



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.401 OF 2017

KENYA PRIVATE UNIVERSITIES

WORKERS UNION.....CLAIMANT

VERSUS

DAYSTAR UNIVERSITY.....RESPONDENT

RULING

1. The claimant union filed application dated 28th February, 2017 and seeking for orders that they be allowed access to the workplace so as to be able to access potential members and current members and that the respondent be ordered to effect union deductions and remit the same to the claimant in terms of section 48 of the Labour Relations act, 2007.
2. In the interim the court restrained the respondent from harassing the claimant members and allowed the claimant union unconditional and reasonable access to the respondent premises.
3. The respondent also filed application dated 8th March, 2017 seeking to have he orders on access to be stayed and that the suit be declaimed as premature.
4. The respondent also filed Notice of Preliminary Objections on the grounds that the suit is premature and here are pending conciliation proceedings on similar issues as the ones before court; there is no recognition agreement between the parties and that the court lacks jurisdiction herein.
5. The claim in the application dated 28th February, 2017 and on the orders sought is supported by the affidavit of Peter Emisember Owiti, the General Secretary of the claimant and on the grounds that section 56(3) of the Labour Relations Act, 2007 allows matters concerning the refusal to access to be lodged with the court and the respondent is in breach of the claimant members rights by restricting access. Despite writing to the respondent severally, the respondent has not obliged. The claimant has therefore invoked the provisions of section 62 of the Labour Relations Act, 2007.
6. Due to refusal for access, the claimant reported a dispute with the minister and a conciliator was appointed and a meeting held on 13th January, 2017 but the respondent opted to appoint advocates to act and asked for more time. No time was given by the respondent.
7. The respondent employees have joined the claimant union and signed check-off forms and these have been forwarded to the respondent on 14th February, 2017. The employees are now being threatened by the respondent. the deduction and remittance of trade union dues is lawful and in accordance with section 48 of the Labour Relations Act, 2007. The respondent has refused to oblige.

8. In reply, the respondent filed the **Repaying Affidavit sworn by Pius Muia**, Chief Manager-Human Resource to the respondent and avers that there is no Recognition Agreement between the parties. By letter dated 13th December, 2016 the respondent was invited to attend a conciliation meeting by the Conciliator appointed by the minister over a trade dispute that the claimant had reported. The meeting was scheduled for the 23rd December, 2016.

9. The issues in dispute reported to the conciliator were that the respondent had refused to allow the union officials access so as to recruit members to join the claimant union and that there had been threats of sackings of employees for distribution of union materials and recruiting others to join the union. The respondent thus instructed advocates to attend to the matter. By consent it was agreed that the conciliation meeting be held on 13th January, 2017.

10. It was also agreed that the claimant was to supply the respondent advocates with their memoranda to enable them submit their respective responses. The claimant was also to set out the allegations made against the respondent; write to the respondent so as to be given access to the premises and that parties would go back to the conciliator on 31st March, 2017.

11. The claimant did not agree. They instead filed suit. The respondent wrote to the conciliator with information of the suit ad interim orders.

12. The issues raised in the suit are similar to what is before the conciliator/ the claim and application and thus premature and facts material herein have not been disclosed to the court.

13. Without a recognition agreement between the parties, the claimant cannot invoke the provisions of section 56 of the Labour Relations Act, 2007. Access to the respondent premises has been denied due to the unreasonable demands been made by the claimant union. The claimant has attempted to impose time on the respondent during work hours to conduct meetings. This has been done without respect and courtesy. This is meant to disrupt the business of the respondent which is an academic institution which serves students both local and foreign. Any disruptions of routine matters will be of great prejudice to the respondent.

14. Both parties made their oral submissions in court.

15. From the foregoing and based on the applications before court and the notice of objections filed by the respondent, it is apparent that parties attended before a conciliator on 13th January, 2017 and several matters were agreed upon. These were facts not disclosed to the court on 1st March, 2017 when interim orders were granted to the claimant.

16. Conciliation proceedings are lawful and well recognised in our judicial system and the court. such is to ensure parties are able to address matters of concern as nearest to the shop floor as possible.

17. Therefore, when the parties attended before the conciliator on 13th January, 2017 and drew consent on the way forward, such is lawful and ought to have been addressed as agreed.

18. By application of section 15 (4) of the Employment and Labour Relations Court Act, 2011 this court is required where it is apparent that the dispute ought to be referred for conciliation to stay proceedings and refer the same as appropriate. The law provides as follows;

(4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

19. I find this as one such appropriate case for reference back to the conciliator to address as outlined in the consent of 13th January, 2017. The proceedings herein are stayed to allow the process of conciliation to conclude.

20. Before conclusion, reference was made by the respondent with regard to their not being a Recognition agreement between the parties and that as such; there can be no compliance with section 48 of the Labour Relations act, 2007. To the contrary, a Recognition Agreement is only applicable where parties seek to have, conclude or negotiate a collective bargaining agreement. Deduction and or remittance of trade union dues where a trade union has recruited over five (5) employees in the employment of an individual employer must be effected. Such does not require the existence of a Recognition Agreement.

21. Section 48 of the Labour Relations Act, 2007 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.

22. Therefore, where the claimant has recruited over 5 members and employees of the respondent and the respondent has been served with the requisite Form S and has knowledge of orders as published by the minister on trade union deductions in favour of the claimant, the condition for a Recognition Agreement should not arise.

Accordingly, proceedings herein are hereby stayed by virtue of section 15 of the Employment and Labour Relations Court Act, 2011. The matter is referred to the conciliator as appointed by the Minister.

Delivered in open court at Nairobi this 19th day of October, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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