



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 391 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA NATIONAL UNION OF NURSES CLAIMANT

-Versus-

- 1. KAKAMEGA COUNTY PUBLIC SERVICE BOARD**
- 2. HON. WYCLIFFE AMBETSA OPARANYA**
- 3. KISUMU COUNTY PUBLIC SERVICE BOARD RESPONDENTS**

JUDGEMENT

The Claimant, Kenya National Union of Nurses, filed this claim against the Respondents, Kakamega County Public Service Board, Hon. Wycliff Ambetsa Oparanya, the Governor of Kakamega County and Kisumu County Public Service Board being the 1st, 2nd and 3rd Respondent's respectively, seeking the following orders:-

i. **THAT**, this Honourable Court directs the 1st Respondent to pay forthwith to the Claimant from their kitty the sums due and owing to the Claimant as union dues which the Respondent has neglected/failed and/or refused to deduct and remit from members whose names appear in the Check-off notices appended and the list of 391 members annexed in this Application forthwith, with an interest totalling **Kshs.4,105,500** with an interest at the current market rates.

ii. **THAT**, this Honourable Court directs the 3rd Respondent to pay forthwith to the Claimant from their kitty the sums due and owing to the Claimant as union dues which the Respondent has neglected/failed and/or refused to deduct and remit from members whose names appear in the Check-offs notices and lists provided in this Application totalling **Kshs.2,467,500** with an interest at the current market rates.

iii. **THAT**, this Honourable Court compels the Respondents to be fully deducting union dues from all members who have acknowledged membership with the Claimant herein within (30) thirty days upon receipt of Check-off forms and remitting the same not later than the (3rd) third day of the month next after months in respect of which deductions are made.

iv. **THAT**, this Honourable Court declares as null and void any agreements signed by the 1st and 2nd Respondents with persons who are not National Officials of the Claimant Union and without the authority of the General Secretary.

v. **THAT**, this Honourable court grants a permanent order restraining the 2nd respondent from

interfering with the running of the union affairs by dealing with any other persons purporting to be acting for the union other than the authorized national and branch officials, and not to sign any recognition and/or Collective Bargaining Agreement without the involvement of the General Secretary or his authorized representative.

vi. **THAT**, any other relief this Honourable Court may deem fit to grant.

vii. **THAT**, costs be borne by the Respondents.

Together with the Memorandum of Claim, the Claimant filed a Notice of Motion under Certificate of Urgency seeking the following orders:-

1. **THAT**, this Application be and is hereby certified as urgent and service to be dispensed with in the first instance owing to the urgency of the matters.

2. **THAT**, pending hearing and determination of this application and claim, this court be pleased to grant an **interim** order restraining the 1st and 2nd Respondents, their agents, servants and or anybody acting on their instructions from diverting union dues deducted from its members in Kakamega County into undisclosed accounts other than the specified accounts of the Union.

3. **THAT**, pending hearing and determination of the Application and main suit, this honourable court be pleased to grant an **interim** order directing the 1st Respondent to deposit in the authorized Union Account Union dues for the months of July, August, September and October 2015 by 5th November, 2015 and thereafter continue deducting and remitting the dues by 3rd day of every subsequent month.

4. **THAT**, pending hearing and determination of this Application and main suit this honourable court be pleased to grant an **interim** order **staying** any purported Recognition Agreement or any other Agreement signed between the 1st Respondent and individuals masquerading to be national officials of the Union and without the knowledge and authority of the General Secretary, and direct that such an Agreement be filed in this court to ascertain its authenticity or otherwise for directions.

5. **THAT**, pending hearing and determination of this Application and main suit this honourable court be pleased to grant an **interim** order restraining the 2nd Respondent His. Excellency Wycliffe Ambetsa Oparanya, his agents, servants and or anybody acting on his instructions from interfering with the running of claimant union by dealing with anybody purporting to represent the union on matters of Recognition and Collective Bargaining without the knowledge and express authority of the claimant General Secretary.

6. **THAT**, pending hearing and determination of this Application and main suit, this court be pleased to grant an **interim** order directing the 1st and 2nd respondents, their agents, servants and or anybody working on their instructions from interfering with the claimant's members meetings/gatherings by restraining and or stopping them from accessing their usual venue of meetings for the purpose of conducting union activities.

7. **THAT**, pending hearing and determination of this Application and main suit, this court be pleased to grant an **interim** order restraining the 2nd respondent, his Agents, servants and or anybody acting on his instructions from interfering with the forthcoming union Branch elections through intimidation, cohesion restrictions, bribery and or any other acts that may amount to interference into the free and fair elections at the Branch level.

8. **THAT**, pending hearing and determination of this Application and main suit, this Honourable Court be pleased to grant an **Interim** Order directing the 3rd Respondent to immediately remit Union dues with interest at prevailing rates for the month of September, 2015 to the authorized union Account.

9. THAT, pending hearing and determination of this Application and main suit, this Honourable Court be pleased to grant an **Interim** Order restraining the 1st and 3rd Respondents from neglecting, ignoring and or refusing to deduct union dues from members who have acknowledged membership of the claimant union currently and in future.

10. THAT, Costs be in the cause.

The motion was supported by the grounds on the face thereof and the affidavit of David Omulama, the claimant's Industrial Relations Officer, sworn on 2nd November, 2015. The motion which was filed under certificate of urgency was heard *ex parte* on 4th November, 2015 and the following orders granted among other orders-

1. The Respondent is restrained from paying union dues, into the impugned accounts pending hearing and determination of the application.
2. The Respondents will deduct and keep the union dues in a safe account until further orders of the court.

On 1st December 2015, the court consolidated the application with the claim and directed, with the consent of parties, that the case be argued by way of written submissions.

In response to the application, the 1st and 2nd Respondents filed a replying affidavit of Lukale M. Sande, the County Legal Attorney, County Government of Kakamega, sworn on 20th November, 2015. The 3rd Respondent filed a replying affidavit of Solomon Okinyi, a payroll Manager of the County Government of Kisumu sworn on 1st March, 2016.

The 1st & 2nd Respondents filed a reply to the claim while the 3rd Respondent did not, but relied on its replying affidavit and documents exhibited and filed therein. All the Respondents filed and exchanged written submissions.

The Claimants Case

The Claimant is a trade union registered as the sole labour organisation mandated by its constitution to represent nurses under the Labour Relations Act. The Claimant recruited nurses who are employees of the 1st and 3rd Respondents into its membership within the provisions of section 48 of the Labour Relations Act and sent check-off forms signed by the recruited nurses to the 1st and 3rd Respondents for purposes of deducting union dues from the salaries of the recruited nurses and remitting the same to the Claimant's registered account specified in the check-off notices.

The Claimant alleges that the 1st and 3rd Respondents failed, neglected and/or refused to fully deduct union dues in respect of all the employees whose names appeared in the check-off notices for the months of January 2014 to September, 2015 with impunity. The Claimant states that its numerous pleas and requests to the Respondents to deduct and remit union dues from the wages of all its members have been in vain and if not done shall cause disruption of its day to day operations to the detriment of its members.

The Claimant avers that the failure to deduct and remit union dues is aimed at removing the members from union membership and denying the union recognition for purposes of negotiating collective bargaining agreements for its members and that the actions of the Respondents is in defiance of section 48 and 50 of the Labour Relations Act.

The Claimant states that pursuant to the refusal of the Respondents to deduct and remit union dues, the 1st Respondent owes the Claimant shs.4,105,500 for the 21 months period from January 2014 to September 2015 calculated at Shs.500 x 391(members) x 21 plus interest, while the 3rd Respondent owes Shs.2,467,500 being unremitted union dues for 21 months from 235 members in the employ of the 3rd Respondent plus interest.

