



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2003 OF 2016

KENYA UNION OF HAIR AND BEAUTY WORKERS ...CLAIMANT

VERSUS

SOLPIA KENYA LIMITEDRESPONDENT

RULING

1. By Notice of Motion dated 28th September 2016, the claimant union applied to court seeking urgent orders on the grounds that the respondent should be restrained from hiring new employees until the matter is heard and further that the respondent should be restrained from dismissing, harassing and victimizing employees and also reinstate all dismissed employees pending hearing of the claim.

2. The application was supported by the affidavit of Cecilia Mwangi and on the grounds that the parties have a Recognition Agreement signed on 27th July 2016 but recently employees have been experiencing poor work conditions which resulted in a strike and lock out. There was return- to- work agreement since on 14th July 2016. Upon the signing of the Recognition Agreement the employees were still agitated and the respondent decided to lock them out. There was no reason given to the lock out.

3. In reply, the respondent Filed Replying Affidavit sworn by John Waweru who avers that he is the Operations Manager of the respondent and competent to make the affidavit.

That from 11th to 14th July 2016 all workers of the respondent went on strike without notice to the respondent. These paralyzed operations at the business and the respondent chose to engage the claimant so as to have staff go back to work. On 27th July 2016 a Recognition Agreement was signed and this set the ground for a collective bargaining agreement negotiation.

4. On 9th August 2016 the parties herein met at the County Labour Office to discuss the matters arising from the return to work agreement when on 3rd to 5th August the employees went on another unlawful strike. This industrial action was reported to the Minister vide letter dated 9th August 2016.

5. The respondent undertook a verification of documents exercise with the Kenya National Examination Council and it was discovered that several employees had forged certificates and the respondent issued them with show cause letters. There was no response and opted to incite other employees not to work on 22nd September 2016 all employees went on strike.

6. Parties have since engaged in a return to work formula and all dismissed employees were reinstated. The suit matter has therefore been overtaken by events and not correct that the respondent has hired new employees as alleged. The application by the claimant should be dismissed as it discloses no cause of

action that can be allowed by the court.

7. Both parties made their oral submissions in court.

8. Mr. Mwaura appearing for the claimant union confirmed that he is not a member of the claimant and has been helping the claimant with litigation with the consent of the court vide a circular that he got from the court. He however was not able to present such circular.

9. Mr. Mwaura also submitted that the matter between the parties has been resolved but the respondent should be issued with a warning that they should stop harassing workers and intimidating them at work.

10. Mr. Mwenda, Advocate for the respondent submitted that under Section 2 of the Labour Relations Act, the authorized representative for court cases for a trade union is the secretary general. Mr. Mwaura is not such an officer and has no letter of authority giving him permission to appear for the claimant union. The power of the authorized officer cannot be delegated unless done in writing and for a specific purpose. It cannot be general.

11. With regard to the application filed by the claimant union the dispute revolves around an employee audit where some employees were found to have fake certificates. Since such discovery there has been several strikes to prevent the audit and taking of accounts. The claimant has also been calling for meetings during work hours at the respondent premises which has disrupted work and agitated employees. The conduct of the claimant has led employees to believe that they do not have to comply with respondent directions as the claimant union will protect them.

12. Mr. Mwenda also submitted that on 22nd September 2016, workers downed their tools forcing the respondent to take disciplinary action on employees with fake and forged documents/certificates and testimonials. Other employees joined in the industrial action in support of their colleagues issued show cause letters contrary to the provisions of Section 80 of the Labour Relations Act.

13. On 28th September 2016 the parties herein discussed a return to work agreement and the respondent allowed all to resume work as negotiations were ongoing, the claimant filed this application and claim which demonstrates that they engaging in return to work agreement in bad faith as behind the scenes the claimant was also in court. This was never disclosed to the respondent until the court order was served.

Determination

14. The parties confirm that the suit matter has been settled. What is left is a demand by the claimant that the respondent should be issued with a stern warning directing them to desist from harassing, victimizing and in any manner interfering with the claimant member's employment. The respondent on their part are emphatic and the application and suit herein is filed by an unqualified person, Mr. Mwaura who is not the General Secretary of the claimant union and therefore lack *locus standi* to appear and make any representations before the court.

