



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1087 OF 2017

KENYA PRIVATE UNIVERSITIES WORKERS UNIONCLAIMANT

VERSUS

UNITED STATES INTERNATIONAL UNIVERSITY RESPONDENT

RULING

1. The application dated 14th June, 2017 was fixed for hearing by the court in the presence of both parties for 2nd October, 2017. The respondent was absent at the hearing. The claimant made oral submissions to support the application. The respondent has filed a Replying Affidavit.

2. The claimant, Kenya Private Universities Workers Union by application dated 14th June, 2017 filed under the provisions of section 12 of the Employment and Labour Relations Court Act, 2011 and sections 56 and 74 of the Labour Relations Act, 2007 and seeking for orders that;

Prohibitory orders be issued against the respondent to allow the applicant/claimant to access both potential members till the hearing and determination of this application.

The court issue an order against the respondent to comply by mandatory provision of the law (Section 48 of the Labour Relations Act, 2007) by way of deducting and remitting union dues from the applicant members who have duly signed the check off forms pending the hearing and determination of the application.

3. The application is supported by the annexed affidavit of Peter Emisembe Owiti and on the grounds that section 56(3) of the Labour Relations Act, 2007 (the LRA) allows matters concerning refusal to access be referred to the court. The respondent is in breach of the workers fundamental rights under articles 36 and 41 of the constitution, 2010 to associate and unionise. The claimant has written to the respondent severally but declined to have a meeting and thus forced the claimant to invoke the provisions of section 62 of the LRA.

4. A conciliator was appointed by the minister but the respondent refused to attend and opted to engage through their advocates.

5. Other grounds are that the claimant has 75% of respondent employees willing to join its membership but fear victimisation and termination of employment. The threat is real as this has happened to other institutions where the claimant has sought to recruit union members which has resulted in termination of employment and such are matters now before court in Cause No.180 of 2015 (nakuru); Cause No.347 and 682 of 2015 (Nairobi); Cause No.108 of 2014 (Nairobi) and Cause No.28 of 2017 (Nyeri).

6. Section 48 of the LRA allow for the deduction and remittance of trade union dues and the respondent has refused to comply. The claimant is seeking for the intervention of the court and allow the orders sought.

7. In reply the respondent filed Replying Affidavit sworn by Prof. Paul Tiyambe Zeleza the Vice Chancellor and avers that the respondent has not denied the claimant access to the respondent to recruit members as alleged as all proposed dates for meetings arrived and the claimant failed to confirm. On 3rd July 2017 the claimant officials met and addressed respondent's employees at the Auditorium which was provided for and facilitated by the respondent. despite such use, there were no charges made as required.

8. Prof. Zeleza also avers that when the respondent was invited before the conciliator their advocates replied and asked for time to reply to the submissions. The claimant was to particularise the alleged breaches of the law for the respondent to be able to respond. There was no evidence of denial of access to the respondent premises. Materials required by the respondent to be able to respond to the claimant were never submitted

9. The claimant is not entitled to union dues under section 48 of the LRA as this is premature. There is no Ministerial Order to this effect to enable the respondent comply and ensure union dues deduction and remittance to the claimant. The application should be dismissed with costs.

10. The claimant made oral submissions.

11. The claimant is seeking a prohibitory order against the respondent so as to be allowed access to their premises so as to recruit members. The claimant is also seeking a mandatory order compelling the respondent to deduct and remit trade union dues to the union.

12. The principles governing the issuance of mandatory orders were set out by the Court of Appeal in the case of **Nguruman Limited versus Jan Bonde Nielson & 2 Others, Civil Appeal No.77 of 2012**, as follows;

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour. ...

13. The essence of a prohibitory order is issued where the court finds a high degree of assurance that at the trial it will appear that the injunction was rightly granted. Even where there is a prima facie case, an applicant must demonstrate that unless he order of prohibition sought is not granted there will be grave injury and damage caused and that the balance of convenience favours such an applicant.

14. Access to an employer's premises by a trade union is addressed under section 56 of the LRA, as follows;

56. Trade union access to employer's premises

(1) Without limiting the matters that may be dealt with in a recognition agreement, a recognition agreement shall provide for an employer to grant a trade union reasonable access to the employers premises for officials or authorised representatives of the trade union to pursue the lawful activities of the trade union, including but not limited to—

(a) recruiting members for the trade union;

(b) holding meetings with members of the trade union and other employees outside of

working hours;

(c) representing members of the trade unions in dealings with the employer; and

(d) conducting ballots in accordance with the constitution of the trade union.

15. My reading of the above provisions is that access to the employer premises by the trade union is a matter that should be addressed in a Recognition Agreement. Such should address recruitment, holding of meetings, representations and conducting of ballots. The question of Recognition Agreement, how it is achieved, agreed upon and executed is addressed under section 54 of the LRA. Such is not a matter in issue herein but with the question of access to the respondent premises, the claimant ought to address the same before seeking access to the respondent premises through the court.

16. On the other aspect of deduction and remittance of trade union dues by the respondent to the claimant, sections 48 and 52 of the LRA apply. On the one hand the Minister must issue an order that is published in the Kenya Gazette or that the unionised employees make a direct payment to the trade union.

17. The claimant herein has not submitted the published order of the Minister. There is no evidence at this instance that the respondent has been served with such an Order and failed to comply.

18. For the respondent to make any deductions from its employees without any order of the Minister or pursuant to any other lawful authority, such would be in violation of section 19 of the Employment Act, 2007. Such violation carry a serious sanction including a fine and prison term. Without proof thus of any lawful cause or justification for the demand of trade union deductions and remittance to the claimant, the application by the claimant must fail.

Accordingly, application dated 14th June, 2017 is hereby dismissed. Costs in the cause.

Delivered in open court at Nairobi this 7th day of November, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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