



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 276 OF 2018

KENYA LONG DISTANCE TRUCK DRIVERS

AND ALLIED WORKERS UNION.....CLAIMANT

VS

TRANSEAST PROFESSIONAL HAULIERS.....RESPONDENT

AND

TRANSPORT WORKERS UNION.....INTERESTED PARTY

RULING

1. There are two applications brought by the Claimant Union. The first one is dated 25th April 2018 and seeks orders restraining the Respondent from harassing, dismissing, threatening and/or intimidating the Claimant's members.

2. The application, which is supported by the affidavit of the Claimant's Secretary General, Nicholas Mbugua is based on the following grounds:

a) That the Respondent has been harassing its employees who are members of the Claimant Union;

b) That the Respondent has refused to sign a Recognition Agreement with the Claimant despite the Claimant having recruited the majority of employees;

c) That this prompted the Claimant to seek the intervention of the Ministry of East African Community, Labour and Social Protection and a conciliator by the name, John Narangwi was appointed. The conciliation meetings did not bear fruit but the Claimant was found to have recruited a majority of the Respondent's employees;

d) That the Claimant has continued to plead with the Respondent to try and negotiate into signing a Recognition Agreement to no avail and the Respondent has taken advantage to continue harassing and intimidating its workers and forcing them to resign from the Union;

e) That the Respondent has now gone ahead and induced and/or forced its employees to resign and/or withdraw its membership from the Claimant Union by threatening them with dismissal;

f) That the Respondent has further refused to fully remit the monthly union dues to the Claimant despite the Claimant recruiting a majority of employees;

g) That it is fair and in the interest of justice that the Respondent be restrained from harassing and intimidating the employees who are or wish to be members of the Claimant Union.

3. The 2nd application is dated 20th September 2018 and seeks orders to restrain the Respondent from deducting agency fees from the Claimant's members for remittance to the Interested Party. This application is also supported by the affidavit of the Claimant's Secretary General, Nicholas Mbugua and is premised on the following grounds:

a) That the Respondent has, in collusion with the Interested Party been illegally deducting agency fees from the Claimant's members;

b) That in October 2017, the Claimant recruited a simple majority of the Respondent's employees after they had resigned from the Interested Party. However, the Respondent has frustrated and continues to frustrate the signing of a Recognition Agreement with the Claimant despite receiving check off forms signed by the members;

c) That as of July 2018, in addition to union dues deducted and remitted to the Claimant, the Respondent has started deducting agency fees from the Claimant's members for remittance to the Interested Party;

d) That the deduction of union dues in favour of the Claimant goes to prove that the Claimant has recruited a simple majority and should therefore be recognized by the Respondent as required by law;

e) That it is unfair and in breach of the Claimant's members' rights under Articles 36 and 41 of the Constitution of Kenya, 2010 for the Respondent to continue deducting agency fees from the Claimant's members and remitting the same to the Interested Party from which they had procedurally resigned.

4. The Respondent's response to the Claimant's application dated 25th April 2018 is contained in a replying affidavit sworn by its Human Resource Manager, Lorin Kimuyu on 23rd May 2018. She depones that in October 2017, the Respondent received check off forms from the Claimant on account of employees said to have been recruited to join the Claimant's membership.

5. Upon receipt of the check off forms, the Respondent conducted due diligence and confirmed that the Claimant had recruited 190 employees out of a total workforce of 345 employees, 293 of whom were unionisable. The Respondent started deduction of union dues and had continued to do so diligently.

6. Kimuyu states that the Respondent could not grant the Claimant recognition owing to the fact that it already had a Recognition Agreement with Transport Workers Union. At the time of filing suit, Transport Workers Union had a total membership of 81 from the Respondent's establishment and a Collective Bargaining Agreement (CBA) for the period 2018-2019 had been registered.

7. On the issue of recognition, Kimuyu depones that the Respondent had been advised by its Advocate on record that it was statutorily barred from executing two Recognition Agreements. The Respondent's Advocate had written to the Claimant to this effect. The Claimant subsequently reported a dispute to the Labour Office but the parties failed to agree prompting the Labour Officer to issue a certificate of disagreement.

8. Kimuyu states that the Respondent's employees had continued to resign from the Claimant Union prompting the Respondent to stop deduction of union dues on account of the employees who had resigned, pursuant to Section 48(6) of the Labour Relations Act, 2007.

9. Kimuyu denies that the Respondent had harassed, threatened, intimidated or dismissed any of its employees on grounds of joining the union.

10. The Respondent's response to the application dated 20th September 2018 is contained in a replying affidavit sworn by its Human Resource Manager, Lorin Kimuyu on 27th September 2018. She states that the list attached to the supporting affidavit dates back to the year 2015 when the Respondent's employees resigned from the Interested Party without joining any other union.

11. Kimuyu depones that majority of the Respondent's employees had rejoined the Interested Party, some had died while others did not belong to either of the unions. She adds that the attached list was duplicative and therefore not a true reflection of the current position.

12. Kimuyu denies the allegations of collusion between the Respondent and the Interested Party, made by the Claimant and states that the Respondent had received a letter dated 28th June 2018 together with a legal notice dated 26th June 2018, with instructions to deduct agency fees from employees who were not members of the union but were enjoying the CBA negotiated and registered by the Interested Party.

13. Kimuyu maintains that deduction of agency fees is a statutory requirement mandated by law and does not in any way amount to collusion on the part of an employer. She goes on to state that negotiation and registration of a CBA between the Interested Party and the Respondent had nothing to do with conciliation meetings between the Respondent and the Claimant, which meetings related to the issue of recognition. Further, the Respondent having a valid Recognition Agreement with the Interested Party had all the right to negotiate a CBA in the interest of its employees.

14. The Interested Party filed two replies on 25th September 2018 and 1st October 2018, stating that it had a growing membership within the Respondent's establishment and that it has a valid Recognition Agreement with the Respondent pursuant to which it had negotiated several CBAs. The Interested Party asserts its right to agency fees under Section 49 of the Labour Relations Act.

15. It is the Interested Party's case that the Claimant is encroaching on its membership with the full knowledge that there exists a CBA which binds the Respondent. The Interested Party states that the Respondent is obligated to deduct and remit agency fees pursuant to Legal Notice No 130 of 13th June 2018. The Interested Party denies any collusion between itself and the Respondent.

16. I have considered the Claimant's twin applications together with the supporting affidavits and annexures. I have also looked at the replies filed by the Respondent and the Interested Party. What emerges is a convoluted turf war between the two unions with the Respondent's employees being the prized targets.

17. Although the Claimant alleges intimidation and harassment of its members, it is evident to the Court that the real dispute has to do with numbers in membership between the two unions. This is not the sort of dispute that can be determined at the interlocutory stage. I say so

because the Court would need to take evidence in order to determine which union has recruited a simple majority of the Respondent's employees for purposes of recognition and collective bargaining.

18. Similarly the question as to whether the Interested Party is entitled to agency fees from the Claimant's members cannot be determined at the interlocutory stage.

19. For this reason alone the Claimant's applications dated 25th April 2018 and 20th September 2018 are declined. The costs of these applications will follow the outcome of the main claim.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF NOVEMBER 2018

LINNET NDOLO

JUDGE

Appearance:

Miss Chepng'eno for the Claimant

Miss Opolo for the Respondent

Mr. Ndege (Union Representative) for the Interested Party