



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2044 OF 2017

KENYA AVIATION WORKERS UNION.....CLAIMANT

- VERSUS -

KENYA CIVIL AVIATION AUTHORITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th July, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 12.10.2017 through Okweh Achiando & Company Advocates. The Claimant prayed for judgment against the respondent for:

- a) An order declaring that the respondent's action of withholding union funds from the claimant is illegal and unlawful.
- b) That an order compelling the respondent to commence remitting union funds deducted from employees who are members of the Claimant.
- c) That an order compelling the respondent to immediately remit to the claimant all union funds deducted from employees who are members of the claimant which have fallen due since March, 2017 to date.
- d) Any other or further relief that the honourable court deems fit.
- e) The respondent to pay costs of the claim and interests.

The claimant's case is urged upon the following grounds:

- a) The claimant is duly registered trade union.
- b) On 02.12.2016 Nduma J delivered a judgment in Judicial Review No. 1 of 2013 at Nairobi that ordered for deregistration of the claimant. The claimant moved to the Court of Appeal under rule 5(2) (b) and 47 of the Court of Appeal Rules to stay the execution of the judgment. On 17.01.2017 the Court of Appeal heard the claimant's application which was dated 13.12.2016 and on 03.02.2017 the Court delivered its ruling staying the execution and implementation of the judgment delivered on 02.12.2016 by Nduma J.
- c) The Aviation & Airport Services Workers Union was dissatisfied by the stay of execution order given by the Court of Appeal and it filed the application dated 23.02.2017 at the Supreme Court seeking to stay the decision by the Court of Appeal. The Supreme Court recorded consent orders in the matter about union dues but which turned out not to apply to the respondent because the respondent was not a party to the proceedings before the Supreme Court.
- d) The parties have a CBA in place for 2014 to 2016 and had signed a recognition agreement. The claimant's case is that the respondent is reluctant to discuss the CBA for 2016 to 2017.
- e) The respondent's failure to deduct and remit the union dues has adversely affected the claimant's financial position as the claimant has suffered losses in its legitimate revenue. For example the claimant has failed to pay its employees, to remit employees' statutory dues, to pay rent, and to efficiently and effectively perform its core mandate.
- f) It is illegal for the union dues to be withheld.

The respondent filed the memorandum of defence on 07.05.2018 through Munyao, Muthama & Kashindi Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The respondent's case is as follows:

- a) The Aviation & Airport Services Workers Union (Kenya) served upon the respondent the decree in Judicial Review No. 1 of 2013 at Nairobi flowing from the judgment delivered on 02.12.2016 by Nduma J. The decree quashed the registration of the claimant and declared the claimant's registration a nullity. The claimant, in line with the said decree, was deregistered as per Gazette Notice Vol.CXVIII – No. 157 dated 16.12.2016. Following the aforesaid events, the respondent discontinued the check-off system and has never deducted union dues on account of the claimant.
- b) On 06.02.2017 a group of the respondent's employees wrote to the respondent advising the respondent not to remit any deductions to the claimant. It is on such further account that the respondent stopped deducting and remitting union dues.
- c) On 14.02.2017 the claimant served upon the respondent a copy of the order by the Court of Appeal staying the execution orders by Nduma J quashing the registration of the claimant. It is the respondent's case that as at the time the stay order by the Court of Appeal was served, the order by Nduma J had already been executed.
- d) There is no court order in place requiring the respondent to deduct and remit union dues to the claimant.
- e) The claimant has properly taken precautionary measures to protect the employees just in event the claimant is not successful in the appeal.
- f) The matter in dispute is sub judice in view of the pending appeal.
- g) The case is res judicata in view of the ruling by the Supreme Court varying the consent order that was recorded and to the effect that the order did not apply to the respondent to deduct and remit union dues to the claimant.
- h) The case is properly about the interpretation of the effect of the order by the Court of Appeal staying the execution orders by Nduma J quashing the registration of the claimant and such interpretation falls in the jurisdiction of the Court which made the order – the Court of Appeal.
- i) The prayers as made are misconceived because the respondent has not deducted union dues which it has withheld and failed to remit to the claimant.

The respondent also filed the notice of preliminary objection on 02.02.2018 that the memorandum of claim be dismissed upon the following grounds:

- a) The Honourable Court lacks jurisdiction in the matter, the Court having rendered its judgment on the matter on 02.12.2016 in Judicial Review No. 1 of 2013 deregistering the claimant and the Court is functus officio.
- b) The current proceedings are subjudice and an abuse of Court process because the matters raised are alive and under consideration by the Court of Appeal in Civil Application No. NAI 274 of 2016.

The claimant filed on 07.03.2011 the grounds of opposition to the respondent's notice of preliminary objection.

By consent of the parties it was ordered that the suit and the preliminary objection be heard together and parties filed their respective submissions.

The **1st issue** is for determination is whether the order by the Court of Appeal staying the execution of orders by Nduma J quashing the registration of the claimant is subject of interpretation before the Court in the instant proceedings. The Court finds that there is no prayer or claim for interpretation of that order before the Court and if such were the case, the Court would obviously lack jurisdiction to entertain such claims and prayers. The Court finds that the claimant is merely relying upon the Court of Appeal decision in issue to found a cause of action and to justify the claims and prayers. In that regard, the Court finds that suits based on a court order are envisaged under section 4(4) of the Limitation of Actions Act (Cap.22) and the present situation would not be unique.

The **2nd issue** for determination is whether the preliminary objection should succeed. It is clear that the respondent has not provided a previous final decision by a court of competent jurisdiction determining the matters in dispute between the parties. Thus the doctrine of **res judicata** would not apply as a bar to the present case. Similarly and as submitted for the claimant there is no matter cited as pending between the same parties about the a similar or substantially similar cause of action in the present suit and the suit is therefore not sub judice as was urged for the respondent. The preliminary objection will therefore fail.

The **3rd issue** for determination is whether the claimant is entitled to deduction and remission of union dues as prayed for. The Judgment by Nduma J directing deregistration of the claimant was given on 02.12.2016. The decree flowing from the judgment was issued on 07.12.2016. The decree was implemented by the cancellation of the registration of the claimant under section 28 of the Labour Relations Act as per Gazette Notice No. 10272 of 16.12.2016 but the cancellation having been signed by the Registrar of Trade Unions on 09.12.2016. The order by the Court of Appeal staying the execution of the order by Nduma J was given on 03.02.2017 and issued on 27.02.2017. Thus the Court returns that in view of that flow of events, the respondent is entitled to say that as at the time of the stay order, the claimant had already been deregistered. The Court further finds that the claimant has not shown steps taken to set aside the cancellation of its registration (and which was not said to be an issue in the pending appeal) and in view of the stay orders by the Court of Appeal. Thus the Court returns that the respondent was entitled to take the view that it could not proceed to deduct the union dues and remit the same as urged for the respondent.

To answer the **4th issue** for determination the Court returns that the claimant has not provided evidence that the respondent had deducted union dues but withheld the same without remitting to the claimant. In such circumstances, the Court returns that the respondent's submission that prayer (a) in the memorandum of claim (for a declaration that the respondent's action of withholding union funds from the claimant is illegal and unlawful) was misconceived was well founded and is hereby upheld.

Finally, the Court returns that in view of the foregoing findings, the claimant's suit will fail. In view of the parties' respective margins of success and all circumstances of the case, each party shall bear own costs of the suit.

In conclusion, the claimant's memorandum of claim is hereby dismissed with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 6th July, 2018.

BYRAM ONGAYA

JUDGE