The Claimant avers that the 2nd Respondent is using his position as Governor of Kakamega County to interfere with the running of the Union affairs by directing the finance department to direct union dues into undisclosed accounts which do not belong to the Union hence denying the Union funds with which to run its day to day activities. The Claimant further avers that the 2nd Respondent has been heard claiming at public gatherings and at funerals that following the devolution of health services the union services and activities have been devolved hence the 2nd Respondent shall not entertain the Claimant's National Officials in his County and that the allegations have caused confusion among the union rank and file. The Claimant further alleges that the 2nd Respondent is dealing with persons who are not national officials of the Union with whom he has purported to sign a recognition agreement.

The Claimant states that unless the Respondents are compelled by this Honourable court to fully deduct and remit all trade union dues from their employees who have acknowledged union membership the activities of the claimant will continue to be interfered with unlawfully hence the prayers in the claim herein.

1st and 2nd Respondents Case

It is the 1st and 2nd Respondents case that the Claimant is not making a full and candid disclosure of material facts in its Memorandum of Claim, Notice of Motion and Supporting Affidavit and that in many instances the Claimant has deliberately misrepresented facts.

It is also 1st and 2nd Respondents case that the Claimant is facing new challenges of relevance and recognition following the sudden and drastically changed operational terrain in the wake of devolution of the health function to the devolved units of County Governments. That the devolving of the health functions to the County Governments has also shifted the issue of who really is the nurses' employer and brought into sharp focus the question of relevance and force of the arrangements or agreements previously entered into by the Claimant.

The 1st and 2nd Respondents further aver that the Claimant is grappling and battling with freedom of persons to engage in union activities of their choice as enshrined both in the Constitution of Kenya 2010 and the Labour Relations Act 2007 and that this suit exposes the coercive, undemocratic and dictatorial attitude on part of the claimant compelling all the nurses of Kenya to belong to its membership against the tenets in the Constitution and the Labour Relations Act 2007. That the Claimant has displayed a lot of intolerance and hostility to the growth and freedom of its branches.

The 1st and 2nd Respondents deny that they are dealing with strangers or rogue elements masquerading as Kenya National Union Officials or that they have diverted and are paying nurses union dues to some mysterious and unknown accounts in which the 2nd Respondent has a personal interest as alleged by the Claimant. The 2nd Respondent states that it takes great exception to the unsubstantiated and scandalous attacks of financial impropriety and personal probity and integrity by the claimant. That it is also not true that union dues deducted by the 1st Respondent are not remitted to union accounts or that the 1st respondent has failed to deduct union dues from some nurses. The 1st and 2nd Respondents state that they have been dealing with the officials of the Kakamega Branch of the Kenya Union of Nurses and the decision of their transacting with those officials was precipitated by the following events:-

- i. In February 2014, the General Secretary of the union one Seth Panyako introduced County Government of Kakamega to the Kakamega Branch Secretary one Renson Bulunya who eventually contacted the County. Annexed hereto and exhibited is a letter to this effect.
- ii. Around the same time, a certified of an extract from Registrar of Trade Union Officers was forwarded to the County Government confirming the officials of the Kakamega County Branch of Kenya National Union of Nurses.
- iii. In April 2014, the County Government of Kakamega received a copy of a letter dated 4th April, 2014 from the General Secretary of the Union invalidating, annulling, suspending or disbanding the entire aforesaid officials of the Kakamega County Branch.

iv. At this point the County Government of Kakamega was served with a copy of a Court Order staying the annulment, suspension or invalidation of the Kakamega Branch Officials by the General Secretary of the Union.

v. On 20th May 2014, the County Government of Kakamega was served with a copy of a Court Order staying the annulment, suspension or invalidation of the Kakamega Branch Officials by the General Secretary of the Union.

vi. In June 2014, the Kakamega Branch Secretary of the Union brought to County correspondence from the Registrar of Trade Union to the General Secretary of the union dated 20th June, 2014 which stated inter alia that the General Secretary had no power under their Constitution to suspend or disband any branch of the union.

vii. The County Government of Kakamega received a letter dated 8th July, 2014 from the General Secretary of the Union advising it of new Kakamega County Branch Officials in, an acting, capacity whom he advised the County work with.

