



**REPUBLIC OF KENYA**

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

**CAUSE NO.1520 OF 2016**

**TRANSPORT WORKERS UNION .....CLAIMANT**

**VERSUS**

**AUTOMOBILE ASSOCIATION OF KENYA .....  
RESPONDENT**

**And**

**KENYA LONG DISTANCE TRUCK DRIVERS &**

**ALLIED WORKERS UNION..... INTERESTED  
PARTY**

**RULING**

1. On 22<sup>nd</sup> September 2016, the Interested Party, Kenya Long Distance Truck Drivers & Allied Workers Union was enjoined herein.
2. The Claimant filed application dated 1<sup>st</sup> August, 2016 under the provisions of section 12(3) of the Industrial Court Act [Employment and Labour Relations Court Act] and section 74(b) of the Labour Relations Act and seeking for orders that;
  1. Spent.
  2. ...
  3. *Pending the hearing and determination of this application, this Court stays any other agreement that may have been entered into between the Respondent and any other party to the detriment of the claimant.*
  4. *The Respondent be restrained from entering into negotiations of another collective bargaining agreement other than the one negotiated by the claimant.*
  5. *Pending the hearing and determination of the memorandum of Claim, the Respondent be ordered to remit to the Claimant trade union monthly dues for the month(s) of April, 2016 /June, 2016 and July 2016 and all other subsequent months.*
  6. *Pending the hearings and determination of the memorandum of claim attached herein, the Court do issue 'an order' restraining the Respondent from unfairly terminating, inducing and forcing the*

*unionised employees to revoke their union membership*

*7. The Court do issue any other appropriate relief/order as it may deem fit to meet the ends of justice.*

3. The application is supported by the annexed affidavit of Dan Mihadi and on the grounds that the Claimant has a recognition agreement with the Respondent but is now threatening to unlawfully terminate the same contrary to section 54(5), (6), & (7) and (8) of the Labour Relations Act. The Claimant has a unionised membership base of 90% of the Respondent employees and several Collective Bargaining Agreements (CBA) have since been negotiated the last such covering January 2014 to December 2015. Parties are reviewing the CBA to cover 2016/2017 concluded in March 2016 but the Respondent has declined to forward the same to the Court for registration within section 60 of the Labour Relations Act.

4. Further grounds in support of the application is that the Respondent is interfering with the Claimant members and is threatening to terminate and or induce some of them to withdrawal their union membership. The Respondent is also withholding the monthly dues payable to the Claimant for April, June, and July, 2016 at Kshs.109, 100.00 for each month.

5. In response, the Respondent filed their **Grounds of Opposition and the Replying Affidavit of John Muchiri**, the Director General of the respondent. The grounds in opposition are that the Claimant lack locus standi to file the application as they do not represent unionisable employees in the employment of the Respondent as these are represented by the Kenya Long Distance Truck drivers & Allied Workers Union since July 2016 when the parties signed a recognition agreement. The employees exercised their constitutional rights by joining a union of their choice pursuant to resigning from the Claimant and the Respondent cannot force the employees to join or remain with the claimant. The parties followed the provisions of section 54(1), (2) and (3) of the Labour Relations Act in signing recognition agreement with the union that now represents the simple majority of its unionisable employees.

6. Mr Muchiri also avers that as at 18<sup>th</sup> July, 2016 the Claimant does not represent the Respondent unionisable employees. The Respondent and the Kenya Long Distance Truck Drivers & Allied Workers Union have signed a recognition agreement pursuant to the union fulfilling terms required under section 54(1) of the Labour Relations Act. The Respondent does not wish to enter into inter-union disputes and the issues herein were set out with the appointed conciliator vide letter dated 27<sup>th</sup> June, 2016. The unionisable employees have moved to another union other than the Claimant union and as the employer, the Respondent has to respect the employees' wishes. There is no breach of the law and the application dated 1<sup>st</sup> August, 2016 has no merit and should be dismissed with costs.

7. The Interested Party filed **Replying Affidavit** sworn by **Nicholas Mbugua**, the General Secretary and avers that the Respondent has 322 unionisable employees. These employees were members of the Claimant but have all resigned since April, 2016 and the Claimant was given notice by letter dated 26<sup>th</sup> April, 2016. Since April, May, June, 2016 the Respondent employees were not members of the claimant.

8. Mr Mbugua also avers that on 24<sup>th</sup> June, 2016 the 322 employees of the Respondent joined the Interested Party after signing check off forms and on 18<sup>th</sup> July, 2016 the Respondent and Interested Party signed a recognition agreement as they had attained simple majority for recognition. On 20<sup>th</sup> September, 2016 the Respondent and Interested Party signed a CBA. From July, 2016 the Respondent has been remitting union dues to the IP.

9. That the employees have a constitutional right to join the union of choice and the application by the Claimant affect the rights of the employees in that they have since resigned from the Claimant union and joined the Interested Party union. Under section 48(8) of the Labour Relations Act, the Respondent notified the Claimant that the claimant's union members had resigned vide letter dated 3<sup>rd</sup> June, 2016.

## **Submissions**

10. The Claimant submit that under section 48 of the Labour Relations Act, the Claimant received letter dated 3<sup>rd</sup> June, 2016 from the Respondent indicating that the unionisable employees and members of the Claimant had resigned. The letter also enclosed 50 documents alleged to be resignation letter. On 6<sup>th</sup> June, 2016 the Claimant disputed such resignations as there was intimidation and collusion between the Respondent and a shop steward to coerce and create a false impression that members of Claimant had resigned.

11. The alleged resignation letter were not in compliance with the law as required under section 48(6), (7) and (8) of the Labour Relations Act. The employees are supposed to notify the employer in writing of their resignation from the union but there is no such letter. The Court in **Transport Workers Union versus Saudi Arabia Airlines, Cause No.389 of 2016**; held that the law requires that resignation letters from the trade union where an employee belongs shall be addressed to the employer. What the Respondent has submitted are letters not prepared by the Claimant members. The letters attached were not addressed to anybody; they were not dated; they are all generic; and all state that the resignations were to take effect from 22<sup>nd</sup> April, 2016. These details infer that an individual prepared the letters taking into account the Claimant members are spread all around Kenya in Nairobi, Mombasa, Kisumu, Kitui.

12. The Claimant also submit that following communications between the shop steward, Emma Opiyo and the respondent, it was clear that a CBA was under negotiations between the Claimant and the Respondent and by 26<sup>th</sup> April, 2016 the employee had not resigned from the Claimant union as alleged. There was manipulation of employees to resign from the claimant.

13. The letter of 26<sup>th</sup> April, 2016 has inconsistencies, which demonstrate that there was no *en masse* resignations by the union members. The alleged resignations were to take effect on 22<sup>nd</sup> April, 2016 but the letter is dated 26<sup>th</sup> April, 2016; some letter allegedly signed by Claimant members are dated 7<sup>th</sup> May, 2016; the names, handwriting and signatures on documents of resignations are not the same. The Claimant gave the examples of details set out as from;

Peter njoka

Towett Mbathi

Kennedy E LuBanga

Nancy W Mungu/Nancy Wairimu

George k Mugambi

Sabina Waweru

Justus Githae

Hillary Rotich

John K Kazungu

Bernard W Wanjala

Don Bosco Mboya

George O Odongo

Aieel L Tai

June Dorothy A Ngwaye

Bernard O Obiero.

14. The Claimant also submit that they have a recognition agreement with the Respondent which has not been revoked. By virtue of Section 54 of the Labour Relations Act, the Respondent cannot enter into another recognition agreement with a rival union and the one signed on 18<sup>th</sup> June, 2016 is void *ab initio*. The letter by the Interested Party to the Respondent dated 24<sup>th</sup> June, 2016 which enclosed check off forms of 322 employees is not correct as the attached list contains 325 names. In this list; 62 employees did not state their ID numbers or pay roll numbers; 6 employees did not sign the check off forms; 15 employees did not date the check off forms; Some employee arrear more than once on the check off forms; and In 102 employees, names and details of the employees are written by the same person/hand

15. That from the list of 322 employees and members of the Claimant only 50 have dully signed the letters and documents of resignation. Such is below 50% and cannot form majority membership of the Interested Party. In **Kenya Scientific Research international Technical & Institutions Workers Union versus Kenya Marine and Fisheries Research Institute**; the Court held that a trade union that does not recruit a simple majority does not qualify for any recognition for the purposes of collective bargaining. The mandate of the Claimant in its constitution is clear to the extent that they cover the sector of the Respondent while the Interested Party constitution indicate that they are in the sector of *instructors*. As such, to enter into a recognition between the Respondent and Interested Party would be to defeat the recognition accorded to the Claimant which has not been revoked.

