



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO.756 OF 2012

(Before D.K.N.Marete)

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

Versus

KENYATTA NATIONAL HOSPITAL BOARD.....RESPONDENT

RULING

This matter came to court by way of a Notice of Motion dated 23rd May, 2013 under a Certificate of Urgency filed on the same date and sought the following orders of court;

1. *THAT, this application be certified as urgent and heard ex-parte in the first instance.*
2. *THAT, this Honourable Court be pleased to order the Respondent to pay from its kitty, all the moneys it would have, except for its refusal/failure and/or negligence, deducted from its employees wages and remitted to the Claimant as trade union dues since the date the remittance became due after the employees first joined the Claimant union forthwith.*
3. *THAT, this Honourable Court do direct the Respondent to comply with the mandatory provisions of Section 48 of the Labour Relations Act, No.14 of 2007, Laws of Kenya, with regard to deduction of trade union dues.*
4. *THAT, the Respondent be prohibited/restrained and injuncted from harassing,intimidating,victimizing, unlawfully declaring redundant, wrongfully dismissing or unfairly terminating the contract of employment for the Claimant's members whose names appear in the check-off notices appended in the memorandum herein.*
5. *THAT, the Respondent be directed to pay to the Claimant from its Kitty the sums due and owing the Claimant as union dues which the Respondent has neglected/failed and/or refused to deduct or remit from members whose names appear in the check-off notices appended in the memorandum herein forthwith.*
6. *THAT, this Honourable Court order interest on (2) at the prevailing commercial rates to be paid to the Claimant forthright.*
7. *THAT, this Honourable Court do issue order containing a Penal Notice to punish for contempt any contemnor to the Award reached, by Civil Jail or Fine.*
8. *THAT, this Honourable Court issue Order to the Respondent to sign a formal recognition agreement with the Claimant sent to the Respondent and acknowledged receipt on 18th*

September, 2012 forthwith.

9. *THAT*, this Honourable Court be pleased to grant such orders or relief as it deems fit and just in the circumstances.
10. *THAT*, cost be provided for by the Respondent.

The application is premised on the following grounds;

1. *The Claimant is a duly registered trade union with due rights to enjoying all the privileges and benefits as enshrined under Section 19,48 and 54 of the The Labour Relations Act, No.14 of 2007, Laws of Kenya.*
2. *The Claimant is entitled by its Constitution and the Labour Relations Act No.14 of 2007, Laws of Kenya, to recruit potential employees of the Respondent into union membership.*
3. *The Claimant did recruit potential employees of the Respondent into union membership by means of check-off within the meaning of the mandatory provisions of Section 48 of the Labour Relations Act, No.14 of 2007, Laws of Kenya and did sent the duly signed check-off forms to the Respondent to effect deduction to trade union dues from wages of its employees and remit to the Claimant.*
4. *The Respondent be put to proof before this Honourable Court by producing a “Master Roll” of its employed Nurses.*
5. *The Respondent on receipt of the check off forms from the Claimant has neglected, failed and/or refused to deduct or remit from members whose names appearing the check off notices appended in the memorandum with impunity.*
6. *The Claimant herein have acquired and leased a union head office with an obligation to paying rent on monthly basis and other operational organizational responsibilities within the meaning of Section 19 of the Labour Relations Act, 2007, and that unless the respondent remits forthwith the trade unions to the Claimant it will without authority whatsoever have disrupted the activities of the Claimant and therefore interefereed with the smooth running of the Kenya National Union of Nurses country-wide.*
7. *The Claimant herein did sent a Recognition Agreement to the Respondent for the formal signing and that it has failed, ignored, neglected and/or refused to accept formalizing this important Industrial Relations mechanism between the parties despite the Claimants endeavours to have it real happen amicably.*
8. *The Claimant Union has recruited Eight Hundred and Twenty Seven employees of the Respondent in the cadre of Nursing employees in the same cadre that constitute more than a simple majority of the employees of the Respondent and that the letter of the Respondent dated 15th May, 2013 of Ref: KNH/HR/43/290 addressed to the claimant to violates in total Section 48 and 54 of the Labour Relations Act, No.14 of 2007, Laws of Kenya.*
9. *The Claimant's visits by its Industrial Relations Officer on 9th, 10th and 13th May, 2013 at the Deputy Executive Officer's office, Mrs. Dina J. Kirwa of the Respondent on the subject matters herein for an amicable resolve have bore no solution.*
10. *This Honourable Industrial Court has the necessary jurisdiction to compel the Respondent by an order of the court to deduct trade union dues and remit the money so deducted to the Claimant.*

The respondent in opposition set out and filed therein Grounds of Opposition dated the 3rd June, 2013 and filed on the same date.

1. *That the Respondent has in its employ over 2000 nurses and is yet to verify that the names if persons listed in the Claimant's Registration Forms have consented to being members of the Claimant Union.*
2. *That with over 2000 nurses, the Claimant is yet to attain the required threshold of 50% + 1% so that the Recognition Agreement can be negotiated upon and executed by all parties.*
3. *That the application and petition herein are premature as the Respondent has not neglected and/or refused to execute the Recognition Agreement and deduct union dues from the nurses but*

has only asked for the Claimant to comply with the law.

- 4. That the Respondent's functions are performed through the Board of Directors and the Board is yet to convene a meeting and discuss on the effects of the Recognition of the Claimant Union.*
- 5. That the Claimant was registered on 19th April 2013 and though the Recognition Agreement was sent to the Respondent in 18th September 2012, the Claimant was not duly constituted and recognized as a Trade Union. As such, any negotiations between the Claimant and the Respondent were to be done after 19th April, 2013.*
- 6. That there is already in existence another Union, Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (hereinafter referred to as KUDHEIHA) in which employees of the Respondent are members and whose names may be appearing on the Claimant's Registration Forms. The Respondent further needs to verify with KUDHEIHA on those names of persons.*
- 7. That persons who are already members of KUDHEIHA need to resign from the union before any deductions from their salaries can be made in favour of the Claimant.*
- 8. That it would be unfair and unjust to deduct union dues from the Respondent's employees twice, 1st in favour of KUDHEIHA and 2nd in favour of the Claimant.*
- 9. That it is in the interest of justice that KUDHEIHA be enjoined as an interest party in these proceedings as Orders made by this Court will adversely affect it.*

She also sets out and files a preliminary objection dated 3rd June, 2013 and filed on the same date as follows;

- 1. That this suit is incompetent, premature, bad in law and offence Sections 48,50 and 54 of the Trade Relations Act.*

The application came to court for hearing on 23rd May, 2013 whereby the court ordered as follows:

- 1. That this application be and is hereby certified as urgent and be heard ex-parte in the first instance.*
- 2. That this application be heard inter partes on 30/05/2013 at 9.00 hours.*
- 3. That the Applicant be and is hereby ordered to serve this application and the hearing notice onto the respondent forthwith but not later than the close of the day on 27/05/2013.*
- 4. That the Respondent is directed to make all requisite responses and appear for inter partes hearing.*

When the application came for hearing on 30th May, 2013. The Respondents sought an adjournment citing late receipt of instructions but this was viciously opposed by the Claimants/Applicant on grounds that the subject matter of collection and submission of union dues was their lifeline and that they required a determination to enable payment of due rent and salaries. They opposed the application. They therefore prayed for an order directed to the Respondents to remit dues as they responded to the application within fourteen days. The parties would not agree on this and the hearing was set for 3rd June, 2013 with the Respondent filing all responses to the suit.

The matter resurfaced on 4th June, 2013 when Mr. Mutubwa for the Respondents submitted that he had filed a Preliminary Objection which should be heard on a priority basis. Both the application dated 8th June, 2013 and the Preliminary Objection was set for hearing at 12.00 hours.

At the hearing the court made an impassioned plea for negotiations and an out of court settlement of the issues in dispute. This was agreed on by the parties. The matter was therefore set for mention on 7th June, 2012 at 1430 hours with a view to ascertaining progress and other directions of court.

On the 7th June, 2013, Mr. Panyako for the Claimant reported that an *inter partes* meeting had been held the previous day and this excluded the Director of the Respondent but a compromise was reached. He proposed that parties issue the results of proceedings on oath. He reported that the minutes of the meeting were not confirmed and remained unsigned. He further reported that from these proceedings it would appear that the Counsel for the Respondent is not acting on the respondents instructions or authority of the board and that the Director of Kenyatta National Hospital had confessed of not being aware of the goings on in this matter. He wished that the Counsel addresses the issue of instructions.

Counsel for the respondents submitted that her client had called and communicated a deadlock on negotiations. She prayed for more time to enable an expeditious thrashing of the issues in dispute. She objected to the filing of the minutes of the meeting of 6th June, 2014 and prayed that the matter comes for mention on 12th June, 2013. This was agreed and the matter set for 12th June, 2013 at 1400 hours. At this mention the matter was set for hearing on 4th July, 2014 at 900 hours.

At the proceedings on 4th July, 2014 Mr. Panyako for the Claimants submitted that the parties had a set of minutes of their meeting of 24th June, 2013 and these had been duly confirmed. The parties also had a Certificate of Agreement/Disagreement signed *inter partes* on 1st July, 2013 and 4th July, 2013 and now wished to file the same in court.

Mr. Panyako further submitted that the issue of union dues had been finalised in the agreement and that the position taken by the respondent requires a court ruling. The hearing was deferred to 1100 hours to await a further report from the parties.

At 1100 hours, Mr. Panyako reported that he had been informed that the minutes aforesaid had not been confirmed and that the final agreement after negotiations and discussions had some corrections to be made before signing. He prayed for a filing of the same at a later date. Miss Ngeresa for the Respondents confirmed the position and also that the issue of disagreement be determined by court. Mr. Panyako then clarified that the reason for calling for check off forms was to confirm that indeed there were members who had joined Kudheihia, the Intended Interested Party. This was not at all for court purposes. The issue of registration is as a consequence of an order of court calling on Kudheihia to amend its constitution and register afresh. The matter was set for further mention on 12th July, 2013.

On the mention date 12th July, 2013 Mr. Panyako reported that the verification exercise had taken place as agreed and that the forms verified were those that had been submitted to the respondents. He further reported that the Director of the respondents was not available for the exercise and had reported that his diary was full and that he was able to meet the team the following day at 1400hours. Miss. Ngeresa apologized on behalf of their client and prayed for a last chance and also prayed that the parties be allowed to report the following friday and that in the event of failure parties would seek the courts directions on the subject. The court was not happy with these developments and warned the parties of stringent measures in the event of non compliance in the future.

On 14th June, 2013 Mr. Panyako again reported unavailability of the Director for a discussion of the matter. He further reported lack of further progress. Miss. Ngeresa rose to report that the Senior Management of the Respondent was holed into a retreat and were therefore not available for a meeting. Secondly, the immediate former Director had been appointed Principal Secretary and that the acting Director was a Clinical Officer doubling as such. She prayed for ample time for the parties to negotiate and put it as follows:

“ I believe the parties should be given ample time and it should not appear like the parties are negotiating with a gun pointed at their head. If negotiations should be the way forward parties should be given hours to negotiate freely. If otherwise, we should take a date for hearing of the application before court. That is all.”

Mr. Panyako then rose to protest that the respondent was not taking the orders of court seriously on the last two previous occasions. The respondent by their conduct had demonstrated that they were not willing to engage the union or even respect the court. He proposed that they be punished for disobedience of court orders. He called for the courts intervention and for payment of union dues to the claimant. The parties on Mr. Panyako's suggestion and proposal agreed to take on a date for hearing and in the meantime attempt negotiation. The hearing was set for 1st July, 2013 at 900hours.

On 1st July 2013, Mr. Panyako reported that they had had two meetings and minutes of the same confirmed. He further reported that they had a verification exercise for the check off forms submitted to the respondents by the claimant. He prayed that the matter be mentioned at 1100hours for submissions of the verification report to court. This was agreed *inter partes*.

