



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 668 OF 2019**

**KENYA PRIVATE UNIVERSITY WORKERS UNION.....CLAIMANT/ APPLICANT**

**-VERSUS-**

**ALJAMEA TUS SAIFIYAH CAMPUS NAIROBI.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

**RULING**

The claimant filed the claim on 08.10.2019 through Peter Emisembe Owiti, the claimant's General Secretary. The claim is for judgment against the respondent for the respondent to permit the claimant access to the respondent's premises to recruit members, the respondent to comply with section 48 of the Labour Relations Act, 2007 by deducting and remitting union dues to the claimant's account, the respondent be restrained from victimising, harassing, or terminating its employees on account of trade union activities or membership in the claimant and costs of the suit. Together with the statement of claim the claimant filed the notice of motion under section 12 of the Employment and Labour Relations Court Act, 2011; section 56 and 74 of the Labour Relations Act, 2007 and all other enabling provisions of the law. The application was supported with the annexed affidavit of Peter Emisembe Owiti and his further affidavit filed on 07.11.2019. It was for orders:

- 1) That the application be heard ex-parte in the first instance.
- 2) The matter be certified urgent and be heard on priority basis in the first instance.
- 3) The prohibitory orders be issued against the respondent restraining herself and her agents from victimising her unionisable employees of the claimant or applicant union members on ground of trade union affiliation or activities till the hearing and determination of the suit.
- 4) The prohibitory orders be issued against the respondent to comply by 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 the check off forms pending the hearing and determination of the suit.
- 5) Any other order the Honourable Court may deem fit to grant.

The claimant's grounds in support of the application are as follows:

- a) The claimant is a duly registered trade union.
- b) Section 56(3) of the Labour Relations Act, 2007 allows matters of refusal of access by employers to be referred to the Court.
- c) The respondent has violated its unionisable employees' right to associate as provided for in Articles 36 and 41 of the Constitution of Kenya, 2010; sections 4 and 6 of the Labour relations Act, 2007 and ILO convention No. 87, 98, 100, and 111.
- d) The claimant has visited the respondent at its Langata Campus severally in July and August 2019 and recruited 242 members who are employed by the respondent and the employees have signed the check off form S for deduction of union dues.
- e) The claimant has written on 16.07.2019 to the respondent's management for a meeting on 07.08.2019. The respondent's advocates, Kangethe, Waitere & Company Advocates replied by the letter dated 06.08.2019 that the respondent is an Arabic Religious Organisation and is not a private university or college and as such it is not obligated to grant the claimant the request for a meeting. The claimant's request was therefore declined.

f) The claimant has reported a trade dispute and the respondent failed to attend the conciliation meeting fixed for 10.09.2019 and 25.09.2019. Accordingly, the conciliator by the letter dated 30.09.2019 issued the certificate of unresolved dispute in accordance with section 67(a) of the Labour Relations Act, 2007.

g) Over 50 % of the respondent's employees have joined the claimant but they have called the claimant to report that the respondent is coercing them to withdraw membership to avert victimization.

h) Section 48 of the Labour Relations Act, 2007 entitles the claimant to deduction and remittance of union dues by the respondent for the recruited members but the respondent has failed to comply.

i) On 01.11.2019 the claimant has recruited 6 more members.

j) The respondent has refused to grant the claimant access for recruitment of more members and lawful trade union activities.

The respondent has opposed the application by filing on 08.11.2019 the replying affidavit of Zoeb Kapacee, the respondent's trustee. The grounds of opposition are as follows:

a) The respondent has not breached rights for its employees or the claimant as alleged for the claimant.

b) The respondent has informed the claimant that it is not a university or college and therefore it falls outside the sector the claimant is permitted to recruit members.

c) The respondent is a religious organisation registered under the Ministry of Education to offer basic education under the IGCSE curriculum and it does not offer tertiary education as per exhibited certificate of registration.

d) The claimant can recruit employees only from the private universities and colleges.

e) The check-off forms were not served upon the respondent but the respondent saw them in Court.

f) Of the 242 recruited employees only 64 of them are the respondent's employees and the 64 have denied joining the trade union or signing the check off forms. The remaining 178 are employed by companies the respondent has contracted to provide cleaning services and security services so that they are not the claimant's employees.

g) The respondent having not notified the respondent about the recruited employees, the respondent was entitled not to participate in the conciliation proceedings.

The claimant has filed on 19.11.2019 the affidavit of Peter Emisembe Owiti in response to the replying affidavit. The claimant urges further as follows:

a) The respondent deliberately refused to participate in the conciliation proceedings.

b) Exhibit ZK4 on the replying affidavit is clear that the respondent styles itself as a university because in that agreement for provision of security services, it identifies itself as "**Aljamea Tus Saifiyah University**." Further in a letter exhibited as Appendix 2 on the affidavit in response, the respondent stated that redundancy was due to reduced workload in the university.

c) The certificate of registration was to mislead the registering authorities at the time of registration because on the ground the respondent engages in the business of universities.

d) The check off forms could not have been served without a protective order to shield members from the respondent's likely victimisation and harassment.

e) The remaining 178 employees after allegedly 64 withdrew membership are the ones who are keen to exercise their right to join the trade union.

The Court has considered the parties' affidavits, submissions and the exhibits. The Court makes findings as follows:

1) The parties are in agreement that the claimant's constitution allows the claimant to recruit in the sector of private universities. The respondent has exhibited the certificate of registration dated 08.06.2017 showing that it is a basic education institution. However, in the top page of the agreement for provision of security services the respondent describes itself as "**Aljamea Tus Saifiyah University**" and further the letter exhibited on the affidavit in response to the replying affidavit the respondent described itself as a University. The rest of the pages on the service agreement for security services is not legible. The service contract on cleaning services is not exhibited or is part of the illegible exhibits. The Court returns that the respondent has failed to explain why it has described itself as a university and by its own evidence, the Court returns that as urged for the claimant it is engaged on the ground in the business of private universities so that on a balance of probability at this interlocutory stage, there is no reason to find that the claimant is not the sector trade union.

2) As relates to outsourced services, the details of the service are illegible and in any event there was no evidence before the Court for a finding that the 178 workers who have signed Form S for check-off deduction and to signify membership of the trade union are

not employed by the respondent but by the alleged outsourced service providers.

3) Thus the Court returns that the applicant has established that it is the sector union on a balance of probabilities and is entitled to recruit the employees in the respondent's establishment per section 14 (1) (e) of the Labour Relations Act, 2007 and section 54 of the Act. Further the claimant has established that it is entitled to the deduction and remission of union dues per section 48 of the Act.

4) The Court finds that it is law that the employees shall not be victimised or harassed or terminated for joining or participating in lawful activities of a trade union per section 46 of the Employment Act, 2007 and the claimant is entitled to a remedy in those terms pending the hearing and determination of the suit.

5) The Court has considered that the union dues to be deducted and remitted are out of earnings of the employees who have joined the union so that the respondent will not suffer prejudice in that respect.

In conclusion the application filed herein for the claimant on 08.10.2019 and dated the same 08.10.2019 is hereby allowed with orders for:

1) The prohibitory order hereby issued against the respondent restraining herself and her agents from victimising her unionisable employees of the claimant or applicant union members on ground of trade union affiliation or activities till the hearing and determination of the suit.

2) The order hereby issued directing the respondent to comply by 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 the check off forms pending the hearing and determination of the suit; and the due deductions to commence and to continue on monthly basis not later than for the salary or wage for end of January 2020 till the hearing and determination of the suit.

3) The parties to seek to compromise the main suit failing, to take steps for the expeditious hearing and determination of the suit.

4) The costs of the application in the cause.

**Signed, dated and delivered in court at Nairobi this Thursday, 19th December, 2019.**

**BYRAM ONGAYA**

**JUDGE**