



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1665 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 15th June, 2017)

KENYA PETROLEUM OIL WORKERS UNION CLAIMANT

-VERSUS-

KENYA PIPELINE COMPANY RESPONDENT

AND

1. FREDRICK M. MACHIO (Branch Secretary – KPOWU - NAIROBI)

2. GANIRA A. ANDOLO (Branch Secretary – KPOWU – ELDORET

FOR AND ON BEHALF OF 726 MEMBERS OF KENYA PETROLEUM OIL

WORKERS UNION..... INTERESTED PARTIES

RULING

1. There are two Applications before Court for determination; one is dated 18.8.2016 and the other is dated 12.9.2016. The Application of 18.8.2016 is brought under Section 12 of Employment and Labour Relations Court Act, Sections 4, 5, 48, 49, 53, 54 and 74 of the Labour Relations Act 2007 and Rules 16 of Industrial Court (Procedure) Rules 2010 and all the enabling provisions of the Law where the Claimant/Applicant seeks for Orders:

1. That this Honourable Court certify this Application as urgent and the said Application be heard ex parte in the first instance.

2. That service of this Application/Claim on the Respondents be dispensed with.

3. That this Honourable Court do issue Orders directing the Respondent to deduct and remit union dues from their employees, members of the union as per the June, July 2016 salary deduction check off list used by the Respondent of all the members of the Union pending the hearing and determination of the Application and the main suit.

4. That this Honourable Court do issue an Order directing the Respondent to notify the Claimant urgently all the members of the union who have sought to pay union dues directly to the Union.

5. That this Honourable Court do issue Orders restraining the Respondent and/or its agents from victimizing, intimidating, coercing, harassing, persuading, dissuading members of the Claimant to leave the membership of the Claimant/Applicant pending the hearing and determination of the Application and the main suit.

6. That this Honorable Court do issue Orders restraining the Respondent from interference and meddling with the membership of the Claimant and in any form whatsoever inter alia advising the membership.

7. That this Honourable Court do issue Orders restraining the Respondent and/or its agents from receiving, accepting and acting on letter or instructions from members of the Claimant seeking to pay unions directly pending the hearing and determination of the Application and the main suit.

8. That the costs of this Application be provided for.

2.The Application is premised on the grounds:

1. That the Claimant/Applicant's Constitution and rules allow it to recruit, enroll and represent the Respondents' unionisable employees and it has since the year 1984 represented all the unionisable employees of the Respondent.

2. That the Respondent has been deducting Trade Unions from a total of 858 Union members and remitting to the Union Kshs. 1,500,000/= as union dues.

3. That the Respondent and its agents have in the month of July and August 2016 harassed, intimidated, coerced members of the Claimant/Applicant and unlawfully dissuaded them to sign spurious forms to indicate that they will pay union dues directly to the union.

4. That the Respondent has equally refused to inform the Claimant the members who have indicated their interest or willingness to pay directly Trade Union dues.

5. That the Respondent in violation of the Claimant/Applicant's Constitution and the provisions of the Notice of Employees Authority Deduction (popularly referred to as Check Offs deduction forms) advised some members of the Claimant/Applicant to pay directly the union without informing the Union and/or seeking the mandate of the union on such cumbersome form of payment considering the total number of members.

6. That it is the Claimant/Applicant who has the legal mandate to inform the Respondent about its members who want to remit directly to be removed from the Check Offs System. That the Respondent has interfered and intermeddle in the affairs of the union by purporting to advise the Claimant members.

7. That the Claimant/Applicant does not want to change/amend and or alter the check off forms that has been in place latest June, July 2016.

8. That the Check Offs Forms are a Ministerial Order and no alternative Order has been made cancelling the Order by any party.

9. That paying directly for over 857 union members present a logistical nightmare, inconvenience, hardship and is cumbersome and the Respondent has orchestrated this process to kill the Union.

10. That the Respondent action is malicious, unlawful, and atrocious and is geared to cripple the Claimant/Applicant and the function of the union envisaged in the constitution of the Union and Article 41 of the Constitution of Kenya.

11. That without union dues the Claimant/Applicant will not be able to pay its staff salaries, office rent, electricity, water and meet its overheads and other fundamental legal and financial necessities and run and manage its branches.

12. That the Respondent action is meant to ensure that the Claimant/Applicant is not financially sound to run its affairs.

3. The Application is supported by the Affidavit of one Gilbert Amolo the General Secretary of the Claimant/Applicant wherein he reiterates the grounds on the face of the application and adds that all their efforts to have the Respondent disclose members who have subjected themselves to deduction of union dues and desist from activities geared to weaken the union have not succeeded. They pray for their Application to be allowed.