The 2nd Respondents states that these wrangles between the General Secretary of the union and the Kakamega County Branch of the union, was in their view, mainly caused by the General Secretary because it is difficult for them to understand how every other legitimate authority, including the Registrar of Trade Unions, could recognize the Kakamega Branch of the Union except the General Secretary. That the 1st and 2nd Respondents therefore made a decision that it was prudent to stay with the majority who were showing sobriety in the dispute and support, deal, transact and recognize the Kakamega County Branch of the Union. That the decision was further informed by the fact that the constitution of the Kenya Union of Nurses permitted the branches to operate bank accounts in which union dues could be remitted.

It is further stated that the 2nd Respondent also felt obliged, as the Chief Executive in the County, with a constitutional mandate and obligation to offer leadership, administration and management in the county, that he should ensure the sustainability of the Kakamega County Branch of the union.

it is the position of the 1st and 2nd Respondents that with the health functions now fully devolved, there is a totally different employment structure from what previously existed, which has been replaced with a County Executive Committee Member responsible for health and the 1st Respondent as the current employer of the nurses in public health facilities in the County. The 1st and 2nd Respondents question whether the Recognition Agreement marked and the signed check forms entered into with the Public Service Commission and the Ministry of Health of the National Government have any binding effect on them. It is their position that the nurses are not staff seconded to the County Governments by the National Government as has been alleged by the Claimant, that health is a devolved function and all employment issues concerning health workers are the full responsibility of the respective County Governments. According to the 1st and 2nd Respondents they have continued to pay nurses union dues more on a moral basis rather than legal obligation, to support the Kakamega County Branch of the Union. That the 1st Respondent has paid the nurses union dues to the Kakamega County Branch from March, 2014. The total amount that has been paid so far is Kshs.1,588,287.60.

The 2nd Respondent denied that he has interfered with running of union affairs. On the contrary, owing to his aforesaid obligations in the county, the 2nd Respondent has endeavoured to support and promote union activities within the kakamega County.

according to the 1st Respondent, as the employer of nurses in public health institutions within the Kakamega County, it is entitled to enter into new Recognition Agreements, there having been no other Recognition Agreement binding upon it. Accordingly, the 1st Respondent entered into a Recognition Agreement with the Kenya National Union of Nurses-Kakamega Branch. It is the position of the 1st and 2nd Respondents that the Claimant has no valid claim against the 1st and 2nd Respondent.

The 3rd Respondent's Case

The 3rd Respondent through the Replying Affidavit of Solomon Okinyi, its payroll Manager, denies failing to deduct and remit union dues. Mr. Okinyi states that on behalf of the 3rd Respondent he has always made the necessary pay rolls indicating various statutory deductions, including the union dues for the Claimant which he forwards to the finance department for dispatch. Mr. Okinyi states that none of the applicant's members has complained of none deduction of Union dues to enable him carry out a verification follow up and enforcement. He states that the deductions have been made without delay and the Claimant's allegations against the 3rd Respondent are far-fetched. The extract of payrolls showing union deductions have been annexed to the affidavit of Mr. Okinyi.

The 3rd Respondent prays that the claim against it has not been proved and should be dismissed

Findings and Determination

Having carefully considered the pleadings and submissions on record, the issues arising for determination are whether the 1st and 2nd Respondents are entitled to deal with Branch Officials of the Claimant and whether the Claimant is entitled to the remedies sought.

The law governing relations between trade unions and employees is contained in Article 36 and 41 of the Constitution, part II, VI, VII, VIII and IX of the Labour Relations Act. The Employment Act recognises union dues as statutory deductions under section 19 while section 31 of the Labour Institutions Act establishes the office of Registrar of trade unions with the mandate to register and regulate the activities of trade unions.

Section 48, 49 and 50 of the Labour Relations Act provide for deduction and remittance of trade union dues while section 5, 4 and 57 of the Labour Relations Act provide for recognition of trade Unions and negotiation of collective agreement respectively.

