



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

CAUSE NO. 389 OF 2016

TRANSPORT WORKERS UNION CLAIMANT

VERSUS

SAUDI ARABIA AIRLINES RESPONDENT

RULING

On 23rd March 2016, the respondent filed Notice of Preliminary Objections to the claim as filed by the claimant. The grounds are that

- 1. By respective letters of resignation dated 25/1/16 by the employees of the respondent withdrawing their membership from the claimant, it will be unconstitutional and contrary to article 41 of the constitution and freedom of association as provided under section 4 of the labour Relations Act, 2007 to force the respondent's employees to be members or continue to be members of the claimant having had voluntarily resigned and withdrawn their membership.*
- 2. By virtue of (1) above the claimant lacks locus standi to purport to bring out this suit or purport to represent persons who are no longer its unionisable members and/or purport to effect the Collective Bargaining Agreement (CBA) to unconstitutionally collect 'union dues' of staff that are not its members pursuant to a CBA that has already been overtaken by events.*
- 3. The claimant has not proved that it has more than 5 members from the claimant to warrant the respondent deductions premised on the provisions of Labour Relations Act.*
- 4. That the application and claim by the claimant are tantamount to an attempt of unjust enrichment.*
- 5. The claimant suit and application are vexatious and an abuse of court process and should be dismissed in limine.*

Both parties submitted in court.

The respondent submitted that the claimant has no locus standi to bring this claim owing to the fact that its members in the employment of the respondent have since resigned their membership and under article 41 of the constitution and section 4 of the Labour Relations Act, they cannot be compelled to belong to the claimant union. The basis of the claim no longer exists. The resignation was voluntary and the claimant has no basis to claim a deduction of union dues by the respondent as they lack the legal mandate and numbers for the same. An employee has a right to join a Trade union of choice and once the

respondent employees tendered their resignations from the claimant union, a claim such as this one cannot stand as the claimant lacks capacity to represent non-members. The contention that Agnes Wairimu should not sign documents for the respondent has no basis as this is an officer of the respondent who has been given authority to represent the respondent.

In reply, the claimant submitted that the cause of action arose from the respondent intimidating and harassing claimant members. On 25th January 2016 the claimant called claimant members who are on yearly contracts and threatened them to resign from the claimant union or lose their contract. The staff were called from leave to sign prepared letters or be terminated. The parties have a CBA and have agreed to mutually negotiate terms between them. The respondent cannot change such terms without consulting the claimant as such would be an illegality. The respondent has demonstrated why Agnes Wairimu should sign their documents and not a senior officer as required under section 2 of the Labour Relations Act. That the respondent has taken a course for intimidation on its employees and the claimant and it is wrong to stop union dues deductions without following the clear provisions of the law. The purported resignations are meant to defeat justice and the suit should be heard on merit.

Determination

Both parties agree they are in a relationship governed by a CBA as a result of a Recognition Agreement between the parties. Such recognition is key, as from it, rights flow to both parties. To achieve recognition by a trade union is no mean task. Such is attained upon meeting the required stipulated status in law. Such are lawful processes set out under section 54 of the Labour Relations Act. See **Amalgamated union of Kenya Metal Workers versus Dathley Industries Ltd, Cause no.2098 of 2011**. The import of a Recognition Agreement is given meaning by this Court in the case of

KUDHEIHA versus the Aga Khan University Hospital, Cause No.815 of 2015 thus;

... Recognition Agreement gives the Claimant the sole role of representing employees to raise any issue with the Respondent issues which may have negative impact on them... [acts that] may be barred by the Recognition Agreement as it says, the Claimant reserves the right to negotiate the procedures to be followed. The Claimant has the right to question any practice undertaken against its members within the Respondent employment. The Respondent should consult with the Claimant before taking any negative action against its members. [Emphasis added].

It is common cause that the respondent employees are/were members of the claimant. the claim herein was filed on 14th March 2016 And the issues registered in dispute are the changing of terms and conditions of employment of claimant members without involvement of the claimant; refusal to review the CBA for 2016/2017; refusal to deduct trade union dues pursuant to section 48 of the Labour Relations Act; and intimidation and threats to claimant members for their union membership contrary to section 4 and 5 of the Labour Relations Act. In response, the respondent filed the defence setting out their objection and noting that the claimant members resigned from their union membership vide letters dated **25 January 2016** and therefore the objections with regard to the claimant *locus standi*.

Unionisation is a right under the Bill of Rights and set out under article 41 of the Employment Act. The basis of such unionization is in the context of the right to associate and the freedom to choose and make decision in the context of the right to personal autonomy, dignity and security of the person. Section 48 of the Labour Relations Act is clear with regard to unionisation and the legal rights that flow from unionisation. Such unionisation is fundamental to an employee as with it several employees come together and associate so that they can achieve a collective within which they can negotiate terms and conditions of work. The right under section 41 of the constitution with regard to unionisation therefore only get effective in the collective. An individual employee claiming the right to unionise must mobilise like-minded employees as alone, the right is just a mirage. Equally, an employer is bound to ensure, protect and promote the right to unionise as with it, the employer deals with the collective unlike the case of negotiating terms and conditions of employment with each individual employee. The positive right in unionisation is for the employer to ensure that the employee under them are aware of their right to unionise and are given the freedom to do so. The negative right is also that the employer should not

punish, intimidate, threaten or in any manner separate an employee seeking to enjoy their right to unionise and pitch them for victimisation. Such would be to derogate from the Bill of Rights.

In this regard, the Labour Relations Act, in its preamble sets the tempo for unionisation thus;

... [the purpose of unionisation is] to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes.

Such I find is the core context, purpose and content for Labour Relations articulated in the Labour Relations Act. To defeat this purpose, would be to go against fair labour relations set out under article 41 of the constitution.

Section 48 of the Labour Relations Act therefore requires an employee and member of a trade union, where they have resigned from the trade union to inform the employer in writing and the employer has to inform the union of this fact as from such written notice of resignation, the employer must stop trade union deduction in the subsequent month thus;

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 notice to resign must therefore come from the employee. Be submitted to the employer and the employer should forward the same to the union. Deduction of union dues should stop from the following month in which the written notice is issued.

The contest herein is that the claimant members in the employment of the respondent have all since resigned. The claimant on their part contest such resignation as being done under threats, intimidation and harassment.

The court cannot ignore the issues in dispute in this cause as set out above. They are in the context that the respondent is engaging in unfair labour practices and does not wish to negotiate a new CBA with terms and conditions of employment for claimant members. There are allegations of threats and intimidation of claimant members so as to resign from the claimant union and in essence defeat the purpose of recognition between the parties. I have had chance to go through the resignation letters of the claimant members and employees of the respondent.

These letters are generic. All dated 25th January 2016.

All the letters are addressed to the claimant union.

Section 48 (6) of the Labour Relations Act is clear, resignation letters from the trade union where an employee belongs *shall* be addressed to the employer. Such an employer is the one who should forward the same to the trade union. It is therefore not lost to the court the submissions of the claimant that their members were all called, some recalled from their annual leave and directed to submit their resignations. These are however matters of fact that cannot be verified in the current context. Such requires call of evidence in a full hearing. To determine the claims for intimidation, harassment, and the context within which the claimant members wrote their letters dated 25th January 2016 to their union, all in the same dictum and template cannot be fully appreciated by the court within the objections made by the respondent.

The issues set out between the parties I find are matters of fact. The court will require the call of evidence as these are not purely legal matters that can be determined instantly under the principles of **Mukisa Biscuit Co. versus West End Distributors (1969) EA.**

To terminate the proceedings at this stage would be to deny the parties crucial opportunity to bring to the attention of the court facts that are yet to be canvassed. The issues set out above requires to be gone into and the same be determined on merit.

I need to add, the respondent based on the above findings shall put into account the provisions of section 46(h) of the Employment Act thus;

(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation;

I find good basis in the standing of the claimant and the court shall address the claim on its merits. The objections herein filed by the respondent are dismissed. Parties shall be allocated a hearing date for the main suit.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS DAY OF 3RD JUNE 2016.

M. MBARU

JUDGE

In the presence of

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