At 1100 hours, Mr. Panyako reported that he had been informed by his technical team that the minutes were not as yet confirmed. Miss. Ngeresa agreed and added that a certificate of agreement/disagreement had been signed and that the parties had agreed that the issue of disagreement be determined by the court.

Mr. Panyako further submitted that the reason for calling for check off forms was to confirm that indeed there were members who had joined Kudheihia. This was only for purposes of verification and no more. It was not for court purposes. The issue of registration was a consequence of a court order calling upon Kudheihia to amend its constitution and register afresh. The matter was slated for further mention on 11th July, 2013.

On 11th July, 2013 Mr. Panyako reported that the verification exercise had taken place as agreed and that the forms verified were those that had been submitted to the respondents. He further reported that the verification exercise stalled midway through abandonment by the office representing the respondent. The Director of the respondent had requested for seven days to complete the exercise and prayed that the same be allowed by court. Miss. Ngeresa, on the other hand submitted and prayed that the minutes and certificate as presented to court be deemed a record of court. She further submitted that the respondent was ready on this save that the employees who are members of Kudheihia tender their written resignation from the union. She further submitted that the Claimant union had requested for check off forms on the face of the agreement and she was willing to do an affidavit on this as well as file written submissions on the issue of union dues.

The parties ultimately came out with contrasting submissions on the subject of verification but they agreed that the exercise should continue. The court made the following orders to facilitate the exercise

1. *That the parties shall continue the verification exercise for the next seven days from today's date.*
2. *That the Respondent is ordered to furnish the verification team with a master roll of the employee nurses of the hospital.*

Other developments in the matter occurred on 17th July, 2013 when Mr. Tonge came to court with an application dated 16th July, 2013 seeking that he be joined as an interested party to the suit. The application was referred to this court and listed for hearing on 23rd July, 2013. On 19th July, 2013 the said Mr. Tonge came in to prosecute the application but this was slated for hearing on 23rd July, 2013. The Respondents submitted that they not in opposition to the application and would not file any objection to the same.

When the matter came for mention/hearing on 23rd July, 2013. Miss. Ngeresa reported that a further verification had been done. She submitted that the forms submitted by the claimant on 11th July, 2013 with additional names for verification had come in after due date, september, whereas the earlier ones have been worked on and a report filed. This would require clarification and directions of court. Mr. Panyako submitted and expressed surprised at the sincerity of the respondent who he posited seemed to be taking the court for granted. It was clear that the agents for the respondent were bent on sabotaging the exercise. He further submitted that recruitment is an ongoing exercise and would only effect once dues are remitted. It would affect the issue of recognition agreement as a simple majority had been

established by September, 2012. This was agreed on *inter partes* and the verification on these forms continued. It was agreed that a further hearing be heard on the 29th July, 2013 at 900 hours.

Come 29th July, 2013 Mr. Panyako as usual reported sabotage of the verification exercise by the Human Resource Department of the respondent. He further submitted that it was clear that this exercise was lost and would not be completed presumably due to lack of goodwill from the respondents. He prayed for a date for hearing of the dispute on recognition agreement. He also submitted further verification forms as follows;

- i. Form no.1175 with four (4) members
- ii. Form no.2472 with fourteen (14) members, and
- iii. Form no.2461 with fifteen (15) members

The court ordered the parties to further partake the verification exercise and set the matter for mention on 31st July, 2013. At this juncture, the court moved on to hear the application for joinder of the Intended Interested Party. This was vehemently opposed by Mr. Panyako on grounds that the Intended Interested Party is not a duly registered union in Kenya as evidenced in a ruling by Mukunya, J. (as he then was) in the authority of **Kenya Hotel Allied & Workers Union vs. Tea Hotel (Kericho) and Kenya Union of Domestic, Hotels, Educational institutions, Hospitals and Allied Workers, Ind. Cause No.36 of 2005**. He further argued as submitted that the Intended Interested Party has not amended her constitution and sought registration as would have been necessary and therefore the Intended Interested Party does not exist. Further, the Intended Interested Party has not complied with the 5th Schedule of the Labour Relations Act which requires that all trade unions amend their constitutions to conform with the new law.

