 2017 was for an order directed to Saima Ondima the Director General of the Respondent to appear before the Court in person to show cause why she should not be committed to Civil Jail for contempt of Court Orders. The basis upon which the application was made was that by ruling of this Court made on 23rd June,2017 the Court stated that the respondent shall continue to recognize the Claimant for purposes of future CBA negotiations until such time that the Claimant shall be validly derecognized in accordance with Labour Relations Act. The Court further stated that the respondent shall remit to the Claimant unpaid union dues and agency fees for the period of 2011 up to September,2015 when the CBA with KUDHEIHA was registered.
20. An application for contempt is a quasi criminal process. If granted it can lead to loss of liberty or property of a citizen. The evidence in support of the application must be beyond peradventure.
21. Concerning the issue of payment of agency fees and union dues the Claimant has not come out emphatically that they have not been paid. All the Claimant is saying is that the respondent has refused to furnish the tabulation or sit down with the Claimant to tabulate the same. It is the Claimant who is alleging that union dues and agency fees have not been paid as per the order of the Court; it is therefore incumbent on it to state how much the agency fee and union dues are and how much remain unpaid after receiving the sum of Kshs. 1,295,299.86 from the respondent. Besides the Claimant has stated that the instant application and suit is not so much concerned with union dues and agency fees but with negotiations for 2017/2019 CBA which the respondent has refused to engage with the Claimant.
22. On this score, the evidence against the respondent to support an order for contempt is either not there or if there, does not meet the required threshold for a finding of contempt.

23. On the second issue of CBA negotiation the respondent has maintained that it derecognized the Claimant when it wrote to the National Labour Board on 12th January ,2015 stating therein that the respondent had had a recognition agreement with the Claimant since 2009 however in 2014 most of its members resigned to join another Union (KUDHEIHA) en masse. The respondent then applied to have the recognition terminated forthwith.

24. Section 54(5) of the Labour Relation Act provides as follows: -

(5) An employed, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.

25. Further subsection (6) provides as follows: -

(6) If there is a dispute as to the right of a trade union to be recognized for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with provisions of par VIII.

25. Whereas the LRA provides for an application by an employer etc. to the Labour Board to terminate a recognition agreement, the Act seems to be silent on what happens when the National Labour Board does not respond on time. According to the respondent the application to the Labour Board for de-recognition finalized the matter whether the Board responded or not. To the Claimant the recognition agreement was still valid as per the ruling of this Court delivered on 23rd June, 2017. This ruling on this aspect of the dispute the Court now realizes could have been made per incuriam or premature of the provisions of section 54(6).

26. That having been said, the issue in contestation between the parties is whether the respondent validly derecognized the Claimant or not. The LRA provides for mechanism for resolution of disputes of this nature hence an application for contempt is inappropriate recourse in the circumstances.

27. In conclusion the Court finds and holds that the contempt application is not merited and the same is hereby dismissed with no order on costs.

28. It is so ordered.

Dated at Nairobi this 18th day of October, 2019

Abuodha Jorum Nelson

Judge

Delivered this 18th day of October, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge