



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 983 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 18th December, 2019)

KENYA SHIPPING CLEARING AND

WAREHOUSES WORKERS UNIONCLAIMANT

VERSUS

VEGPRO (K) LIMITED.....1ST RESPONDENT

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....2ND RESPONDENT

RULING

1. The Claimant herein filed its Claim on 29th May, 2017 before this Honourable Court for determination. The same was filed under certificate of urgency together with the Notice of Motion Application dated on even date seeking the following Orders:-

1. ***THAT*** this Honourable Court be pleased to certify this Application as extremely urgent, services be dispensed with and it be heard *ex parte* in the first instance (Spent).
2. ***THAT*** there be temporary injunction restraining the 1st Respondent from sacking, victimizing, intimidating and harassing employees until the hearing and determination of this suit (Spent).
3. ***THAT*** this Honourable Court be pleased to direct and order the 1st Respondent to stop deductions and remittances of the sixteen (16) workers their union dues forthwith and refund the deducted union dues since 28/7/2016 to date.
4. ***THAT*** the 2nd Respondent to return the Union dues of the sixteen (16) employees from the time they stopped deductions 28/7/2016 to date.
5. ***THAT*** this Honourable Court be pleased to direct and order the 2nd Respondent from interfering with our sector mandate by the Applicants/Claimants Constitution.

2. The Application is premised on the grounds that:-

- a) ***It is true that all the workers of the 1st Respondent have never signed check-off forms forwarded to the 1st Respondent by the 2nd Respondent as the law requires under Section 48 of the Labour Relations Act, 2007.***
- b) ***The 1st Respondent herein forcefully and deliberately deducted the entire employees without being served form 'S' by the 2nd Respondent as a requirement of joining a Trade Union as the law requires.***
- c) ***The Applicant/Claimant is the right Trade Union to represent the 1st Respondent's employees as it operates within the sector and is thus mandated by its constitution to represent the employees.***
- d) ***The Applicant/Claimant has by now managed to recruit 205 members of the Applicant/Claimant union and still continuing recruiting despite the threats from the Respondents.***

3. The Application is further supported by the Affidavit of **JAMES O. TONGI**, the General Secretary of the Claimant Union sworn on 29th May, 2017 in which he reiterates the grounds on the face of the Motion.

4. Further, the Claimant union in their Memorandum of Claim sought to be granted the following reliefs:

- a) *The Applicant/Claimant is the appropriate Trade Union to represent the 1st Respondent's employees.*
- b) *The 2nd Respondent to cease forthwith to represent the 1st Respondent's employees as no employee joined the 2nd Respondent.*
- c) *The 2nd Respondent is not the appropriate trade union to represent the 1st Respondent's employees.*
- d) *If the Court finds that the 2nd respondent is well mandated to represent the 1st Respondent's employees, the employees be given a chance to decide by secret ballot.*
- e) *The 1st Respondent to stop deducting the employees who resigned from the 2nd Respondent union dues forthwith.*
- f) *The Respondents to pay the cost of the suit.*

5. In response to both the Application and the main Claim the 1st Respondent through the firm of Okweh Achiando & Company Advocates filed a Notice of Preliminary Objection dated 1st July, 2019 and filed in Court on 2nd July, 2019, in which they raise the following grounds:-

1. ***THAT*** this Honourable Court lacks jurisdiction to entertain this Application and the Claim as the subject matter of the Application and the Claim falls within the province of Section 62 (1) (a) & (b) of the Labour Relations Act, 2007.

2. ***THAT*** the Application and the Statement of Claim are in breach of Section 54 (1), (2) and (3) of the Labour Relations Act, 2007.

3. ***THAT*** the Application and Statement of Claim as drawn are in contravention of Sections 57(1) and 59 of the Labour Relations Act, 2007.

4. ***THAT*** the Application and the Statement of Claim are in breach of Section 31 (2) of the Labour Relations Act, 2007 as the Secretary General of the Claimant has also sued the Respondent in ELRC Cause No. 1415 of 2018 as Kenya Shipping Clearing Freight Logistics and Warehouses Workers Union.

