



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1330 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 3rd December, 2018)

KENYA TERTIARY AND SCHOOL WORKERS UNION.....CLAIMANT

VERSUS

ROCKY DRIVING SCHOOL.....RESPONDENT

RULING

1. The Applicant/Claimant Union, Kenya Tertiary & School Workers' Union, filed a Notice of Motion Application dated 23rd August, 2018 and brought under Section 48(3), 54(1), 73(2) (a) of the Labour Relations Act 2007, Section 48 of the Labour Institutions Act 2007, Section 12 (ii), (iii) & (iv) of the Employment and Labour Relations Court Act and Rule 17(3) of the Employment and Labour Relations Court (Procedure) Rules 2016 against the Respondent, Rocky Driving School Limited. The Applicant seeks for orders that:-

- 1. The Application is certified as urgent and service of this application/suit be dispensed with and the same do proceed for an ex-parte hearing in the first instance.*
- 2. The leave of Court is granted that the application proceed for hearing during vacation.*
- 3. The Respondent by its Directors, Managers and Agents are forthwith restrained and/or prohibited from harassing, intimidating the Claimant Union members and infringing on their constitutional rights of fair labour practices and their opportunity to freely join or participate in the activities and programmes of a trade union of their choice.*
- 4. A stay of execution forthwith to the punitive, discriminative and perpetuated transfers of Mr. Raymond Kadhengi Ziro to Kisumu and of any other member of the Claimant Union for their active involvement in trade union activities and programmes pending hearing and determination of this suit.*
- 5. The Respondent is ordered forthwith to effect trade union dues deductions from the salaries of its unionisable employees, who have voluntarily acknowledged their union membership with the Claimant Union on the Check-off Forms S dated 24th & 31st May, and 9th & 16th July 2018 and pay the moneys so deducted to the Claimant Union.*
- 6. The Respondent is ordered forthwith to pay the Claimant Union from its kitty, all accrued sums of moneys due and owed to the Claimant Union as trade union dues which the Respondent would have deducted and remitted regularly from its employees who had acknowledged their membership on the Check-off Forms.*
- 7. The Respondent is ordered to sign a "Recognition Agreement" with the Claimant Union for purposes of collective bargaining.*
- 8. Costs be provided for by the Respondent herein.*

2. The Application is premised on the grounds that:-

- 1. The Respondent is grossly interfering with the right to freedom of association and fair labour practices of its unionisable staff employees by insinuating that the officials of the Claimant Union are all conmen and fraudsters.*
- 2. The Respondent has since neglected and/or refused to effect deductions of trade union dues from the wages/ salaries of its unionisable employees who have acknowledged their union membership with the Claimant Union thus contravening section*

48(3) of the Labour Relations Act 2007.

3. The Respondent continue to underpay salaries/wages without housing allowances earned therewith to its unionisable employees without the existing minimum rates of remuneration and terms of conditions of employment as envisioned under section 48 of the Labour Institutions Act 2007.

4. The Respondent has since failed and/or refused to accord “Recognition Agreement” to the Claimant Union for purposes of collective bargaining as envisioned under section 54(1) of the Labour Relations Act 2007.

5. The Respondent is hell bent to causing discriminative, punitive and perpetuated transfer of Mr. Raymond Ziro to Kisumu for his active participation in trade union activities as envisioned under section 46(d) of the Employment Act 2007.

6. This Court has jurisdiction over this matter within the meaning of section 12 of the Employment and Labour Relations Court Act 2014.

7. There is no previous and/or pending suit before any Court in respect of the cause of action herein

3. In the Supporting Affidavit sworn by the Applicant’s Secretary-General, he avers that the Union recruited unionisable employees of the Respondent as evidenced by the Check-off Forms S dated 15/11/2017, 15th May, 15th June, 16th & 18th July and 7th August 2018 and upon serving the Respondent with the forms, it has at all material times refused to acknowledge receipt on the Union’s principal copies. That the Claimant Union also served the Respondent with a copy of the “Recognition Agreement” proposal for their consideration and signing for purposes of Collective Bargaining but it has failed and/or refused to comply.

4. Further, that the Respondent’s negative demeanour of compliance on the mandatory terms of the law is therefore wanting and an abrogation of the labour laws in force. He also avers that the Claimant Union reported the existence of a trade dispute for conciliation at the Ministry of Labour and Social Protection and hence this Application and suit before this Court for arbitration within Section 73 and 74(a) of the Labour Relations Act.

5. The Honourable Court heard the application ex-parte and granted orders on 27/08/2018 that:

1. The Application is certified urgent and admitted for hearing during the August recess.

2. The Application be served by 28/08/2018 for inter partes hearing on 04/09/2018 before the duty judge.

3. Pending the inter partes hearing or further orders by the Court, the Respondent herein by its Directors, Managers and Agents, are hereby restrained and/or prohibited from harassing, intimidating the Claimant Union members and infringing on their constitutional rights of fair labour practices and their opportunity to freely join or participate in the activities and programmes of a trade union of their choice.