4. The Application dated 12.9.2016 is brought under Articles 36 and 41 of the Constitution of Kenya 2010, Section 12 and 16 of the Employment and Labour Relations Act, Sections 4, 34, 41, 48 and 52 of the Labour Relations Act and all other enabling Provisions of the Law seeking orders:

1. That this Application be and is hereby certified urgent and the same be heard ex parte in the first instance.

2. That the interested Parties/Applicants be enjoined in this Suit as being persons directly affected by the Dispute herein any resultant orders to be granted herein.

3. That the ex parte Orders granted on 23.8.2016 and extended on 5.09.2016 herein be and are hereby stayed, reviewed, discharged and/or vacated pending the hearing and determination of this application and the Claimant's Application dated 18.8.2016.

4. That the interested parties be allowed to continue remitting their Trade Union Dues to the Claimant through their branches namely Nairobi Branch and Eldoret Branch pending the hearing and determination of the Elections Dispute involving the Claimant and its Members and Branches in ELRC – Cause No. 375 of 2016.

5. That this Honourable Court do grant such further Orders and/or directions in relation to all the parties herein as are just and expedient including but not limited to the manner the Claimant and its branches shall relate pending the hearing and determination of this Application or such further Orders of the Court.

6. That costs of this Application be provided for.

5. The Application is premised on the grounds:

1. There is a dispute pending before the Court in ELRC Cause No. 375 of 2016 over the elections of the National officials of the Claimant Union conducted in an undisclosed location on 6th March, 2016, without the participation of delegates from two (2) Branches of the Claimant namely Nairobi and Eldoret and the Notification of Change of officials of the Claimants hurriedly registered by the Registrar of Trade Unions on 18.3.2016 and 4.4.2016 after filing of the aforesaid suit on 10.3.2016 have been challenged with a view of being nullified.

2. The Interested Parties who are members of the Claimant and who through their Branch Secretaries protested the aforesaid elections never sent their delegates thereto and are accordingly not represented by the National officials of the Claimant.

3. The Interested Parties/Applicants have a constitutional and statutory right to decide and direct their employer (Respondent) on how and where to remit their Trade Union dues and the Claimant cannot compel the Respondent on how to deal with the Applicant's Union dues.

4. The ex parte orders granted on 23.8.2016 are not only unconstitutional, unlawful, irregularly obtained but also unconscionable and an affront to the rights of the Interested Parties, which are constitutional and statutory rights to determine how their union dues are to be handled or paid.

5. The Interested Parties/Applicants had already given requisite Notices to the Employer/Respondent under Section 52 of the Labour Relations Act to stop deduction of the Union dues directly By Check-off System against their salary and continue to pay the union dues directly through their union branch accounts as by law permitted and it is unlawful and unconstitutional to stop them from exercising this statutory and constitutional right to do so.

6. It is only fair and just that the ex-parte orders granted on 23.8.16 and extended on 5.9.2016 be reviewed, vacated, set aside and/or discharged as the Orders were obtained by non-disclosure and concealment of material facts to the Court including the pendency of the Elections dispute before this Court as aforesaid, the discontent by members of the Claimant Union, the Express letters of instructions and Notice to the Employer (Respondent) for direct payment of Union dues.

7. The two (2) Branches of the Claimant namely Nairobi and Eldoret which are recognized entities in law and semi-autonomous have met and taken resolution both in relation to the Union Dues, the Election Dispute and the Proceedings herein for recognition and ventilation of their grievances and they cannot in law be locked out from these proceedings hence the need for their joinder as parties directly affected by any outcome or Orders likely to be given herein.

8. Due to urgency of the matter, and the fact that the Respondent's Pay Roll is closed by 20th every month, it is imperative that this Application be heard and Orders sought herein be granted before the said date to avoid undesirable consequences and inconveniences to all the parties herein.

6. The Application is opposed and the Claimant Union who have filed a Replying Affidavit sworn by the General Secretary wherein they state that the Applicant/Interested Parties have totally misinterpreted the provisions of Article 36, 41 and Section 52 of the Labour Relations Act 2007 and several sections of the law, which they are keen to invoke in their apparent constitutional rights violations.

7. They state that a branch of a trade union is not an autonomous entity and is only registered on condition that the mother union exists and the branch can only operate within the confines of the Constitution of Union for it to function within the law.

8. The Claimant state that under the law they are only mandated to run one designated account for the receipt of trade union dues as dues deducted and they can only be paid into that account after a ministerial Order. That Section 52 of the Labour Relations Act is to the effect that trade union dues can only be paid directly to the trade union and not to the branch of the Trade Union. That the Nairobi and the Eldoret branches are not the trade union envisaged under the law.

9. The Claimant Union further state that the alleged Interested Parties initially become members of the Claimant through signing of the check off forms and the reading of the law requires that any variations to the check-off be in writing to the Claimant, and any signatures require verification. That no document has been presented to Court to show that the so called Interested Parties have desired to vary the check-off forms and or authorized the Branch Secretaries to represent them in this matter.

10. They further state that trade union dues are property of the union which can only be used on the legislated activities and be controlled by the Union and not the branches. That the 1st and 2nd Interested Parties have no authority from the 726 members drawn across all the Branches of the Claimant Union to act on their behalf.

11. They state that the Minutes attached to the Application of 12.9.2016, are not authentic as the 113

members who purportedly attended the meeting held on 2nd September, 2016, do not have signature against their names going to show that the meeting was never held. That the Minutes presented to this Court are a sham as they are unsigned. At the said meeting it is alleged that neither chair nor vice-chair were present and neither was an ad-hoc chair appointed to chair the meeting.

12. The Claimant also state that the list of attendees at the meeting is repetitive and thus not a true representation of any purported meeting.

13. It is the Claimant's contention that the Applicants/Interested Parties herein have not shown how they will suffer irreparable loss once the Application dated 18.8.2016 is allowed. Further that the ELRC Cause No. 375 of 2016 mentioned by the Interested Parties is purely challenging the election of the Claimant's National Officials and has no relationship whatsoever with the current case which is about non-deduction and remittance of union dues through check-off system and the outcome of either suit shall not affect the other in any way. That notwithstanding, they state that the outcome of the aforementioned case will have no effect since the designated National Account of the union is a property of the union and will remain intact in the wake of officials changing hands.

14. The Claimant state that the prayers sought are untenable as the details to the accounts to be affected are not provided and the dues that should be remitted in the said accounts. Further that there is no evidence adduced to warrant the Orders sought by the interested parties as the said Orders were granted in the presence of the Claimant Union and the Respondent.

15. The Claimant state that the enjoining of the Interested Party in the suit will not be procedural as the sole reason for check off system in union dues deduction is between the Claimant and Respondent and the Interested Parties have no proved interest in the subject matter of the suit. They pray for the application to be dismissed with costs.

16. The 1st Interested Party has also opposed the Application by filing a Replying Affidavit sworn by one Frederick Machio the Nairobi Branch Secretary. He states that the allegations that the Interested Parties were coerced, intimidated, misled or dissuaded to leave the Union or execute the letters to the Employer stopping the check off deduction from their salary is false and malicious since the Union members made a voluntary decision guided by the Constitution of Kenya and the Labour Relations Act.

17. They contend that the Orders sought can only be allowed once all parties are heard. Further that the law cannot stop a member of the Union from paying any dues, levies, subscriptions or payment to the gazette account of the Union. That the Interested Parties are the principals of the union and the union officials are mere agents whose wishes cannot override those of the principals.

18. They state that the Minutes attached to their application are genuine and all allegations that the same are false should be disregarded.

Submissions

19. The Interested Parties submit that any Order amounting to a Mandatory injunction cannot be issued by the Court ex parte or at the interlocutory stage before any party likely to be affected by the Order is heard. They cite the case of **Hellen Muthoni Kibora Vs James Kibiro & Another (2007)eKLR** in support of this assertion. They therefore hold that the orders of 23.8.2016 should be vacated as guided by the cited authority.

20. That the prayers sought in the Application of 18.8.2016 are incapable of being granted and should be dismissed with costs as they were made in breach of the rules of natural justice and the constitution as the Interested Parties exercised their constitutional right by instructing the employer to stop the check off system of deduction from their salaries.

21. Further that if the orders sought in the Application of 18.8.2016, are granted they have the effect of determining the whole suit and there will be nothing to be tried herein contrary to the cardinal rules of

civil proceedings.

22. The Interested Parties contend that the Claimant is an agent of the Interested Parties and therefore cannot assume a superior role or right over its principals. That the Application of 18.8.2016 cannot be claimed to be undefended as they filed an Application dated 12.9.2016 to counter any allegations in the said application.