There is no dispute in this case that the Claimant recruited members from among eligible nurses among the employees of the 1st and 3rd Respondents and that a recognition agreement was signed between the Claimant and the Public Service Commission, the then employer of nurses in the service of the Government, on 26th June, 2013. The claimant continued recruiting members after the coming into effect of devolution following the general elections of March 2013 as provided in the Constitution. Under clause 33 of the Transitional and Consequential Provisions (Sixth Schedule) of the Constitution, offices or institutions existing under the Constitution or by Act of Parliament were retained and their services transferred to the County Government. The transfer of nurses from National to County Government did not affect their membership to the Union.

The Respondents' employees are still members of the Claimant Union. The Labour Relations Act does not contemplate a branch that is independent from the National Union. The branch derives its validity from the National Office of the union whose responsibility it is to establish the branch as provided under section 25 of the Labour Relations Act. The Claimant's Constitution also provides at Clause 3 of Chapter XI that *"All cheques of check-off system shall be crossed and shall be neither paid in cash nor be paid into branch bank account but shall be sent to the national headquarters' bank account."* A branch does not have a constitution of its own and can only operate within the provisions of the constitution registered by the National Office with the Registrar of trade unions. A branch does not have capacity to collect union dues or enter into a recognition agreement. And the internal organisation or management of the union is not the business of the Respondent. It was therefore ill advised for the Respondent to "choose" as it stated in the replying affidavit, to deal with or transact business with the Branch office to the exclusion of the National office. Such action is bound to fail as a branch office of the union is like a branch of a tree, it has no leg or trunk to stand on without the support of the National Office. There is sufficient mechanism both in the Union's constitution and in the Labour Relations Act for resolving internal disputes of a union. The 2nd Respondent has no role on mandate to offer leadership, administration and management or to ensure sustainability of the Kakamega County Branch of the Union as deponed in paragraph 14 of the affidavit of Lukale M. Sande. Indeed one of the requirements for registration of a union is that *"The trade Union is independent from the control, either direct or indirect, of any employer or employer's organisation."* (Refer to **section 14(I) (h) of the Act**. The interventions of the 1st and 2nd

Respondents however well intentioned are unlawful and amount to interference with the internal affairs of the Claimant union.

For the foregoing reasons I find that the claimant has proved its case against the 1st and 2nd Respondents. I however find no evidence to support the allegations made against the 3rd Respondent. The 3rd Respondent has produced sufficient evidence of deduction and remittance of union dues which has not been controverted by the Claimant.

In conclusion I make the following findings and orders -

1. That the 1st Respondent failed to remit union dues to the Claimant in contravention of the clear provisions of section 48 and 50 of the Labour Relations Act.
2. The 1st Respondent is directed to forthwith pay to the claimant's designated account all union dues deducted from members of the claimant who are in the employment of the 1st Respondent from 1st January, 2014 to the date of this Judgement and thereafter to continue deducting and remitting such union dues as provided in section 48 and 50 of the Labour Relations Act.
3. The agreements entered into between the 1st Respondent and the Kakamega Branch officials of the Kenya National Union of Nurses are hereby declared null and void *ab initio* for being in contravention of the law.
4. A permanent injunction is hereby issued restraining the 1st and 2nd Respondents from interfering with the running of the Claimant unions' affairs by dealing with the Claimant's Kakamega Branch Officials in any way except as authorised by the Claimant's National office.
5. The Claimant and 1st Respondent shall within 30 days and with the assistance of Kakamega County Labour Officer agree on the moneys due to the Claimant from the 1st Respondent pursuant to order 2 herein above and the County Labour Officer shall prepare and file a report in this court for final judgement on the amount due from the 1st Respondent to the Claimant.
6. The Claim against the 3rd Respondent is dismissed.
7. Each party shall bear its costs of this suit.
8. The case shall be mentioned in 60 days time to receive the report of the Kakamega County Labour Officer and for final Judgement on the amount due from the 1st Respondent to the Claimant.

Orders accordingly.

Dated, Signed and Delivered this 15th day of September, 2016

MAUREEN ONYANGO

JUDGE