



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 18 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

-Versus-

JOKALI HANDLING SERVICES LIMITED.....RESPONDENT

RULING

This suit has been filed by Kenya Engineering Workers Union, a trade union registered in Kenya to represent workers in the engineering sector. The Respondent is a human resource company that provides manpower to manufacturing companies in Kenya in what is commonly referred to as outsourcing. The suit herein is in respect of workers employed by the Respondent to work for Abyssinia Iron and Steel Limited in its plant in Kisumu through an outsourcing contract. The Claimant has filed this suit on behalf of its members deployed by the Respondent to work at the Abyssinia Iron and Steel Limited plant, Kisumu.

In the Memorandum of Claim dated 26th January 2017 and filed on 26th January 2017 the Claimant seeks orders to compel the Respondent to comply with section 48 of the Labour Relations Act by deducting and remitting union dues from the wages of its members in the Respondent's employment, accord recognition of the Claimant for purposes of collective bargaining and further order the Respondent to pay union dues that it has failed to deduct in the past 3 years.

The Memorandum of Claim is filed together with an application under certificate of urgency in which the Claimant seeks the following orders:

1. That the Application be heard ex parte in the first instance
2. That this matter be certified urgent and on priority(sic)
3. That interim orders be issued against the Respondent to comply with section 48 of the Labour Relations Act 2007 by way of deducting and remittance of union dues till the hearing and determination of this suit
4. That the Honourable Court deem fit to issue interim orders against the Respondent from victimising the Applicant's members on grounds of trade union activities/affiliation and or on the basis of this suit pending the hearing and determination of this suit.

The application is supported by the affidavit of CHARLES NATILI, the Applicant's General Secretary and on grounds that the orders are provided for under section 75(a) of the Labour Relations Act, that the Respondent is in breach of section 48 and 54 of the Labour Relations Act and Article 41 of the Constitution, that the Respondent has made verbal threats to the Applicant's members after the Labour Officer, Ministry of Labour issued a certificate of disagreement insisting that they risk being terminated if the matter is forwarded to this court and further that the Respondent's actions are meant to deny the Respondent's members in its employment the right to fair labour relations and make them lose confidence in the ability of the Applicant to represent them.

In the supporting affidavit of Charles Natili he reiterates the grounds in support of the application and states that should the orders sought not be granted the Applicant and her members will suffer irreparable loss.

The Respondent filed a Replying Affidavit of JOSHUA BAP KAGORI, a senior supervisor of the Respondent at Abyssinia Iron and Steel Limited, Kisumu in which he deposes that the affidavit of Charles Natili is riddled with half truths, misinformation and is misguided. He deposes that it is not true that the Respondent represents a simple majority of unionisable employees as alleged. He states that the Respondent employs workers on short or long contracts depending on nature of work and needs of plants it outsources manpower to.

He deposes that the names in the applicant's check off lists are not correct as some of the employees have left employment on grounds of expiry of contracts, termination of employment for gross misconduct or death while other names do not appear in the Respondent's record of employees. It is further stated that some of the names are repeated. It is deposed that the Respondent's employees in the Check-off lists are only 86 out of a total workforce of 328 at Abyssinia plant in Kisumu which constitutes only 26% and not 51% as alleged by the Applicant. It is deposed that the Claimant is not entitled to recognition as it has not met the threshold.

Mr.Kagori deposes that the applicant has not violated any law or the Constitution, that the application is intended to frustrate the Respondent, that the orders sought are irregular and unlawful and the application should be dismissed with costs.

The Respondent filed a further affidavit of the JOSHUA BAP KAGORI sworn on 29th March 2017 in which he deposes that the Respondent intends to lay off some of its employees following a ban on production and use of twisted metal bar in construction in Kenya by Kenya bureau of Standards and subsequent withdrawal of ISO Standard for twisted metals/bars. It states that as a result Abyssinia has decided to scrap the twisting department, a decision that affects 198 employees of the Respondent. He deposes that the respondent issued a notice of redundancy on 1st march 2017 which is effective on 31st March 2017. He deposes that this is a matter beyond the control of the Respondent and prays that the application be dismissed as it does not a chance of success.

At the hearing of the Application Mr. Makale, an officer of the Applicant appeared for the Applicant while Ms. Nkirote Murithi instructed by Wakuraya Mureithi Advocates.

Applicant's Submissions

Mr. Makale submitted that there is no dispute that the Claimant has members among employees of the Respondent as admitted in the replying affidavit. He submitted that the only contention by the Respondent is the number of members recruited by the Claimant, a matter that would be dealt with in the main hearing of the suit. He stated that the fears of victimisation of the Claimant's members is confirmed by the Respondent's annexure to the further affidavit where it has confirmed it is removing the respondent's members and replacing them with new employees to defeat justice and rights of the affected employees as provided in Article 41 of the Constitution.

Mr. Makale submitted that the twisting section is only one of the departments yet only union members are being declared redundant and new ones deployed. He submitted that the applicant is not opposed to

redundancy if it is done properly. He submitted that the notice of redundancy annexed to the further affidavit of JOSHUA BAP KAGORI does not meet the requirements of the law, that the notice has to be issued to the Ministry of Labour and the union before the affected employees are declared redundant, which has not been done by the Respondent. He further states that the notice does not give the extent of the redundancy and names which the Respondent did not do.

Mr. Makale further submitted that the names in the check-off list that are repeated, or are dead, or repeated, or dismissed or whose contracts have expired are not disclosed.

He urged the Court to grant the applications.

Respondent's Submissions

Ms. Murithi for the Respondent submitted that the orders sought are not merited as the applicant has not come to court with clean hands, that the Applicant falsified records by including names of persons who have never been in the Respondent's employment, names of employees who have been dismissed or are deceased and others whose names are repeated to exaggerate numbers of those recruited by the Applicant. She submitted that the court ought to be given an opportunity to investigate such fraud before orders are granted and that the Applicant will not suffer any harm.

Ms. Murithi further submitted that the Respondent is not the owner of the plant where the employees are deployed and any orders granted that causes redundancy would cause mayhem, that the respondent is paid according to output of employees deployed and if there is no output and if there would be no payment to the Respondent a fact that may lead to unwarranted consequences including lawsuits.

On compliance with the law Ms. Murithi submitted that the Respondent issued notice of redundancy on 1st March 2017. On payment of trade union dues she submitted that the Respondent will first have to evaluate the employees to be declared redundant so that only those members of the applicant retained are deducted union dues.

Ms. Murithi had initially sought leave of court to produce gazette notice on the ban on twisted metal but after being granted time to produce it informed the court that her client was mistaken as there was no gazette notice but instead produced a newspaper notification of the ban.

Determination

I have considered the application by the applicant, the replying affidavits filed by the Respondent and the oral submissions made by the parties' representatives. The application by the Applicant is for orders to compel the Respondent to comply with section 48 of the labour Relations Act and to stop victimisation of union members.

Section 48 provides as follows:

48. Deduction of trade union dues

(1) In this Part **"trade union dues"** means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.

(2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to—

(a) deduct trade union dues from the wages of its members; and

(b) pay monies so deducted—

(i) into a specified account of the trade union; or

(ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

(4) The Minister may vary an order issued under this section on application by the trade union.

(5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.

(6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.

(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

(8) An employer shall forward a copy of any notice of resignation he receives to the trade union.

The section obliges an employer who has a minimum of 5 employees to deduct and remit union dues according to the order of the Minister. In this case the Respondent has admitted that 26% of its employees are members of the union but insists on not complying with section 48 as the union does not have 51% on membership. Section 48 is clear that an employer must comply so long as the union has recruited a minimum of 5 employees. By Respondents own admission, the Claimant has recruited 86 employees being 26% of its employees. This is more than the minimum 5 employees referred to in section 48 which further requires that the remittance be made within 30 days of the employer receiving the notice. The check-off forms herein were submitted to the Respondent in January 2014.

From the foregoing it is evident that the Respondent is in breach of section 48 and that the Applicant has a right to enforce the section against the Respondent.

The Respondent's argument that the court ought to investigate the authenticity of the names in the list is not valid as the Respondent has admitted that at least 86 names in the check-off list are genuine. There is no reason why it cannot remit union dues for the 86.

Secondly the lists submitted by the Respondent are current while the check-off forms are dated January 2014. The Respondents arguments about differences in the names of employees are not valid unless they can produce employee records on the dates when the employees signed the check-off forms.

For these reasons the Applicant is entitled to an order compelling the Respondent to remit union dues in respect of employees whose membership of the Applicant is not disputed.

On the second prayer of victimisation of union members the Respondent has admitted that it is carrying out redundancies but denies targeting Applicant's members. The Respondent denies carrying out the redundancies in violation of the law and has referred the court to the notice of redundancy dated 1st March 2017.

The letter referred to as redundancy notice is not annexed to the affidavit of JOSHUA BAP KAGORI. The court can therefore not confirm whether or not it meets the provisions of section 40(1) of the Employment Act which provides for redundancy as follows:

40. Termination on account of redundancy

(1) An employer shall not terminate a contract of service on account of redundancy unless the

employer complies with the following conditions—

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

A notice must be sent to the union and the labour officer and must state the extent of the redundancy. The provisions of section 40 are mandatory.

The Respondent has further not stated when it became aware of the ban on twisted bars or when the notification of the ban was publicised by Kenya Bureau of Standards. It does not state whether it was before or after the filing of this claim, having not brought up the issue of redundancy in its replying affidavit. It was brought up in the supplementary affidavit filed after parties had made initial arguments in court and may have been brought as an afterthought following the filing of this claim as submitted by Mr. Makale.

From the foregoing I find that the Respondent is in breach of section 40 on redundancy and section 48 on deduction and remittance of union dues. I therefore make the following orders:

1. The Respondent is directed to deduct and remit union dues from all members of the Applicant/Claimant union in its employment on the date of this order and remit to the union effective May 2017.
2. The Respondent is restrained from declaring any workers redundant without strictly complying with section 40(1) of the Employment Act.
3. I declared any redundancy effected by the Respondent on or after the orders of this court on 27th March 2017 to be void and any employee so declared redundant is deemed to be in service until and/or unless declared redundant in compliance with section 40(1).
4. Costs of this application shall be in the cause.

Ruling Dated, Signed and Delivered this 4TH day of MAY 2017

MAUREEN ONYANGO

JUDGE