23. They further submit that the 726 of the 858 members of the union have distanced themselves from the National Union Officials and given written instructions of their wishes to have their union dues submitted directly to the branches and the Court cannot be used to disregard their wishes. They therefore pray for the application dated 18.8.2016 to be dismissed and the one of 12.9.2016 to be allowed with costs.

24. The Claimant in addition to the averments in the Replying Affidavit state that their Application dated 18.8.2016 to be allowed for it is unopposed as was set out in the case of **Central Organization of Trade Unions (K) vs. Cabinet Secretary, Secretary, Ministry of Labour Social Security & Services & 2 Others(2014)eKLR.**

25. They further state that the Interested Parties are still members of the Union and as such the Respondent is under the law under an obligation to continue deducting and remitting the union dues using the check-off system. They cite the case of **Kudheha Workers Union Vs Agakhan University Hospital (2015)eKLR** where the Court in interpreting Section 48(2) and (3) stated that:

“From the above provision, it emerges that deduction and remittance of the 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 in an interference by the Respondent of the employees’ right to join and participate in the activities of a trade Union... it is therefore this Court’s finding that the Respondent’s failure to deduct and remit union dues of employees who joined the union infringed on their right under Article 41 of the Constitution and I order that the Respondent do forthwith deduct and remit union dues for employees who have so authorized and not later than 30 days from the date of this judgment.”

26. The Claimant state that they are entitled to receive the union dues of its members and the branches and Interested Parties do not have a separate legal personality allowing to receive any deductions from its members and as such the Application of 12.9.2016 should be dismissed with costs.

27. I have considered the averments and submissions of both parties. I would consider both Applications jointly emanating from the same issues. The issues to determine are as follows:

1. Whether to enjoin the Interested Parties in this suit as persons directly affected by the dispute herein.

2. Whether the Applicant in application dated 18/8/2016 has established a prima facie case before Court to warrant issuance of orders sought.

3. What orders are suitable in the circumstances?

28. The Applicants in Application dated 12.9.2016 are members of the Claimant Union who wish to be enjoined in this suit. They contend that they have a stake in this case because they have already filed Cause No. 375/2016 challenging elections of their union held on 6/3/2016 which was held without their participation.

29. By virtue of the fact that Applicants are members of the Claimant Union, they have a stake on the issue of remittance and use of union dues. They are bonafide union members as evidenced by their Appendix C & D. Since the union dues being questioned are deducted from their salaries, they have a

stake in the matter and I allow them to be enjoined in this case.

30. On the 2nd issue, the issue is whether the Court can order remittance of union dues to branches of a union by individual union member and stop remittance to the Union Account.

31. Section 48 of Labour Relations Act states as follows:

(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.

32. From the above provisions, union deductions are supposed to be made following an order from the Minister. The moneys so deducted should be channeled through a specified Account of the trade union or a federation of trade unions. The Minister may however vary an order he has issued on an application by the trade union but a member of a union may give notice to resign from a union and in that respect stop the deduction of his union dues from his salary.

33. There is no provision of remittance of union dues by individual employees unless they cease being member of such a union. There can only be variance as to the Account where union dues are to be made following an application to the Minister and an order for the Minister thereupon.

34. In this case there is no evidence of any such application and any variance by the Minister. In my view, the Applicants have established a prima facie case with a probability of success hence the order that the trade union dues should continue being channeled to the Union Account as previously done.

35. There is no evidence at the moment that would warrant dislodging of orders given at the ex parte stage. The orders in force are not of a mandatory nature as submitted by the Respondents in the Application as these deductions have previously been made and should therefore not be discontinued at this stage.

36. I would therefore order as follows:

- 1. The Interested Parties are hereby enjoined in this cause.***
- 2. The Respondent is hereby directed to notify the Claimant urgently of all the members of the union who have sought to pay union dues directly to the Union.***
- 3. The Respondent and/or its agents are restrained from victimizing, intimidating, coercing, harassing, persuading, dissuading members of the Claimant to leave the membership of the Claimant/Applicant pending the hearing and determination of the Application and the main suit.***
- 4. The Respondent is hereby restrained from interference and meddling with the membership of the Claimant and in any form whatsoever inter alia advising the membership.***
- 5. The Respondent and/or its agents are hereby restrained from receiving, accepting and acting on letters or instructions from members of the Claimant seeking to pay unions directly pending the hearing and determination of the Application and the main suit.***
- 6. The Respondents to continue deducting and remitting union dues as previously done through check off system pending hearing and determination of this claim.***
- 7. Costs in the cause.***

Read in open Court this 15th day of June, 2017 in Nairobi.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

K'Opere for the Interested Parties – Present

No appearance for the Claimant