16. The Claimant also submit that the Respondent has admitted that they have been paying TAWU union dues unto May, 2016. That the Interested Party started receiving union dues from July 2016. Section 48 of the Labour Relations Act requires that union dues can only be deducted and remitted upon recruitment of more than 5 members and after preparation of Form S which has to have the Minister Order. The order required is by virtue of section 48(2) of the Labour Relations Act and the Interested Party has not complied. As such the orders sought should issue pending hearing of the main suit.

17. The Respondent submit that section 51(1), (2) and (3) of the Labour Relations Act they have mandate to sign a recognition agreement with the Interested Party that had satisfied the requirements therein. This is in appreciation of the right to unionise and join or form a trade union of choice by an employee. The Claimant members in the employment of the Respondent have since resigned and joined the Interested Party. The Claimant therefore lack *locus standi* to file the claim herein and should be dismissed with costs.

18. The Interested Party submit that the claimant's members have since resigned and joined Interested Party and the orders sought cannot issue. There is no evidence of coercion or intimidation to suggest the recruitment and joining of Interested Party was fraudulent. The Court should render substantive justice and not rely on technicalities.

19. The Interested Party also submit that under article 41 of the Constitution, employees cannot be forced to belong in a union contrary to their choice. From April to June, 2016 the Respondent employees were not members of any union until the Respondent recruited them. In **Scientific Research International Technical & Allied Workers union versus Kenya Agricultural Research Institute & Another [2013] eKLR**; the Court held that recognition of trade unions rests on freedom of association and employees have a right to join or leave a trade union. Section 54(1) of the Labour Relations Act requires an employer to recognise a trade union with a simple majority of its unionisable employees. The recognising signed between the Claimant and the Respondent has since been overtaken by events as the Interested Party enjoys majority.

## **Determination**

20. Several issues emerge for determination from the application by the Claimant dated 1<sup>st</sup> August, 2016.

Whether there should be a stay of all agreements entered into between the Respondent and the IP;

Whether the Respondent should be restrained from entering into a CBA with any other party save for the claimant;

Whether the Respondent should remit union dues from April, May, June, July, 2016 and all other subsequent months; and

Whether the Respondent should be restrained from terminating, forcing or in any manner revoking the Claimant members their membership with the Claimant.

21. All the parties herein agree that unionisation of an employee is based on the Bill of Rights that allow an employee to join a trade union of choice pursuant to the provisions of article 41 of the Constitution. However, as unionisation is based on a collective, the law regulating the same is the Labour Relations Act which create the procedures and processes precedent for unionisation. Such a legislative mechanism is to be appreciated in the context of article 162(3) of the constitution where parliament is required to pass legislation setting out the jurisdiction of this Court and ensuring a legal mechanism for the operations of the Court and such legislation can be traced to the Employment and Labour Relations Court Act and the Labour Relations Act.

22. Section 48 of the Labour Relations Act sets out the mechanisms, procedures, process and provisions under which unionisable employees can join, resign and pay union dues to the trade union of their choice. Once a unionisable employee has joined a trade union of choice section 48(3) provides that;

*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 the prescribed form signed by the employees in respect of whom the employer is required to make a deduction.*

23. Trade union dues can be deducted 30 days from the time the trade union has served the prescribed notice upon the employer. Such *prescribed notice* is in accordance with section 48(2) where the trade union must serve the Minister with Form S under which the Minister has to issue a specific order in terms of an employer making a deduction from the unionisable employees' wages/salary and the remittance to the account of the trade union they belong to. Such procedures are to ensure that the deduction made from the salary of an employee are lawful and that indeed the Minister has ensured that all precedent procedures before and after check off forms were signed have been followed. The deduction of any dues from a wage of an employee must therefore be sanctioned in law. It cannot be based on the whims of an employer or on any trade union as to do so without the consent and approval of an employee would be to defeat the purpose of unionisation and can be challenged under the provisions of section 19 of the Employment Act which prohibit the deduction of unauthorised mounts from a due wage/salary.

24. However, under section 48(6) of the Labour Relations Act, where an employee has notified the employer that s/he has resigned from their union of choice, the union dues being deducted should cease;

*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.*

25. Such notice by an employee must therefore be in writing, dated and indicate when the employee resigned from their union for the same to take effect. The rationale is that, the union dues payable to the trade union from which the employee has resigned from cease and take effect from the *month following the month in which the notice is given.*

*7. A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.*

26. Within the transitional month, the employer must give the trade union notice of the resignation of the employee(s)/member(s). The union dues during the intervening/transition month is payable to the union. the duty and responsibility of undertaking all the administrative work with regard to resignation of an

employee from their trade union and remitting union dues and informing the trade union of such resignation is laced upon the employer pursuant to section 48(8) of the Labour Relations Act;

8. *An employer shall forward a copy of any notice of resignation he receives to the trade union.*

27. In this case, there is letter dated 3<sup>rd</sup> June, 2016 by the Respondent to Claimant that union members had resigned. In this letter, Mr Muchiri for the Respondent noted;

*I have since received resignation letters from a vast majority of the Automobile Association of Kenya Union Members declaring their intention to resign from the Transport Workers union. Copies of these letters are attached for your information.*

28. The Claimant has challenged the *en masse* resignations as arising from intimidation, coercion and without following the legal requirements. The Claimant has also challenged the resignation letters set out by the Respondent and the Interested Party. Such forms the essence of the matters before Court for arbitration and this can only be gone into at a full hearing for each party to have a chance to make arguments and submissions on this issue. To determine this issue of *resignation* of Claimant members and hence joining the Interested Party at this stage would deny the Respondent and the Interested Party their chance for a defence over the same.

29. However, it is clear by the letter of the Respondent dated 3<sup>rd</sup> June, 2016 that this was the date the Claimant was informed of the resignations by the employer and pursuant to the provisions of section 48(7) and (8), the notice takes effect within 30 days of such information. The Respondent shall therefore remit to the Claimant all the union dues owing for the period of April to end of June, 2016.

30. With this communication of 3<sup>rd</sup> June, 2016 it goes that the Respondent should have remitted the trade union dues of the Claimant members until such notification of resignation. I find that such is a matter regulated in law and within the knowledge of the respondent. Where the Respondent did not remit the due union dues to the Claimant and or failed to make a deduction from the wages of the Claimant members until the notification of their said resignations, such union dues should be remitted from the Respondent accounts. It is not in dispute that the monthly dues remitted for each month to the Claimant amounted to Kshs.109, 000.00. For the months of April to June, 2016, the Respondent shall remit the sum of Kshs.327, 000.00.

31. The Claimant has further challenged the recognition of the Interested Party by the respondent. That the Interested Party is not the right union to cover the sector under which the Respondent operates and that the recognition of the Claimant has not been revoked by the Respondent and the legal provisions regarding such revocation has not been adhered to. These are matters that are crucial, relevant and very fundamental for the Court to determine as with such determination, the rights sets out under article 41 of the constitution will be affected.

32. The Interested Party has confirmed that since July 2016, they have been receiving trade union dues from the respondent. however, where the issues of recognition is challenged and should be addressed at the earliest, such dues as remitted will come into question and the right union to have such dues will have to be determined.

33. As such, pursuant to the provisions of section 51 of the Labour Relations Act, the Interested Party shall in the interim continue to receive such union dues and keep such in a separate and defined account without any use or alienation for any purpose, pending hearing and determination of the main suit herein. Such preservation is paramount as the Court has to determine which trade union between the Claimant and the Interested Party is the right union to hold such union dues and direct as appropriate. These union dues should thus not be used and or applied by the Interested Party upon their receipt from the respondents before the suit herein is determined. The Interested Party shall therefore within 7 days open a separate account and keep all funds received from the Respondent with regard to the employees and send the details of such account to the court, the Claimant and the respondent.

**Based on the above findings, the application dated 1th August, 2016 is hereby allowed in the following terms and directions;**

**(a) The Respondent shall remit to the Claimant all union dues owing and not remitted for the months of April to June, 2016 and where such dues were not deducted and remitted, the Respondent shall pay the same from their accounts;**

**(b) Amounts above (a) are assessed at Kshs.327,000.00;**

**(c) The Interested Party shall within 7 days open a bank account and remit all funds received from the Respondent with regard to its employees and continue to receive and keep such account separate and distinct without use or application in any manner until the final determination of the claim herein or upon further directions of the court;**

**(d) Costs shall be in the cause.**

Orders accordingly.

Ruling delivered in open Court at Nairobi this 19<sup>th</sup> day of December, 2016.

**M. MBARU**

**JUDGE**

In the presence of:

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