



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1347 OF 2018**

(Before Hon. Lady Justice Maureen Onyango)

**KENYA PRIVATE UNIVERSITIES WORKERS UNION.....CLAIMANT**

**VERSUS**

**DON BOSCO UTUME SALESIAN THEOLOGICAL COLLEGE....RESPONDENT**

**JUDGMENT**

The Claimant filed a Notice of Motion and Memorandum of Claim on 31<sup>st</sup> August 2018 alleging victimisation of its members and the refusal by the Respondent to deduct union dues. The Court directed that both the Application and the Claim be heard simultaneously by way of written submissions.

The Claimant seeks the following prayers in its Memorandum of Claim:

1. That the Respondent be ordered to comply with Section 48 of the Labour Relations Act, 2007 by way of deducting union dues and remitting the same in the Claimant's gazetted bank account.
2. That the Court to issue a permanent order of injunction barring prohibiting the Respondent by herself , its agents and representatives from coercing, victimising and or terminating services of the Claimant's members on ground of trade union activities/affiliation
3. That the Respondent be compelled to sign a recognition agreement with the Claimant
4. That any other relief which the Court may deem fit to grant
5. That costs of the suit be met by the Respondent.

The Claimant avers that check off forms were signed by the Respondent's employees on 23<sup>rd</sup> January, 2018. However the Respondent has refused to implement the said forms. It avers that on 23<sup>rd</sup> February 2018 the Respondent's Administrator initiated a meeting and demanded that the Union recruits afresh and each form be signed by one member. It avers that it objected to this request as it was not founded in law.

It avers that vide a letter dated 9<sup>th</sup> March 2018 it reported a trade dispute to the Minister and that the Conciliator advised the Respondent to immediately deduct union dues as per Form S. It avers that the Respondent did not oppose the advice. Nonetheless, it completely ignored the advice.

It avers that by its letter dated 14<sup>th</sup> June 2018 it again supplied the Respondent with its membership details. However the Respondent coerced its employees to withdraw from the union.

The Respondent filed a Statement of Response on 5<sup>th</sup> October 2018. It avers that the Claimant held a meeting with its employees on 23<sup>rd</sup> January 2018 but its employees were not aware of what they were signing. It avers that the Claimant misrepresented the deductible amount payable by the employees and as such the signing of Form S was not voluntary.

It avers that the employees signed Form S, which was misrepresented to them as being an attendance register. It avers that the purported check-off form was not implemented as the employees objected to the Respondent remitting the proposed amount and demanded that the

Union officials be summoned for a meeting.

It avers that it demanded that the Claimant recruits its employees afresh in order to disclose the amounts payable but the Claimant turned down the request on grounds that it was not founded in law.

It avers it did not oppose the Conciliator's advice to immediately deduct the dues as per Form S but failed to comply because its employees wrote letters withdrawing their intended consent to join the Claimant. It avers that it has been willing to remit the employees' contribution to the Claimant but the Claimant has ignored its request to clarify the issue of the deductible amount.

The Claimant in its Notice of Motion application seeks the following reliefs:

1. Spent
2. That prohibitory order be issued against the Respondent restraining herself and/or her agents from coercing and victimising her unionisable employees and or Applicant members on ground of trade union affiliation/activities.
3. That pending the hearing and determination of the suit, the Court issue and Order against the Respondent compelling her to comply with mandatory provision of the law (section 48 of the Labour Relations Act, 2007) by way of deducting and remitting union dues from the Applicant members who have duly signed Form S.
4. That any other order the Court be deems fit to grant for the ends of justice to materialise.
5. That Costs and incidentals of this Application be provided for.

The Application is supported by the affidavit of Peter Emisembe Owiti, the Claimant's General Secretary, sworn on 31<sup>st</sup> August 2018. It is premised on grounds that the Union has on diverse dates forwarded the properly signed Form S but the Respondent has failed to comply with Section 48 of the Labour Relations Act.

In response to the Application, the Respondent filed Grounds of Opposition in 5<sup>th</sup> September 2018 and a Replying Affidavit sworn by Fr. Paul Nyaga the Respondent's Administrator on 13<sup>th</sup> September 2018.

It objects to the application on grounds that the application is misconceived and is an abuse of the court process and that the Claimants are strangers and lack *locus standi* to bring this suit against the Respondent under Section 54 of the Labour Relations Act.

In his Replying Affidavit, Fr. Paul Nyaga avers that its employees involuntarily signed Form S which it believed to be an attendance form. He further avers that the employees objected to the remitting of the union dues and that the Union has turned down its request seeking clarification of the dues payable. He contends that the Respondent does not object to its employees joining the trade union.

### **Claimant's Submissions**

The Claimant submits that the Respondent's refusal to deduct and remit union dues after it was served with Form S offends Article 36 and 41 of the Constitution and Section 48(3) of the Labour Relations Act.

It submits that the check-off form containing the 21 names of the recruited members who were unionisable employees of the Respondent was forwarded to the Respondent on 24<sup>th</sup> January 2018 and was to be effected from the month of February 2018. It relies on the case of **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (Kudheiha) v British Army Training Unit Kenya [2015] eKLR**.

It submits that the non-implementation by the respondent of check-off forms constituted an offence contemplated under section 82 of the Labour Relations Act.

In respect of recognition agreement the Claimant submits that the union is the right union to represent the industrial interest where the Respondent operates as it had recruited more than a simple majority of unionisable employees engaged by the Respondent. It submits that out of the 25 unionisable employees, 21 are members of the Union. It relies on **Kenya Petroleum Oil Workers Union v Kenol Mahavir Service & another [2017] eKLR**.

