



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1619 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 31<sup>st</sup> July, 2018)**

**BANKING, INSURANCE AND FINANCE UNION (KENYA).....CLAIMANT/APPLICANT**

**VERSUS**

**KCB (KENYA) LIMITED.....RESPONDENT**

**AND**

**DISHON OCHIENG ACHIRO & 70 OTHERS.....INTEREST PARTIES/APPLICANTS**

**RULING**

1. The Application before Court is the Notice of Motion Application dated 13/6/2018 filed by the Interested Parties herein who seek the following orders:-

*1) That the Application be certified.*

*2) That this Honorable Court be pleased to set aside part of the order issued by Court on 18/8/2017 stating thus:-*

*“That interim orders be and are hereby grated ..... to stop any such unprocedural and unlawful balance score card appraisals”.*

*3) That this Honourable Court be pleased to exempt the Interested Parties from the application of the orders of the Court issued on 18/8/2017 and order the Respondent to conduct a performance appraisal of the Interested Parties.*

*4) That this Honourable Court be pleased to make such order and or further orders as are necessary to meet the ends of justice with respect to this application.*

*5) That costs of this application be in the cause.*

2. The Applicants filed this Application under Article 41 (1) of the Constitution, Section 12, 12(2), 12(3), and 20 of the Employment and Labour Relations Court Act, rules 17 and 17(7) of the Employment and Labour Relations Court (Procedure) Rules 2016 and all other enabling provisions of the law.

3. The Application was based on the following grounds:-

*1. “That the Interested Parties are unionisable employees of the Respondent.*

*2. That the Claimant herein successfully sought orders from the Honourable Court on 18<sup>th</sup> August 2017 and confirmed the same on 21<sup>st</sup> September 2017, the said orders are adverse to the interests of the Interested Parties and have prejudiced them.*

*3. That the Respondent has failed to conduct a performance appraisal of the Interested Parties in compliance with the subject Court Order.*

*4. That the Interested Parties are aggrieved by the Respondent’s failure to appraise them which action has caused them to miss*

*out on the consequential bonuses, promotions, loans, trainings etc.*

**5. That the Interested Parties have thus lost an opportunity to be awarded bonus pay, loans, promotion and training opportunities arising there from.**

**6. That the subject Court orders ought to have been limited to the named employees in Appendix 3 of the Memorandum of Claim filed herein.**

**7. That the Interested Parties stand to suffer substantial financial loss and will miss out on career growth opportunities if the Court orders subject matter of the Application herein continue to be in place.**

**8. That the Interested Parties are dissatisfied with the subject Court order.**

**9. That on 12<sup>th</sup> April 2018, the Honourable Court issued orders herein requiring the Respondent to deposit Kshs.240,721,905/= in an escrow account in the joint name of the Claimant and Respondent being money set aside for bonuses of the unionisable staff.**

4. The application is also supported by the Supporting Affidavit of Dishon Ochieng Achiro who has deponed that he is one of the Interested Parties and has the authority of the other 70 Interested Parties to file the Application and swear this affidavit on their behalf in support of the Application.

5. He deponed that the other 70 Interested Parties and himself are all unionisable employees of the Respondent as per copies of their employment letters annexed as Appendix DOA3.

6. He also deponed that he is aware of the Recognition Agreement and Collective Bargaining Agreement between Claimant Union and Respondent (DOA 4 and 5). He stated that he is the elected Chairman and team leader of the Joint Consultative Committee in accordance with Clause 15 of the Recognition Agreement following an employees' meeting held on 13.1.2018 (DOA6).

7. He avers that the Interested Parties are aware of this Court's orders stopping performance appraisals upon unionisable employees which order they aver has denied them an opportunity to benefit from business, promotions, trainings and loans.

8. He avers that over the years since 2004, they have been subjected to the performance appraisals by the Respondent through the balanced score card and confirm that the process has contributed to healthy competition amongst them, respective career growth and overall growth and sustainability of the Respondent.

9. He averred that the performance management is aimed at aligning the overall organizational objectives of an employer with the employees individual targets based on their skills and competency in line with the employees job description in order to achieve growth of both employee and employer and to ensure sustainability of the organization.