4. Pending the inter partes hearing or further orders by the Court, a stay of execution is hereby issued forthwith to the punitive, discriminative and perpetuated transfers of Mr. Raymond Kadhengi Ziro to Kisumu and of any other member of the Claimant Union for their active involvement in trade union activities and programmes.

5. Costs in the cause.

Respondent’s Case

6. The Respondent filed a Replying Affidavit on 19th September 2018 dated 17th September 2018 sworn by Hellen Anyiso, the Respondent’s Human Resource Manager, who avers that she received a check-off form dated 15/11/2017 on behalf of the Respondent on 07/05/2018 and upon verifying the names therein, the Respondent established that the list of employees recruited by the Claimant Union includes names of persons who are not its employees, employees who are in the management level and employees who had already left the Respondent’s employment. That it would be against the spirit of the Labour Relations Act and the Industrial Relations Charter if the Respondent’s management employees are allowed to join and participate in the activities of the Claimant Union because they control the Respondent’s business interests and that the same would defeat the purpose of Collective Bargaining.

7. She avers that she is aware the Respondent was called for an “Introduction Parties meeting” with the Applicant Union on 17/07/2018 to air out its concerns and be furnished with copies of the order from the Cabinet Secretary but the Claimant Union failed/refused and neglected to note the said concerns and so the Respondent was not in a position to start effecting union deductions. That it also received letters from some of its employees resigning from the union herein and whose names were in the Claimant’s list and so out of the possible 177 unionisable employees and after verification, only 73 had been recruited by the Applicant Union. Further, that the union has failed to meet the 50+1% legal threshold of unionisable employees required for it to be recognised.

8. The Respondent avers that it has not denied any employee the right to join a trade union of their choice nor indulged in bad labour practices because it has the best interest of its employees at heart as it has compromised by calling for meetings with the Applicant/Claimant Union which they failed to attend other than remaining unyielding. That it is the Claimant who has been interfering with its daily operations by being confrontational over lawful transfers and deployment of the Respondent’s workers and that the union has also failed to pursue procedure for the recognition dispute as under Section 54(6) and (7) of the Labour Relations Act for purposes of reconciliation.

9. In rebuttal, the Claimant filed a Further Affidavit dated 22/10/2018 denying that it refused to meet with the Respondent and that the allegation it included unnecessary persons in its list is false. That its annexed check-off forms reveal they have recruited and registered over 115 out of the 195 unionisable employees which is 58.9% and that it is the Respondent's master roll which is incorrect because it includes names of directors and four managers as unionisable employees.

10. That it reported the trade dispute but since no Conciliator was appointed as per Section 65 of the Labour Relations Act, this dispute is correctly before this Court under Section 69(b) which states that:-

“A trade dispute is deemed to be unresolved after conciliation if this (b) thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties expires.”

Applicant/Claimant's Submissions

11. The Applicant submits that the Respondent's unionisable employees have implied unfettered right of joining a trade union of their own choice through the annexed Check-off Forms as envisioned by Articles 1, 2 and 3 of the ILO Convention No. 87, Article 36 and 41 of the 2010 Constitution of Kenya read together with Part II, Section 4(1) of the Labour Relations Act, No. 14 of 2007 which states that:-

“Every employee has the right to; participate in the forming of a trade union or federation of a trade union; join a trade union; or leave a trade union.”

12. It is the Applicant's submission that Section 48 of the Labour Relations Act, 2007 provides for deduction of trade union dues and while it followed procedure in requesting the Minister of Labour for an order to the Respondent, the Respondent ought to have deducted the trade union dues 30 days from the date of receipt of the duly signed check-off forms S. That the Respondent has effected deductions and remittances of trade union dues from the salaries of its three unionisable employees on check-off form S dated 10/09/2018 for the month of September 2018.

13. The Claimant submits that in light of evidence of interference by the management of the Respondent, the Claimant Union has proved its case on a balance of probability and it is therefore entitled to the relief sought in the Application and Suit herein. The Claimant relies in the case of **Kudheha Workers Union –vs- Aga Khan University Hospital [2015] eKLR** where the Court in paragraph 11 held that:

“From the above provision, it emerges that deduction and remittance of union dues is part and parcel of the obligation of the Respondent following the exercise by the Claimant of a right to join a union.

In this case, the Claimant's members chose to join the union and did sign forms authorizing the Respondent to deduct union dues and remit them. The refusal by the Respondent to deduct and remit these dues is an interference by the Respondent of the employees' right to join and participate in the activities of a trade union. It was not the duty of the Respondent to decide which employees could join a union or not so long as they are in the unionisable category and so long as they had chosen to exercise their right as provided for under Article 41 of the Constitution.”

14. Further, in **Cause No. 2145 of 2014 Kenya Hotels & Allied Workers Union –vs- Sentrim Kenya Limited & Another** the Court in paragraphs 8 and 9 held that:

“This fact together with the letter dated 30th June, 2015 shows that there is no valid reason why the Respondent should not sign the recognition agreement with the Claimant for purposes of collective bargaining. An employer is under obligation to sign a recognition agreement once a union has fulfilled the requirements of Section 54 of the Labour Relations Act.