5. ***THAT*** the Application and Statement of Claim as drawn and filed are in contravention of the principles enumerated in the Civil Appeal No. 22 of 2016; Railways and Allied Workers Union Vs Rift Valley Workers Union (K) & Another (2017) eKLR and in Cause No. 751 of 2017.

6. ***THAT*** the Application and Statement of Claim as drawn and filed are in contravention of Order 5 of the Civil Procedure Rules, 2010 read together with Rule 11 and 1st Schedule Form 2 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

6. The matter was thereafter fixed for hearing on 18/9/2019 when this Honourable Court directed that the Preliminary Objection be heard first and that parties proceed to file their written submissions to the same.

Submissions by the Parties

7. In support of the Preliminary Objection filed herein, the 2nd Respondent submitted that the same ought to be allowed as prayed as the Claimant /Applicant ignored, neglected and failed to observe the Dispute Resolution Mechanisms as provided under Section 62 to 69 of the Labour Relations Act, 2007.

8. It is further contended that there is no evidence in the Claim showing that conciliation ever took place and there is no certificate for the same under Section 69 (a) of the Labour Relations Act, 2007.

9. It is further submitted that the issues raised by the Claimant herein do not fall under the ambit of Section 74 of the Labour Relations Act, 2007.

10. On the issue of the Claimant's recognition as a trade union as provided under Section 54 of the Labour Relations Act, 2007, the 2nd Respondent submitted that there is no formal relationship between the Claimant/Applicant and the 1st Respondent as there is no signed and valid recognition agreement between the Claimant and the 1st Respondent. The 2nd Respondent further contends that in absence of a signed and valid recognition agreement the Claimant Union remains a stranger to the 1st Respondent.

11. It is further submitted that where two unions are competing for membership in an industry, simple majority threshold must first be realized and that voting by way of secret ballot to determine simple majority is tantamount to seeking recognition through the backdoor.

12. The 1st Respondent relied on the Court of Appeal decision in the case of Civil Appeal No. 22 of 2016; **Railways and Allied Workers Union Vs Rift Valley Railways Workers Union (K) & Another (2017) eKLR** for emphasis.

13. In conclusion, the 2nd Respondent urged this Honourable Court to strike out the entire suit with costs to the 2nd Respondent.

Claimant's Submissions

14. On the other hand, the Claimant submitted that its rights as enshrined under Article 22 (1) and 36 (2) of the Constitution of Kenya have been violated by the Respondents herein. It further contends that the Orders sought in the Application dated 29/5/2017 ought to be allowed as prayed as they touch on its rights.

15. The Claimant further urged this Honourable Court to consider its Application and proceed to dismiss the Preliminary Objection raised with costs and grant the remaining orders as sought in the Notice of Motion Application dated 29th May, 2017.

16. In conclusion, the Claimant urged this Honourable Court to dismiss the Preliminary Objection with costs to the Claimant.

17. I have examined the averments of both Parties herein. The 1st Respondent contends that this claim falls under Section 62(1)(a) & (b) of the Labour Relations Act and therefore the claim is in breach of Section 54(1) & (3) of the Labour Relations Act 2007 and also Section 57(1) & 59 of the Labour Relations Act 2007.

18. The claim and application herein by the Claimant sought orders to compel the 1st Respondent to recognise them as the right union to represent the workers of the 1st Respondent and not the 2nd Respondent herein.

19. They also sought orders to compel the 1st Respondent to stop deducting union dues from employees who resigned from the 2nd Respondent union.

20. Indeed the issues herein relate to recognition and demarcation of different trade union.

21. Section 54(6) of the Labour Relations Act 2007 states as follows:-

“If there is a dispute as to the right of a trade union to be recognised 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 the provisions of Part VIII”.

22. The term used in this Section is ‘**may**’ an indication that the trade union may or may not refer the dispute for reconciliation. Failure by the Applicant/Claimant to refer this claim for conciliation is therefore not fatal and the Preliminary Objection cannot succeed in that respect.

23. I find the Preliminary Objection not merited and I direct the Claim to proceed accordingly.

24. Interim orders in main application to be extended according.

25. Costs in the cause.

Dated and delivered in open Court this 18th day of December, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Araka holding brief Makali for Claimant – Present

Ashioya holding brief Muchiri for Respondent – Present