



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1283 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

KENYATTA NATIONAL HOSPITAL BOARD.....1ST RESPONDENT

CABINET SECRETARY FOR EAST AFRICAN COMMUNITY, LABOUR &

SOCIAL PROTECTION.....2ND RESPONDENT

-AND-

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,

HOSPITALS AND ALLIED WORKERS (KUDHEIHA).....1ST INTERESTED PARTY

STEPHEN K. RUTEERE & 19 OTHERS.....2ND INTERESTED PARTY

JUDGMENT

There are five parties to this suit, the claimant, 1st and 2nd respondents and 1st and 2nd interested parties.

The claimant is a trade union registered in Kenya to represent nurses. The first respondent Kenyatta National Hospital, a state corporation, has been sued in its capacity as a hospital employing nurses who are members of the claimant.

The 2nd respondent, the Cabinet Secretary for East African Community Labour and Social Protection is sued in its capacity as the Regulator of Trade Unions.

The 1st Interested Party is a trade union registered in Kenya to represent employees engaged in the sectors set out in its constitution which includes employees of hospitals.

The 2nd interested party is a group of persons engaged by the 1st respondent as nurses of different levels and in different departments of the 1st respondent hospital. They have been joined to this dispute on their application in their capacity as members of the claimant.

The issues in dispute as set out in the amended memorandum of claim are as follows –

1. Refusal to deduct and remit trade union dues.
2. Refusal to sign a Recognition Agreement
3. Unprocedural and unlawful Recognition Agreement between the 1st respondent and 1st Interested Party.
4. Unprocedural and unlawful gazettment of Legal Notice No. 1845 of 8th February 2013.

Other than the memorandum of claim and the amended memorandum of claim the claimant filed a plethora of documents as follows –

1. Grounds of opposition and replying affidavit in reply to respondent's notice of preliminary objection (both dated 12th August 2016).
2. Notice of motion dated 18th August 2016 seeking leave to amend claim to join 2nd respondent.
3. Submissions to preliminary objection dated 28th July 2016 (dated 20th September 2016).
4. Notice of motion dated 4th November 2016 application for contempt proceedings.
5. Notice of motion dated 22nd November 2016.
6. Notice of preliminary objection dated 13th April 2017.

The 1st respondent did not do better than the claimant. It filed the following documents –

1. Replying affidavit of Calvin Nyachoti dated 28th July 2016.
2. Notice of motion dated 28th July 2016 seeking orders to join the 1st Interested Party.
3. Grounds of opposition dated 28th July 2016.
4. List of documents dated 28th July 2016.
5. Response to petition (*sic*) dated 28th July 2016.
6. Submission on preliminary objection dated 28th July 2016 (dated and filed on 15th September 2016).
7. Notice of motion dated 17th October 2016.
8. Replying affidavit of Calvin Nyachoti dated 15th December 2016.
9. Preliminary objection dated 7th February 2017.
10. Grounds of opposition dated 17th February 2017.
11. Submissions on preliminary objection dated 28th February 2016 (dated 19th February and filed on 20th February 2016)
12. Notice of preliminary objection dated 28th July 2016
13. Preliminary objection dated 5th April 2017.

The 2nd respondent filed a replying affidavit of JOSEPH AJANGA YIDA dated 22nd February 2012. The 1st interested party filed the following documents: -

1. Notice of motion dated 10th August 2016.
2. Submissions on preliminary objection dated 28th July 2016 (dated 21st September 2016)
3. 1st interested party's statement of response.

The 2nd interested party filed the following documents –

1. Notice of motion dated 21st September 2016 for orders to be enjoined to the claim as Interested Party.
2. Replying affidavit of STEPHEN KABURIA RUTEERE in response to preliminary objection of 1st respondent dated 5th April 2017.
3. Statement of response to 2nd Interested Party.

When this matter first came before me on 21st November 2017, my attention was drawn to the three notices of preliminary objection and several applications that had not been disposed off, I directed that the pending applications be argued by way of written submissions together with the claim.

I will therefore set out all the issues arising from the amended memorandum of claim, the notices of preliminary objections and the applications that are still pending for determination and handle them together.