The court therefore directs that the Respondent forthwith signs the recognition agreement with the Claimant for purposes of Collective Bargaining.”

Respondent's Submissions

15. The Respondent submits that the main issues in dispute are deduction of union dues by the Respondent; signing of a Recognition Agreement between the parties herein; and the minimum wages and terms of conditions of employment. Further, that the issues for determination in this application are:-

i) Whether the Claimant has recruited unionisable employees.

ii) Whether the Claimant has achieved a simple majority of the unionisable employees in the employment of the Respondent to qualify for recognition.

iii) Whether the Claimant is entitled to the orders sought.

16. The Respondent submits that the Claimant has not at all specified in the pleadings, the category of employees to be included into the unionisable categories to be represented by the Claimant and has however initially purported to have recruited 109 employees and changed the narrative in its submissions that it has recruited 115 employees.

17. That the Claimant was legally wrong to include branch coordinators who oversee the day to day operations of the Respondent thus

offending sections 2 and 74(a) of the Labour Relations Act 2007 and the Industrial Relations Charter on union representation. It relies on **Cause No. 19 of 2013 Kenya Union of Sugar Plantation & Allied Workers –Vs- Mumias Sugar Company Limited** where Lady Justice Maureen Onyango Held as follows:-

“ I agree with the Respondents argument that Article 41 is not absolute and can be limited as was stated in Cause No.35 of 2011 Aviation and Allied Workers Union v Kenya Civil Aviation Authority. The Court agreed with the limitation of management staff rights to join trade unions. The same issue was the subject of Cause No. 1567 of 2011 Kenya Game Hunting and Safari Workers Union v Lewa Wildlife Conservancy where the court stated that not all staff can be in management or in the Union although the constitution guarantees the right to form, join and participate in trade Union activities. The court stated that the restriction is reasonable in a democratic society as allowing management staff to join trade unions and sit on the same side with union leaders on the negotiation table would stunt such negotiations.”

18. It also submits that as per tabulation, the percentage of recruitment by the Claimant is 41.4% meaning that it is yet to meet the 50+1% legal threshold of unionisable employees. That it is for the same reason the Recognition Agreement cannot therefore be negotiated upon for execution by all parties and that it is also untrue that the Respondent refused and/or neglected to sign the Recognition Agreement.

19. Further, that the Claimant has not shown that the Respondent has refused to appear before a Conciliator or that there was a dispute, which could have been referred to a Conciliator in the first place. The Respondent states that Article 159 of the Constitution of Kenya encourages parties and Courts to explore methods of ADR which the Claimant has disregarded and rushed to this Court. It cites the case of **Francis Gitau Parsimei & 2 others –v- The National Alliance Party and 4 Others (2012) eKLR** wherein Justice David Majanja had the following to say:-

“It is against this background that the Court of Appeal established the principle that where the Constitution and statute establish a dispute resolution procedure, then that procedure must be used...”

20. It is submitted by the Respondent that it has been barred by this Honourable Court from transferring any of its employees and while the order was based on the allegation that the Respondent was discriminating employee members of the union, the Claimant has not submitted or adduced evidence on the same. That it is the nature of its business to have their instructors transferred to pick trainee drivers at different destinations especially due to inflation or low sales as per their employment letters and its Human Resource policy. It relies in the case of **National Bank of Kenya v Pipelastik Samkolit (K) Ltd & another [2001] eKLR** where it was held that: ***“a Court of law cannot purport to rewrite a contract between the parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded”***.

21. It also submits that the Claimant has not specified the amount of union dues it seeks to be paid by the Respondent and that the Claimant has admitted that union dues have already been deducted. It refers the Court to the judgement by Lady Justice Maureen Onyango in **Cause No. 1283 of 2016 Kenya National Union of Nurses -V- Kenyatta National Hospital Board** where the Honourable Judge held that:-

“...The members from whom the deductions were to be made and the relevant period is also not specified. It is an ambiguous prayer that is incapable of being ascertained. It is therefore not possible for the court to make any orders in respect thereof with the result that it is dismissed.”

22. The Respondent finally submits that the Claimant has not proved its claim and as such, the interim orders be vacated and that the instant application should be dismissed with costs.

23. I have examined all the averments and submissions of the parties. I note that part of orders sought by the Applicants are similar to those sought in the main claim such as the quest for recognition. I will not therefore grant orders for recognition at this stage until the issues in the claim are thrashed out.

24. However, where there are employees who have already signed check off forms and desire to join the union, this right cannot be taken away by anyone. This is a right guaranteed under Article 41 of the Constitution.

25. It is for this reason that I confirm the interim orders granted by J. Onyango. These orders will remain in force pending hearing and determination of this claim.

26. Costs in the cause.

Dated and delivered in open Court this 3rd day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muriithi holding brief for Morara for Respondent – Present

Charles Salano for Claimant – Present