15. Indeed there is a legal issue herein that must be resolved.

16. Mr. Mwaura appearing for the claimant union confirmed in court that he is just an ordinary person, not a member of the claimant union, not an advocate or union official with the claimant and has been over the years appearing in court for the claimant. That such appearance has been sanctioned by the court with a circular. Such circular was never submitted.

17. Section 2 of the Labour Relations Act defines who a union representative in court proceedings should be;

“authorised representative” means –

a. the general secretary of a trade union;

b.

c.

d. ...; or

e. any person appointed in writing by an authorised representative to perform the functions of the authorised representative.

18. With the above provisions, Mr. Mwaura does not have any of the requirements above. Does he therefore have the standing to move the court as he has and seek for interim orders and the orders sought against the respondent? In my view this not the case.

19. In **Josphinus Musundi and Others versus Seth Panyako, Cause No. 866 of 2014**, the Court held;

To run the affairs of a union there is an authorised officer in law or a person so authorised by the authorised officer. This is the nature of trade unions so as not to defeat the purpose of such organising. Even where a party has a claim against such an entity as a trade union, such a party can lodge an individual claim as of right but when making such a claim under the entity of the union, then by operation of the law, the authorised officer has to act in that regard.

20. The answer lies in the law. The Labour Relations Act recognizes that employees have the right to unionise so as to ensure democratization and the collectively bargain over terms and conditions of employment. With such rights, the Labour Relations Act sets the objective and regulatory framework thus;

AN ACT of Parliament to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratization of trade unions and employers organizations 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. (Emphasis added)

21. In the case of **Julius Macharia Maina & another v Kenya Building, Construction, timber & Furniture Industries Employees Union & 3 others [2016] eKLR** the court held that with unionization, regulations re required to ensure that each party and member is given a hearing but the same must be done with responsibility. Therefore, where the law sets out as to who is the legal representative of a trade union in court proceedings, not only illegal but criminal. Where Mr. Mwaura has a letter and or circular from the court, its basis or authority has not been set out in any event, such a circular it at all it exists would fly on the face of clear provisions to Section 2 of the Labour Relations Act. It leaves heavy doubt that such circular exists.

22. Does the claimant have its registered official? Are they aware that a suit exists and filed by Mr. Mwaura on their behalf? Such are the questions that linger but cannot be answered by Mr. Mwaura as he has no authority to appear for the claimant union. Where indeed the claimant union have given Mr. Mwaura instructions to appear for them and failed to attend to the same procedurally, then the claimant must bear the consequences of such misrepresentation. The application before court is not signed. When I discern the Memorandum of Claim, the same is signed by Cecilia Mwangi, the dependent to the affidavit dated 28th September 2016 and who avers that she is the General Secretary of the claimant. Why then not appear and represent the claimant union herein? Why allow a third to enter and appear for the claimant where indeed the office with the mandate to present the claimant is the office held by Ms Cecilia Mwangi?

23. As the right-holder, the claimant union and by virtue of the office held by Ms Cecilia Mwangi, the duty to represent the claimant union is vested herein. See **Kenya Union of Employees of Voluntary and Charitable Organizations [KUEVACO] v Board of Governors & Maina Wanjigi Secondary School**

[2005] eKLR. To allow a third party play the role deified for the Secretary General of a union without authority is to put the affairs of the union in jeopardy and to place the union into unnecessary liability.

24. Court proceedings are not a matter of personal whims. With it, a responsibility goes with it. Where the claimant union Secretary General has not appeared to represent the union, a letter of authority should be issued to the person so appearing. Such requirements are necessary as where there is a duty, responsibility and requirement to attend as to pay costs, such is the office to ensure the legal commitments made for the union or against the union are met. For Mr. Mwaura therefore to proceed herein without such authority and or authorization by the claimant union secretary general and seek to obtain orders advance to the respondent under a false representation that he possess a circular giving him authority to appear for the claimant, such is a façade and fallacy that must cease.

25. Mr. Mwaura having moved the court and obtained interim orders under the guise of having authority from the claimant union is by error. Such error cannot be sanctioned by giving any further directions herein. To move any further step would be to visit injustice on the seat of justice. This is a superior court of record and should never be abused by a party keen to satisfy their ego by making false representation without authority of the party they are acting for.

As such, the claimant having moved the court improperly does not deserve any orders or directions. The application dated 28th September 2016 and the Claim therein are dismissed. Costs to the respondent.

Delivered in open court at Nairobi this 3rd November 2016.

M. MBARU JUDGE

In the presence of

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