In the amended memorandum of claim the claimant prays for the following reliefs –

1. That the 1st respondent be directed to pay the claimant from its kitty all sums of monies owing to the claimant as union dues which the 1st respondent has neglected, failed and/or refused to deduct from its members' wages who name appear in the check-off forms (Form S) from the date of receipt and remit the same in the claimant's bank account.
2. The court issues an order directing the 1st respondent to sign a formal Recognition Agreement with the claimant union and conclude a Collective Bargaining Agreement with the claimant.
3. That the court direct the 1st respondent to comply with the mandatory provisions of Section 48 and 54 of the Labour Relations Act, No. 14 of 2007, Laws of Kenya, with regard of trade union dues.
4. That the court be pleased to grant an order directing the 2nd respondent (Cabinet Secretary), Ministry of East Africa Community, Labour & Social Protection to revoke the Kenya Gazette Notice No. 1845 of 8th February 2013 authorizing the 1st respondent to deduct agency fee and remit to the 1st Interested party (KUDHEIHA).
5. That the court be pleased to grant an order revoking the Recognition Agreement between the 1st respondent and the 1st interested party.
6. That the court be pleased to grant such orders or relief as it deems fit and just in the circumstances.
7. That the cost of this suit be borne by the respondent.

All the other issues in the many documents filed by the parties revolve around the issues in the amended claim.

The 1st respondent filed a response to the claim in which it denies the averments in the claim specifically the 1st respondent avers that the claimant has not complied with Sections 48, 49, 50 and 54 of the Labour Relations Act, that it has a Recognition Agreement with KUDHEIHA the 1st Interested Party, that the employees alleged to have been recruited into the membership of the claimant have not resigned from membership of KUDHEIHA and that the claim is *res judicata* having been adjudicated in Cause No. 756 of 2015 between the same parties. It further avers that it would be unfair for the respondent to make deductions for two different unions from the employees.

On the list of employees recruited by the claimant, the respondent avers that the claimant has included names of employees who are not nurses, names of deceased employees, retired employees and employees who left the 1st respondent's employment under other circumstances. The 1st respondent prays that the claim be dismissed with costs.

The 2nd respondent filed a replying affidavit of JOSEPH AJANGA YIDA who deposes that there are no grounds for enjoining the 2nd respondent to these proceedings as it complied with its mandate under the Labour Relations Act by appointing a Conciliator, inviting parties for conciliation meetings and issuing certificate of disagreement when conciliation failed thus paving the way for filing of the present case. It prays that its name be struck off these proceedings.

The 1st Interested Party filed a statement of response to the claim in which it avers that it has a Recognition Agreement with the 1st respondent and has concluded several collective agreements with the 1st respondent which cover nurses. It further avers that the claimant's suit is *res judicata* as a similar suit was filed by the claimant in Cause No. 756 of 2012.

The 2nd interested parties filed a statement of response in which they state that on diverse dates between 20th June and 3rd July 2016 they applied to be members of the claimant by notice as provided under Section 48 of the Labour Relations Act, that they have a right to join a union of their choice under Articles 41, 25, 19 and 20 of the Constitution as read with Section 4 (1) of the Labour Relations Act. They further aver that they cannot be forced into joining membership of the 1st Interested Party.

The 2nd Interested Parties aver that the present claim is different from Cause No. 756 of 2012. They pray that the claim be allowed.

Determination

I have considered all the pleadings filed in this suit as already set out herein before, notices of preliminary objection and all pending applications. I have further considered the written submissions of the parties. The issues for determination in my considered opinion are the following –

1. Whether this suit is *res judicata*.

2. Whether the 2nd interested parties legally resigned from membership of the 1st interested party.
3. Whether the claimant has achieved a simple majority of the nurses in the employment of the 1st respondent to qualify for recognition.
4. Whether the 2nd respondent issued Gazette Notice No. 1845 of 8th February 2013 irregularly.
5. Whether the claimant is entitled to the remedies sought.

1. Whether this suit is *res judicata*

The 1st respondent and 1st Interested Party aver that the suit filed herein is *res judicata* as the same parties and the same issues were the subject of Industrial Court Cause No. 756 of 2012. A copy of a ruling in the case is annexed to the affidavit of CALVIN NYACHOTI supporting the motion dated 28th July 2016. None of the parties availed a memorandum of claim in that claim.

