REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 45 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

VERSUS

HEBATULLAH BROTHERS LIMITED.....RESPONDENT

RULING

Before me for determination is the Applicant's Notice of Motion filed on 28th January 2019. It seeks the following Orders:

1. Spent.

2. That this Court deem fit and issue interim orders against the Respondent by herself, agents or servants from victimising or discriminating the Applicant's members pending the hearing and determination of this suit.

3. That any increment given to employees to coerce them from the same department so as to withdraw from the Claimant union be given to all unionisable employees in the said department by an interim Order of this Court pending the hearing and determination of this suit.

4. That interim order be issued against the Respondent to produce the audited financial statement for the past 2 years (April 2016 to March 2018), produce its wage bill and number of staff for both unionisable and management and the salary for the lowly paid management staff and highly paid unionisable employees.

5. Any other Orders that the Court may deem fir to grant.

6. Costs of this application.

The Application is premised on grounds that:

1. The Respondent has refused to produce the required documents for negotiation and that the refusal has caused a stalement between the parties during the negotiation which has prompted the Claimant to invoke section 62 of the Labour Relations Act.

2. The Applicant reported the trade dispute and the Respondent started threatening the Applicant's members and has managed to coerce some to withdraw from the Union by giving them 7.5% salary increment but left out all those who had declined to withdraw membership. This action amounts to discrimination.

3. The Respondent herein is using salary increment to coerce the applicant's members and make them lose confidence in her ability of representation so as to withdraw membership.

The application is supported by the Affidavit of Wycliffe Nyamwatta sworn on 23rd January 2018 in which he reiterates the grounds on the face of the application.

In response to the application, the respondent filed a Replying Affidavit sworn by Zoeb Kapacee, the Respondent's Human Resource Manager on 12th February 2019. He deposes that the matters in issue do not fall under section 54 and 57 of the Labour Relations Act and that the jurisdiction of this Court is not properly invoked. Further that a conciliator has since been appointed and the Applicant rushed to Court before the Conciliator discharged his mandate.

He deposes that the Respondent has over 480 unionisable employees with 29 being members of the Applicant. That in 2016 the Applicant negotiated a CBA for 2 years despite having only 49 of its employees being members of the Applicant and that after the expiry of the 2 years, 20 of the Applicant's members resigned from the Applicant and joined Kenya Glass Workers Union with whom the Respondent has an active CBA expiring in the year 2020.

He avers that though the Applicant does not meet the threshold for recognition, the Respondent was willing to negotiate a CBA with similar terms as those of the Kenya Glass Workers Union. However, the Applicant rejected the proposal. He further avers the Respondent has not discriminated or victimised any of the Applicant's members as alleged.

Despite the court directing the parties to file written submissions, neither party filed its written submissions.

Determination

Having considered the application and affidavits by the parties, that the issues for consideration are whether the Respondent should be compelled to produce its register of employees including their salaries and whether the Applicant has proved that the respondent has discriminated and coerced the Applicants' members to resign from the union.

The applicant avers that the respondent has refused to produce documents it requires for negotiation. The Respondent on its part avers that of its 480 employees the Applicant has only recruited 29 members thus it has not met a simple majority for recognition. Further that the previous CBA was entered into despite not having attained a simple majority by having only 49 of its employees as the Applicant's members amongst whom 20 have since resigned and joined the Kenya Glass Workers Union.

The respondent does not deny that it has a Recognition Agreement with the applicant. Indeed, it is the respondent's case that it negotiated a Collective Bargaining Agreement (CBA) with the claimant for the period 1st April 2016 to 30th March 2018. They were in the process of negotiating the next CBA for the period starting 1st April 2018 when the dispute herein arose.

The Applicant contends that the Respondents action is contrary to Section 57 of the Labour Relations Act, which provides that an employer that has recognised a trade union is to conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.

Section 57 of the Labour Relations Act provides as follows –

> **57. Collective agreements.**
>
> **(1) An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.**
>
> **(2) For the purpose of conducting negotiations under subsection (1), an employer shall disclose to a trade union all relevant information that will allow the trade union to effectively negotiate on behalf of employees.**
>
> **(3) All the information disclosed by an employer as specified in subsection (2) is confidential and shall not be disclosed by any person to a person who is not engaged in the negotiations.**
>
> **(4) An employer is not required to disclose information that–**
>
> > **(a) is legally privileged;**
> >
> > **(b) the employer cannot disclose without contravening a prohibition imposed on the employer by any law or an order of any court;**
> >
> > **(c) if disclosed, may cause substantial harm to the employer or employee; or**
> >
> > **(d) is private personal information relating to an employee, unless an employee consents to the disclosure of that information.**
>
> **(5) If there is a dispute about what information is required to be disclosed in accordance with the provisions of this section, any party to the dispute may, in writing, refer the dispute to the Minister for conciliation.**
>
> **(6) If a dispute remains unresolved, after it has been referred to the Minister under subsection (5), any party to the dispute may refer the dispute to the Industrial Court under a certificate of urgency.**
>
> **(7) In any dispute about an alleged breach of confidentiality, the Industrial Court may order that the right to disclosure of information be withdrawn for a period specified by the court.**
>
> **(8) No person shall disclose any confidential information disclosed under this section to a person who is not a party to those negotiations.**

Section 57 elaborately provides for the right of a trade union to information relevant for negotiation of a CBA and for a union which has been denied the information to approach this court for appropriate orders.

The respondent argued that the dispute is premature as a Conciliator was appointed and the claimant came to court before the Conciliator concluded the matter. From the evidence on record, the dispute was reported to the Minster by the claimant's letter dated 17th October 2018 and a Conciliator appointed by letter dated 2nd November 2018. According to Section 69 of the Labour Relations Act, a dispute is unresolved if not resolved within 30 days. Section 69 provides –

> **69. Dispute unresolved after conciliation.**
>
> **A trade dispute is deemed to be unresolved after conciliation if the?**
>
> **(a) conciliator issues a certificate that the dispute has not been resolved by conciliation; or**
>
> **(b) thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires.**

Further, Section 57(6) permits the union to refer a dispute to this court under certificate of urgency if not resolved after it has been referred to the Minister. This dispute was referred to this court under certificate of urgency on 28th January 2019, more than 30 days from the date of report of the dispute to the Minister or the date of appointment of a Conciliator. It was therefore referred in compliance with the law and is not premature.

The other matters raised by the respondent in the replying affidavit of ZOEB KAPACEE, the Human Resource Manager, are irrelevant to the dispute herein. I however do not find any evidence of coercion of members of the claimant to resign or victimisation of the members.

For the foregoing reasons, I make the following orders –

1. The respondent is directed to produce the audited financial statement for the past two (2) years (April 2016 – March 2018), wage bill and number of staff, both unionisable and management and salaries of the unionisable staff and lower level management staff to the union within 30 days.

2. The claimant is directed to treat the information with confidence a provided in Section 57.

3. Both parties are reminded that failure to comply with these court orders constitute an offence punishable as provided in the Labour Relations Act and the Employment and Labour Relations Court Act.

4. Each party shall bear its costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE