



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 1020 OF 2016

**KENYA NATIONAL PRIVATE SECURITY WORKERS
UNION.....CLAIMANT/APPLICANT**

VERSUS

GYTO SECURITY SERVICES LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant's notice of motion application dated and filed on 31st May 2016, expressed to be under Section 12 of the Industrial Court Act as read together with Article 41 of the Constitution of Kenya and Section 48(2) of the Employment Act 2007, seeks the following prayers:-

1. This motion be certified urgent and be heard on priority and *ex parte* in the first instance.
2. Pending the hearing and determination of the motion *inter partes* the Honourable Court do issue an interim preservative order to stop the Respondent from victimising, harassing or coercing, intimidating or otherwise dismissing or terminating and transferring any of the Union members whose names appear in the check off system.
3. Pending hearing and determination of the motion and/or the main cause the Honourable Court do compel the Respondent to deduct union dues from all unionisable employees who have signed check-off forms therefore acknowledging membership and remit the money so deducted to the Claimant's gazetted account.
4. Pending the hearing and determination of this motion the Court be pleased to order the Respondent to allow workers to join the union of their choice voluntarily.
5. The Respondent to bear the cost of this application in any event.

2. The motion was supported by the affidavit of Isaac G. M. Andabwa and the grounds on the face of the motion which were to the effect that the Claimant had recruited more than 5 employees and was still recruiting employees of the Respondent in the union by means of check-off within the meaning of the mandatory provisions of Section 48 of the Labour Relations Act. The Claimant asserted that on receipt of the check-off forms the Respondent had neglected, failed and/or refused to deduct or remit from members whose names appear in the check off lists and that the Respondent has acted in violation of the Constitution and in particular to deny participation of its employees in the affairs of the Union as provided under Article 41 and the enabling laws of Kenya.

3. The motion was not opposed despite service by affixing copies of the summons and the pleadings on the gate of the Respondent. The Claimant/Applicant submitted on 29th June 2016 that the Respondent's refusal to effect deductions and remit union dues was in violation of the employees rights to join a union of their choice. The Claimant submitted that the refusal to deduct and remit dues of the 56 employees recruited was contrary to the provisions of the Labour Relations Act. The Claimant submitted that the Respondent was targeting and victimising the unionisable employees for joining the Claimant union and has threatened to dismiss them contrary to Section 4, 5, 6 and 7 of the Labour Relations Act. The Claimant submitted that the employees should be free to join any trade union of their choice as provided for under Article 41 of the Constitution. The Claimant relied on the case of **Kenya National Private Security Workers Union v Lavington Security Limited Cause No. 2045 of 2015** (unreported).

4. At the onset, the rights of labour are captured succinctly in Article 41 of the Constitution of Kenya 2010. The Constitution makes it clear that unionisable employees enjoy unfettered rights to join a trade union of their choice. The ILO Convention No. 87 **Freedom of Association and Protection of the Right to Organise Convention, 1948** is not ratified by Kenya. However, the ILO Convention No. 98 **Right to Organise and Collective Bargaining Convention, 1949** is ratified and forms the corpus of international law admitted by Article 2 of the Constitution of Kenya. Article 1 of the Convention provides as follows:-

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to--
 - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

5. In essence, the ILO Convention protects workers against discrimination in respect of their employment on account of joining unions and that the protection shall apply more particularly in respect of acts calculated to make the employment of a worker subject to the condition that the worker shall not join a union or shall relinquish trade union membership or acts calculated to cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours. In other words, the Convention disallows any conduct that may fit within the confines of the application before the Court.

6. Closer still, the Labour Relations Act gives impetus to the provisions of Article 41 the Constitution and ILO Convention 98. The Act states in its preamble that it is an Act of Parliament to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratisation of trade unions and employers organisations or federations, 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. Section 48 of the Labour Relations Act provides as follows:-

48. (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.
(underline mine)

7. The Labour Relations Act makes it amply clear that the 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— deduct trade union dues from the wages of its members; and pay monies so deducted into a specified account of the trade union; or in specified proportions into specified accounts of a trade union and a federation of trade unions. I am yet to see the request made to the Minister for the deduction of trade union dues. The Claimant asserts that it has made the necessary request for deductions but the law places an imprimatur on the union to follow the steps under the Labour Relations Act. In my considered view, the Claimant jumped the gun by rushing to Court and instead should have invoked the help of the Minister in getting the deduction of the union dues effected. In the premises, it is premature for the Court to grant any relief to the Claimant as sought in the motion. It should however be noted that the Respondent is bound by law to permit the employees to freely associate and join a trade union of their choice if they are unionisable and the union meets the threshold under the law.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of July 2016

Nzioki wa Makau

JUDGE