10. The Applicants lay down the process of the appraisal and aver that they are willing to be appraised by the Respondent but this cannot be done because of the subject Court order. They therefore seek that the Court allows the Application to pave way for their appraisal.

11. The Claimants opposed this application by filing a Replying Affidavit which was deponed to by one Joseph Ole Tipape on 26.6.2018. The deponent is the 1<sup>st</sup> Deputy General Secretary of the Claimant union and averred that he has authority to swear the affidavit on behalf of the Claimant, on its behalf and on behalf of the entire Claimant Membership.

12. He averred that the union is the only recognized and agreed body to represent employees of members of the Association in any negotiation (JOS A).

13. He averred that the Claimant union has successfully negotiated several CBAs over the years and the last one was signed on 30.8.2017 and was registered in Court on 15/9/2017.

14. He avers that all the Interested Parties are unionisable employees of the Respondent which members total 2,500/= members. They aver that the decision to pull in opposite direction by the 70 is absurd and incompetent.

15. He avers that in a workforce of over 2000 employees a team leader cannot be elected by only 6 employees as portrayed by the Interested Parties. He avers this splinter group seem to have been fronted by the Respondent to demand for the setting aside of the Court orders.

16. The Claimants aver that if the orders sought are granted, it would render their functions impracticable. They also aver that the Interested Parties' Application is meant to divide employees' rights in the middle so that some employees are paid bonuses and others are left out which action amounts to discrimination and preferential treatment.

17. They have submitted that the order of the Court cannot be varied to allow for partial implementation. They also aver that the Union's existence, as the sole negotiating body cannot be taken for granted and wished away as it is based on Section 4 of the Labour Relations Act 2007 and Article 41(2) of the Constitution, which advocates for the employees' rights to bargain collectively. They aver that whilst workers have freedom of association, when they join the union, they cede their right of representation to the union and such as right can only be taken back when such an employee resigns from the union.

18. The Respondents filed a Replying Affidavit to this Application. They support the Interested Parties' Application. They aver that the Claimant will not be prejudiced in any way if the Application is allowed.

19. The Interested Parties have filed a Supplementary Affidavit sworn on 9.7.2018 and filed on 10.7.2018 where they reiterate their earlier position. They deny filing this application at the instigation of the Respondent.

20. I have examined all the averments of the parties plus the submissions filed. I note that indeed the Interested Parties were enjoined in this suit to take care of their own peculiar interests. They have submitted that their interests are not being properly articulated by the Claimant Union hence the prayers sought.

21. Article 41(1) of the Constitution provides as follows:-

***“ Every person has the right to fair labour practices”.***

22. Under 41(1) above every person has a right to participate in the activities of a trade union and therefore one is allowed to join a trade union and also by extension not to join or to cease being a member of a trade union.

23. Article 41(5) on the other hand provides as follows:-

***“Every trade union, employers' organisation and employer has the right to engage in collective bargaining”.***

24. These two sub-Articles considered together show that it is the sole mandate of a trade union to engage in collective bargaining with an employer.

25. When an employee wishes to join union, the employee does so with the full knowledge that the trade union represents his interest. When the employee feels the union is not representing his interest the honorable thing to do is to leave the union.

26. The Interested Parties position then that they want the Court to partially set aside the Court order obtained by the Union on behalf of its members including the Interested Parties herein, would be tantamount to saying that the union no longer represents them well and the honourable thing to do is to cease being members of the Claimant Union and join another.

27. The Claimant Union's right to collective bargaining and representing its members cannot be ceded to the Interested Parties who have a contrary view.

28. Section 4(1) of the Labour Relations Act provide as follows:-

***(1) “Every employee has the right to:***

***(a) participate in forming a trade union or federation of trade unions;***

***(b) join a trade union; or***

***(c) leave a trade union”.***

29. Under (c) above, the right the Interested Parties should exercise is to leave the Claimant Union or else stay in and participate in its activities.

30. It is therefore my finding that the Application sought by the Interested Parties is not tenable as its effect would be to divide the union and also render the exercise of its functions and duties unmanageable.

31. I order costs of this application be in the cause.

**Dated and delivered in open Court this 31<sup>st</sup> day of July, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Nyambura holding brief for Muge for Respondents and holding brief for Oduol for Interested Parties – Present

Appellants – Absent