



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1452 OF 2015

KENYA CONCRETE, STRUCTURAL, CERAMIC

TILES, WOOD PLY & INTERIOR DESIGNS

WORKERS UNION.....CLAIMANT

v

CHINA WU YI COMPANY LIMITED.....RESPONDENT

RULING NO. 2

1. On 19 August 2015, the Union instituted legal proceedings against the Respondent and the Issues in Dispute were stated as

1. Refusal by the management to sign a recognition agreement contrary to section 54 of the Labour Relations Act 2007.

2. Refusal by management to deduct and remit union dues contrary to section 19 of the Employment Act and section 48 of the Labour Relations Act.

3. Intimidation and harassment of employees.

2. Filed together with the Memorandum of Claim was a motion under certificate of urgency seeking two substantive orders (orders compelling the Respondent to deduct and remit union subscriptions, and restraining it from harassing employees).

3. On the same day, the Duty Court granted the orders sought and directed that the application be served for *inter partes* hearing/directions on 2 September 2015.

4. When the application came up for *inter partes* hearing, Ms. Chege for the Respondent sought for more time but considering that the application had been served nearly 3 weeks earlier, the Court gave her 15 minutes to file appropriate documents, but when the application was called out later, the Court was informed that Ms. Chege had put herself on record in error (Court was informed the orders had not been complied with).

5. The Court therefore adjourned the application to 4 September 2015 to enable the Respondent appear to show cause why it had not complied with the orders of 19 August 2015.

6. The Respondent did not appear on 4 September 2015, and the Court directed that the Court bailiff serve a *notices to show cause* to the Respondent's chief officers, with mention set for 11 September 2015.

7. On 11 September 2015, Mr. Ochieng Odhiambo for the Respondent informed the Court that it required up to 2 October 2015 to comply with the Court orders, and the Court directed that the application be mentioned on 2 October 2015.

8. However when the file was called out on the scheduled date, the Respondent sought more time, and the reason given was that its key officers were out of the country.

9. The Court allowed the Respondent up to 7 October 2015.

10. On 7 October 2015, the Respondent and its advocate on record failed to attend Court, and the Court confirmed the orders issued on 19 August 2015 by allowing the application.

11. On 15 January 2016, the Respondent filed an application seeking orders

1. ..

2. **THAT** this Honourable Court be pleased to grant a stay of execution in Cause No. 1452 of 2015 pending the hearing and determination of the application herein.

3. **THAT** this Honourable Court be pleased to issue an order of stay of execution restraining the Respondents (sic) and its agents Clear Real Traders or any other agents whatsoever from proclaiming, attaching, advertising and or from offering for sale any goods belonging to the Respondent in execution of the decree dated 7th October 2015 pending the hearing and determination of this application *inter partes*.

4. **THAT** the Honourable Court gives an interpretation of the orders of Hon. Justice Mbaru on 19th August 2015 in relation to deduction and remittance of union dues payable to the Claimant.

5. **THAT** the judgment and all consequential orders against the Respondent be hereby set aside unconditionally.

6. **THAT** the Respondents to be given leave to appear and file their Response as per the draft annexed Response.

7. **THAT** costs of this application be provided for.

12. When this application was placed before Court, it gave a 7 day stay of execution in order for the proceedings to be typed, and to enable the Claimant respond.

13. When the application came up on 21 January 2016, the Court directed the Respondent to comply with the orders which had been confirmed on 7 October 2015.

14. The next day 22 January 2016, the Respondent moved the Duty Court to have the orders of interim stayed extended, and the Court directed the parties to appear before Mbaru J on 25 January 2016.

15. On 25 January 2016, the interim orders were extended until 26 January 2016. The same were again extended until 1 February 2016.

16. After listening to the parties on 1 February 2016, the Court directed that the Commissioner for Labour appoint a conciliator who would report back to the Court within 3 weeks. Mention was fixed for 22 February 2016, but it was not until 24 July 2018 that the Respondent's application referred to in paragraph 11 herein above was heard *inter partes*.

17. This Court has keenly gone through the record and it mirrors a state of confusion. Some of the confusion may only be undone on appeal or through an appropriate application for review.

18. The Respondent's application under consideration is anchored on the key ground that the Union's application of 19 August 2015 was allowed before affording it an opportunity to be heard, and that the interest of justice dictate that the orders be set aside.

19. The question therefore arises whether it is correct that the Respondent was not afforded an opportunity to be heard before the orders issued on 19 August 2015 were confirmed on 7 October 2015.

20. The record shows that when the Union's application came up for *inter partes* hearing on 2 September 2015 there was an error on representation, but there was evidence that the Respondent had been served (affidavit of service and acknowledged copy of order is on file).

21. There is no explanation why the Respondent was not represented on 2 September 2015.

22. The Court still went ahead to adjourn the proceedings to 4 September 2015. Even on this date, the Respondent was not present and there is no explanation for the absence.

23. The Court during this appearance directed the Court bailiff to serve the Respondent's Chief Officers and a return date of 11 September 2015 was fixed.

24. On 11 September 2015, Mr. Ochieng Odhiambo appeared for the Respondent and sought for more time to enable compliance, and the Court allowed it up to 2 October 2015.

25. The Respondent was duly represented in Court on 2 October 2015 and its counsel requested for more time because its key managers were stated to be out of the country.

26. The Court, after hearing from the parties directed that particulars of Respondent's officers in default be provided in order for summons to issue with a return date of 7 October 2015.

27. For reasons which have not been explained, the Respondent and its advocate did not attend Court on 7 October 2015 when the Court

confirmed the orders now under challenge.

28. In the view of the Court, an explanation as to why the Respondent and its advocate were not in Court on 7 October 2015 was not only material but a relevant consideration for the instant application to succeed, and without any explanation as to why the Respondent and its advocate did not attend Court on 7 October 2015 (even if it was a mention date).

29. The Court after considering the record finds that the Respondent was afforded more than adequate opportunity to be heard but for reasons best known to itself and not disclosed to the Court, it decided to sit on its right(s). It cannot therefore benefit from the pot of justice to set aside the orders under consideration.

30. Just as an observation, it is not the province of this Court to examine the propriety of the orders made on 19 August 2015 and confirmed on 7 October 2015, as this mandate lies elsewhere within the judicial hierarchy.

31. The application filed in Court on 15 January 2016 is therefore dismissed with costs to the Union.

Delivered, dated and signed in Nairobi on this 16th day of November 2018.

Radido Stephen

Judge

Appearances

For Union Mrs. Kamau instructed by Edwin Maina & Associates Advocates

For Respondent Mr. Ochieng instructed by Ogola Okello & Co. Advocates

Court Assistant Lindsey