



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 758 OF 2016

BANKING INSURANCE & FINANCE UNION (KENYA).....CLAIMANT

VS

PESA TRANSACT LIMITED.....RESPONDENT

RULING

1. This ruling proceeds from the Claimant's application brought by Notice of Motion dated 27th April 2016 and filed in Court on 5th May 2016. The application which is supported by the affidavit of the Claimant's General Secretary, Isaiah Kubai seeks the following orders compelling the Respondent to deduct and remit to the Claimant union dues on account of the Respondent's unionisable employees who have joined the Claimant by signing check off forms and to sign a Recognition Agreement.
2. The Claimant also seeks orders prohibiting the Respondent from intimidating or terminating the employment of the Claimant's members.
3. The application is based on the following grounds:
 - a. That by 2nd January 2015, fifty one (51) unionisable employees of the Respondent had opted to join the Claimant union by appending their signatures on the Claimant's check off forms;
 - b. That the duly signed check off forms were submitted to the Respondent to effect deduction of union dues. The Respondent however resorted to harassment and intimidation of the Claimant's members;
 - c. That many of the employees revoked their union membership due to pressure;
 - d. That the Claimant reported a dispute on harassment and intimidation to the Cabinet Secretary for Labour;
 - e. That the Cabinet Secretary appointed a Conciliator who prepared a report;
 - f. That sometime in February 2015, some of the employees who had revoked their membership rejoined the Claimant Union. The Respondent however failed to deduct and remit union dues to the Claimant;
 - g. That on 2nd February 2015, the Claimant sent to the Respondent a draft Recognition Agreement for scrutiny and execution but there was no response from the Respondent;

- h. That on 6th March 2016 a trade dispute on refusal to deduct and remit union dues as well as failure to sign a Recognition Agreement was reported;
- i. That on 3rd February 2016 another group of fifty two (52) unionisable employees joined the Claimant Union but no deduction of union dues had been effected;
- j. That on 9th February 2016 another draft Recognition Agreement was sent to the Respondent for scrutiny and execution but no response had been received.

4. In the supporting affidavit sworn by Isaiah Kubai on 27th April 2016, he depones that the Claimant is the legitimate and relevant union for employees in the banking industry, financial organisations, savings and credit societies, forex bureaus and the larger money market organisations. Kubai further depones that the Respondent is a financial organisation dealing with money deposits and withdrawals.

5. The Respondent's reply is contained in a replying affidavit sworn by Paul Otieno who is a Director of the Respondent. Otieno depones that the Respondent is a limited liability company carrying on the business of telecommunications consultants, advisors on administration and organisation of the telecommunications industry, financing and sale of telecommunications services.

6. Otieno states that the Respondent is not a bank nor a financial institution regulated or supervised by the Central Bank of Kenya and the Claimant is not relevant in the sector in which the Respondent operates. He adds that the Respondent manages financial service kiosks in various branches of Nakumatt Supermarkets across the country on behalf of multiple mobile money and agency banking services, such as Safaricom's Mpesa and Airtel's Airtel Money platforms, within the telecommunications industry and not the financial sector.

7. On 23rd January 2015, the Respondent received a check off list from the Claimant for forty-eight (48) employees demanding submission of union dues. From the list, six (6) were not employees of the Respondent as 31st December 2014 due to expiry of their contracts and resignation. Otieno depones that as at 23rd January 2015, the number of members of the Claimant was forty-two (42) out of a total unionisable workforce of one hundred and seven (107).

8. In the process of compliance with the check-off list received on 23rd January 2015, the Respondent received reports that its employees were not aware of the deduction of monthly union dues at the rate of 1% of basic salary and some employees had been misled to believe that they were joining a welfare society which had been authorised by the Respondent. Furthermore, some employees had been called by individuals masquerading as management and were sent forms to sign under the guise that they were sanctioned by management. Twenty-eight (28) employees subsequently revoked their union membership. While a number of employees rejoined the Union, some reported that they had been coerced to do so.

9. On 2nd February 2015 the Claimant served the Respondent with another check-off list alleging that a further three (3) employees had joined the Union and that the total number of employees recruited was fifty-one (51). Otieno depones that the name of one Andrew Lihanda appeared in both the check-off list dated 23rd January 2015 and the one dated 2nd February 2015 thus misrepresenting the true position on the number of employees recruited by the Claimant.

10. On 2nd February 2015 the Union reported a dispute on the issue of harassment and intimidation of its members. The Conciliator's final report issued on 11th June 2015 indicated that the Claimant had not attained the simple majority required for recognition. The Conciliator also stated that the employees should not be subjected to harassment or intimidation by either the Respondent or the Claimant.

11. Otieno depones that the Respondent has fully complied with deduction and remittance of union dues on account of the Claimant's members as at February 2016 were five (5).

12. On 3rd February 2016 the Respondent received check-off forms with fifty-two (52) names. The Respondent began the process of verifying the check-off forms and processing deduction and remittance of union dues based on confirmations received from its employees. Based on this verification union dues were being remitted on account of three (3) employees. Seven (7) of the persons on the check-off forms were no longer employees of the Respondent.

13. The issue for determination in this application is whether the Claimant has made out a *prima facie* case for grant of the orders sought at the interlocutory stage. The orders sought range from deduction of union dues, prohibition of harassment to recognition.

14. In the affidavits sworn by the parties in support of their respective cases in this application a wide range of accusations and counter accusations have been made. These allegations require to be tested in a full hearing. The parties have also deponed on matters of evidence which in my view, would need to be proved in the main hearing.

15. More significantly, I have looked at the prayers sought in this application together with those sought in the Memorandum of Claim and find that they are substantively similar. In other words, to grant the prayers sought in the application would amount to determining the Claimant's claim at the interlocutory stage.

16. For the foregoing reasons, the Claimant's application is declined with costs being in the cause. The parties are directed to set the main claim for hearing on priority basis.

17. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF JULY 2016

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JUDGE

Appearance:

Mr. Odero (union representative) for the Claimant

Mrs. Omondi for the Respondent