From the ruling I gather that the prayers sought in the notice of motion were as follows –

- i. That the application be certified as urgent and heard ex-parte in the first instance.
- ii. That the court be pleased to order the respondent to pay from its kitty, all the monies it would have except for its refusal/failure and/or negligence deducted from its employees wages and remitted to the claimant as trade union dues since the date the remittance became due after the employees first joined the claimant union forthwith.
- iii. That the court do direct the respondent to comply with the mandatory provisions of Section 48 of the Labour Relations Act, No. 14 of 2007, Laws of Kenya with regard to deduction of trade union dues.
- iv. That the respondent be prohibited/restrained and enjoined from harassing, intimidating, victimizing, unlawfully declaring redundant, wrongfully dismissing or unfairly terminating the contract of employment for the claimant's members whose names appear in the check-off notices appended in the memorandum herein.
- v. That the respondent be directed to pay to the claimant from its kitty the sums due and owing the claimant as union dues which the respondent has neglected/failed and/or refused to deduct or remit from members whose names appear in the check-off notices appended in the memorandum herein forthwith.
- vi. That the court order interest on (2) at the prevailing commercial rates to be paid to the claimant forthright.
- vii. That the court do issue order containing a penal notice to punish for contempt any contemnor to the award reached by civil jail or fine.
- viii. That the court issue order to the respondent to sign a formal recognition agreement with the claimant sent to the respondent and acknowledged receipt on 18th September 2012 forthwith.
- ix. That the court be pleased to grant such orders or relief as it deems fit and just in the circumstances.
- x. That cost be provided for by the respondent.

The motion was dismissed on grounds that the applicant (claimant herein) did not comply with Sections 48, 50 and 54 of the Labour Relations Act.

In the present suit the recruitments were done between 20th June and 3rd July 2016 as averred by the 2nd Interested Parties and supported by the list attached to the affidavit of STEPHEN KABURIA RUTEERE. It is therefore clear that these recruitments could not have been the subject of Cause No. 756 of 2012. The reason why the suit was dismissed was because the claimant did not comply with the procedure of settlement of disputes as provided in the Labour Relations Act. That procedure was complied with herein as is set out at paragraphs 13 to 23 of the amended claim and in the 2nd respondents replying affidavit at paragraphs 5 to 15 therein.

Although the issues in the suits appear to be similar, they relate to different times and recruitment, one being in 2012 and the other in 2016. The court further takes note that recruitment of employees is a continuous exercise and the same facts may lead to different findings when considered at different points in time.

In this case I find that the claim herein is not *res judicata* for the reasons stated above.

2. Whether the 2nd interested parties resigned from membership of 1st interested party

Resignation from membership of a trade union is supposed to be by letter addressed to the trade union with a notification to the employer for purposes of stopping further deduction of union dues. The resignation takes effect a month after the date of receipt by the employer. Section 48 (7) provides that "**A notice of resignation referred to in subsection (6) takes effect from the month following the month in which the**

resignation is given.”

In the present case there were several resignations by some members of the claimant among them the 2nd Interested Parties. However none of the resignations were addressed to the 1st Interested Party from whose membership they were resigning and there is no evidence that the respondent notified the 1st Interested Party of the resignations. I have seen the letters from some of the 2nd Interested Parties addressed to the 1st respondent and copied to the claimant. These are not resignations from the 1st Interested Party as the letters do not state that the members have resigned from membership of the 1st Interested Party. The letters which are identical with a space for filling in the name and particulars of the employee by hand, only inform the 1st respondent that the signatory is a member of the claimant.

Furthermore, an employee cannot be a member of more than one trade union as would be implied by the letters written to the 1st respondent by the 2nd Interested Parties.

For these reasons I find that the 2nd Interested Parties, though desirous of joining the claimant, failed to effectively resign from membership of the 1st Interested party.

3. Whether the claimant has achieved a simple majority of the nurses in the employment of the 1st respondent

The evidence before the court does not state the total number of unionisable nurses of the 1st respondent. None of the parties submitted check-off Forms signed by the unionisable nurses in the 1st respondent's employment who have joined the membership of the claimant. It is therefore this court's finding that there is no proof before the court to enable it determine whether or not the claimant qualified for recognition by the 1st respondent.