It submits that the Preliminary Objection lacks merit as it does not raise any points of law and lacks evidence. It relies on the case of **Kenya Union of Commercial, Food and Allied Workers v Water Resource Management Authority & another [2015] eKLR** and submits that the Respondent has not met the requirements for a preliminary objection. It further submits that the issues raised in the claim invite the court to interrogate and make a finding.

### **Respondent's Submissions**

The Respondent submits that the recruitment of its employees into the Union was vitiated by fraudulent misrepresentation and fraud.

The Respondent submits that it invited the Claimant to meet its employees for purposes of recruitment into the Union. It submits that the Claimant scanned the meeting attendance sheet and purported it to be the check off forms. It submits that the claimant's action was a well-

planned occurrence and fraudulent misrepresentation since the Union knew that the employees were signing an attendance sheet and not a check off form.

It submits that the Court in *Transport and Allied Workers' Union v Kenya Bus Services Ltd [2014] eKLR* declared null and void the agreements arrived at through misrepresentation of facts.

It submits that during the meeting the Claimant's officials informed the employees that the deduction would be 1% of their salaries yet the instructions in the check off forms was that deduction was at the rate of 1.5% of their salaries.

It is the Respondent's submission that the Claimant is trying to coerce its employees to join the union yet the constitution provides for freedom of association.

### **Determination**

The main issues for determination are:

1. Whether the Claimant has *locus standi* to institute the suit
2. Whether there was misrepresentation or fraud in recruitment of members
3. Whether the Respondent should be compelled to remit union dues
4. Whether the Respondent should be compelled to recognise the Claimant.

### **Whether the Claimant has *locus standi***

The Respondent in its Grounds of Opposition avers that the Claimant has no *locus standi* to bring the suit against the Respondent under section 54 of the Labour Relations Act. Section 54(1) of the Labour Relations Act provides:

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

In accordance with this section recognition is only for purposes of collective bargaining and not representation. An employee becomes a member of a union upon payment of membership fees and becomes entitled to representation upon becoming a member. I find that the Claimant has locus to file the instant suit as it has recruited members among the employees of the respondent as demonstrated by the check off forms (Form S) filed in court and thus dismiss the Respondent's objection.

### **Whether there was misrepresentation of fraud in the recruitment of members**

The Respondent avers that there was misrepresentation in the recruitment of members and on the dues payable. It avers that the Claimant scanned the meeting attendance list and purported it to be a check off list. The purported attendance list was not produced in Court. Further, the minutes held on 28<sup>th</sup> February 2018 state that the members were to be issued with individual check off forms thus this was a consensus in respect of the disputed check-off forms. I find that there is no sufficient evidence to prove that there was misrepresentation, fraud or coercion in the recruitment of the Union's members.

### **Whether the Respondent should be compelled to remit union dues**

The Claimant avers that the Respondent has failed to remit Union dues despite submitting Form S to the Respondent and the Conciliator's advice requiring it to immediately remit the dues. The Respondent on the other hand avers that Form S was involuntarily signed and that its employees had withdrawn from the union. In addition, it is its case that it is willing to remit the union dues save for the failure by the Claimant to clarify on the payments.

The Claimant produced a check-off form annexed to its claim as UTU-6 in respect of 22 employees of the Respondent. The Claimant's case is that the Respondent coerced its employees to withdraw from the union as stated in the email dated 1<sup>st</sup> February 2018. The Respondent's witnesses Genetrix Muhongo Konzolo, John Kaburu Mwai and Wamaitha Grace Kariuki in their witness statements stated that Genetrix informed the employees of the Conciliator's decision on the immediate deduction of union dues but the employees objected to it and proceed to write a common letter withdrawing their consent to join the union.

The letter withdrawing from the Union is with respect to 17 employees. The Claimant in its submissions urged the Court to disregard the Witness Statements but did not produce any evidence that none of its members, employees of the Respondent, has resigned from the Union. I find that there is no proof that the Respondent has coerced its members to resign from the Union as three of the Union members who acknowledged resigning from the union did not cite any coercion by the Respondent.

Section 48(6) of the Labour Relations Act provides that no deduction is to be made with respect to an employee who has in writing informed the employer of his/her resignation from the Union. Therefore, the letter dated 14<sup>th</sup> June 2018 addressed to the General Secretary and copied to the Respondent's administrator was sufficient notice that the 17 employees had resigned from the Union. Based on this, it is my finding that the Respondent cannot be compelled to remit dues in respect of the 17 employees. However, the Respondent is under obligation to

deduct the dues payable in respect of the remaining five employees at the agreed rate of 1.5% as stated in the check off form.

**Whether the Respondent should be compelled to recognise the Claimant**

The Claimant submits that the Respondent should be compelled to sign a Recognition agreement with the Respondent in line with Section 54(1) of the Labour Relations Act. It contends that 21 out of the respondent's 25 employees are its members.

Section 54(1) of the Labour Relations Act provides that an employer is to recognise a union that represents a simple majority of the unionisable employees. From the above, it is evident that the Claimant has only five (5) members, which is not a simple majority. Further, in spite of the withdrawal of seventeen (17) employees there is no proof of the exact number of the employees of the Respondent who are unionisable. The Claimant has therefore not proved that it is qualified for recognition under Section 54(1) of the Act.

The Claim is allowed in respect of prayer 1 only for the five members. **The respondent is hereby ordered to comply with Section 48 of the Labour Relations Act, 2007 by way of deducting union dues from the five members and remitting the same in the claimant's gazetted bank account and in respect of any other employee who may be recruited by the union.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF NOVEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**