



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NUMBER 469 OF 2018

BETWEEN

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

M/S RIZWAN METAL CRAFT LIMITED.....RESPONDENT

RULING

1. The Claimant Union filed its Statement of Claim on 26th July 2018. It seeks to have the Respondent compelled to sign Recognition Agreement with the Claimant; deduct and remit trade union dues; and stopped from victimizing Employees on account of their association with the Claimant Union.
2. Simultaneously, the Claimant filed an Application by way of Notice of Motion, asking the Court to grant orders restraining the Respondent from forcing the Employees to withdraw their membership of the Union, and that the Claim is heard and determined on a priority basis.
3. Interim orders of injunction issued against the Respondent on 26th July 2018, restraining the Respondent from intimidating the Employees on account of their association with the Claimant.
4. The Respondent filed a Replying Affidavit through Riazullhaq Ali Mohamed, who describes himself as the Sole Proprietor of the Respondent business. The Affidavit was sworn on 14th September 2018 and filed the same date. The Respondent also filed a Notice of Preliminary Objection on 8th August 2018. Objection is based on the ground that the Respondent brought before the Court, Rizwan Metal Craft Limited is non-existent; the Application is premature; and the whole Claim is pending conciliation.
5. Parties were heard on 2nd November 2018, the Court having earlier ordered that Preliminary Objection is merged and heard together with, the Notice of Motion.

The Court Finds:-

6. It is clear there is no Company known as Rizwan Metal Craft Limited, capable of being sued. Interim orders, or substantive orders of recognition, cannot be directed against a nonentity.
7. Even if there is a proper Respondent in this Claim, it is clear the Claim is premature. The Claimant Union reported the same dispute to the Cabinet Secretary through a notice dated 2nd July 2018, in accordance with Section 62 of the Labour Relations Act 2007 (the Act).
8. The Chief Industrial Relations Officer appointed Conciliator under Section 65(1) of the Act. Parties were directed to submit in writing, their proposals to the Conciliator. The letter of Chief Industrial Relations Officer accepting the dispute, is dated 17th July 2018.
9. The Claimant approached the Court on 26th July 2018 barely a week after communication from the Labour Office, issued upon the Parties.
10. Parties have not appeared before Conciliator or made their proposals as advised. There is no Certificate issued by the Conciliator under Section 69 of the Act, stating that the dispute has not been resolved, to enable the Court assume jurisdiction.
11. The Claim offends rule 5 of the Employment and Labour Relations Court (Procedure) Rules 2016. There is no Report of the Conciliator, no Certificate of Conciliation or Affidavit sworn by the Claimant, or by the Claimant's Representative, attesting to the reasons why conciliation has not taken place.

12. Section 48 of the Employment Act is not relevant to this dispute. The Respondent has the liberty to have an Advocate of his choice, in engaging with the Claimant Union on recognition and trade union dues. Section 48 of the Employment Act bars Advocates from participating in proceedings before a Labour Officer, initiated pursuant to complaints made under Section 47 of the Employment Act. These are complaints in the nature of summary dismissal and unfair termination. The Respondent cannot be faulted for seeking legal advice, in and out of Court, on a dispute centred on recognition.

13. The Claimant needs to exhaust conciliation, and know exactly, who to pursue for purposes of recognition. It is futile to seek recognition from a nonentity.

IT IS ORDERED:-

- a) The Preliminary Objection succeeds.*
- b) The Claim is prematurely and improperly before the Court.*
- c) It is struck out in its entirety.*
- d) No order on the costs.*
- e) File is closed.*

Dated and delivered at Mombasa this 23rd day of November, 2018.

James Rika

Judge