Further no evidence has been submitted to the court ascertaining how many of the nurses have resigned from the membership of the 1st Interested Party and joined the membership of the claimant.

This issue is important because for an employer to recognise the union there must be a simple majority. The same however does not necessarily apply for termination of Recognition Agreement. Thus for one union to require an employer who has a recognition agreement and has negotiated collective agreements with another union to recognise it, it must prove much more than a simple majority. What would be in issue in such a case is not only the membership but also the Collective Bargaining Agreement. The new union would therefore have to prove that it has a critical mass, much more than a simple majority to warrant the employer terminating the existing recognition agreement and transferring the collective agreement to the new union.

In the present case there is a further complication as the claimant can only represent nurses and not the other employees of the 1st respondent.

All these issues must be addressed before the claimant can claim entitlement to recognition by the 1st respondent. As of now, this has not been done and I must therefore return a finding that the claimant has not persuaded the court that it is qualified and entitled to recognition by the respondent based on the evidence before the court.

4. Whether the 2nd respondent issued Gazette Notice No. 1845 of 8th February 2013 irregularly

No evidence has been placed before the court to suggest that Gazette Notice No. 1845 of 8th February 2013 was issued irregularly and should be revoked by the court. It is not clear from the pleadings of the claimant what it is unhappy with as the Gazette Notice affects all employees who are benefiting from the collective agreement negotiated by the 1st Interested Party including those whom the claimant has no interest in.

Section 49 requires the 2nd respondent to issue such a gazette notice upon proof that the union seeking gazette has negotiated a collective agreement with the employer and there are employees who are benefitting from the collective agreement but are not members of the union which negotiated the collective agreement.

I find that there is no proof of irregularity in the gazette notice.

5. Whether the claimant is entitled to the remedies sought

The claimant prayed that the court orders the 1st respondent to pay from its kitty all sums of monies owing to the claimant as union dues which the 1st respondent has neglected, failed or refused to deduct. The amount is not specified. The members from whom the deductions were to be made and the relevant period is also not specified. It is an ambiguous prayer that is incapable of being ascertained. It is therefore not possible for the court to make any orders in respect thereof with the result that it is dismissed.

The claimant further prayed for an order of formal recognition. As I have already found above, the claimant has not proved that it is qualified for recognition by the 1st respondent based on the evidence before the court. This prayer likewise is dismissed.

The third prayer by the claimant is for an order directing the 1st respondent to comply with the mandatory provisions of Sections 48 and 54 of the Labour Relations Act with regard to union dues. This prayer is vague, ambiguous and incapable of being granted as the two sections provide for many different matters that cannot be granted in blanket as prayed. This prayer must fail for non-specificity. The same is dismissed.

The prayer to revoke the gazette notice cannot be granted for reason already stated above. The prayer to revoke the recognition agreement between the 1st respondent and the 1st Interested Party likewise cannot be granted for two reasons. First that the claimant has not proved it is qualified for recognition by the 1st respondent and secondly the 1st Interested Party has membership beyond the constituency of the claimant who can represent only nurses. Even were the court to find that the claimant has qualified for recognition, the recognition agreement with the 1st Interested Party would not be affected.

The end result is that the entire claim fails.

As the claim in respect of the 2nd respondent and the 1st Interested Party were unnecessary and having been dragged to court by the claimant, I order costs of the 2nd respondent and 1st Interested Party to be paid by the claimant. The 1st respondent and 2nd Interested Party shall bear their costs.

Before I finish with this judgment I must express my disappointment with the parties herein especially the claimant and the 1st respondent in the manner they have handled this case, hounding the court with application after application such that writing this judgment has been a nightmare to the court having to go through all the documents filed and to ascertain what the issues are.

Secondly, the union has filed documents through three different persons, Seth Panyako, David Omulama and Stephen Ruteere. This is not acceptable and brings a lot of confusion. There must be certainty about which officer of the union is on record. It is hoped that in future the parties will conduct themselves in a more organised manner.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF MAY 2018

MAUREEN ONYANGO

JUDGE