While bringing in issues of improper presentation by Mr. Tonge who is not an authorized officer, he further submitted that the issues and submissions on recruitment by the Intended Interested Party were false and unverifiable and therefore the application for joinder should be dismissed from the onset. The court ultimately ordered the parties to file and serve the written submissions on the subject with a mention on 16th September, 2013 to confirm compliance and other directions of court.

At the mention on 31st July, 2013 as tabulated, Miss. Ngeresa reported that the parties had undertaken and completed the verification exercise the previous day and wished to present the report to court. She further submitted that the respondent had finished a copy of the master roll. She further submitted that the court makes a ruling on the contentious issues of recognition agreement and union dues upon written submissions by the parties. Mr. Panyako in opposition to the submissions of the respondent submitted that the so called contentious issues should not drag any more. This was because the verification exercise was intended to facilitate a decision by the respondent and that the exercise supported therein case for both the recognition agreement and remittance of union dues. It is not in dispute that the claimants had recruited more than five members and also 90% of the respondents employees and therefore prayed for orders of remittance of union dues as the one of recognition agreement was thrashed. The court ordered as follows on 31st July, 2013.

1. *That the Respondent shall collect and disburse union dues for all verified members of the claimed union to the said union.*
2. *That the Respondent considered the issue of the signing of a Recognition Agreement with the claimant union and submits a written report to court on 16th September, 2013.*
3. *Mention on 16th September, 2013 to confirm progress and compliance.*

On 11th September, 2012 the claimants application of the same date was heard before Rika, J who ordered that the same be served onto the respondent and also be mentioned before this court on 16th September, 2013. On this date, the Intended Interested Party through Mr. Tonge submitted that this was a mention with a view to confirmation of compliance with filing of written submissions on the application dated 16th July, 2013. It was agreed *inter partes* that compliance had been had. The respondents however were opposed to the application for leave to file contempt of court proceedings against themselves and submitted that they were seeking stay of execution of the orders of court. The court made the following orders;

1. *That the parties including the Interested party meet and involve in a free verification exercise on the issue of membership of the union (s).*
2. *That the issue of validity of the Interested Party as a union representing the Respondents nurses the thrashed and resolved at this inter parties meeting.*
3. *That a ruling on the Interested Party's application dated 16th July, 2013 be pended pending the new verification exercise.*
4. *That all other pending application this subject be pended pending this verification exercise.*
5. *That the orders of court made on 31/07/2013 shall stand.*
6. *That the new verification exercise be made within fourteen days of todays date.*
7. *Mention on 1st October, 2013 to record progress and other directions of court.*

The report on the further verification exercise was not glossy, or at all. Whereas the modalities for the exercise had been agreed on as herebelow;

1. *That a master roll for all nurses was to be availed for the verification exercise.*
2. *That the duly completed check off forms for nurses and members of the competing unions were to be availed on the date of exercise.*
3. *The verification exercise is to include nurses all the way to Job Group K8.*
4. *That each party was requested to forward three officers to participate in the exercise.*
5. *The verification exercise was to commence on the following day 25th September, 2013 at 8.00hours, Mr. Panyako submitted that Kudheihia insisted that all nurses of the respondents were her members a fact that was disputed by the claimants. Mr. Tonge noted that the parties had disagreed on the documents to be used in the verification exercise and sought the court's direction on the same. Miss. Ngeresa also reported a stalemate in the verification exercise on the basis of the documents to be used and also the resignation of members for the Intended Interested Party and prayed for direction as to enable to continue with verification or take a date for hearing date. This was the pick of the court's frustration and made orders as follows;*

1. *The parties are ordered to make file and serve their respective submissions on their cases within twenty one days all inclusive.*
2. *Mention on 27th October 2013 at 900 hours to confirm compliance and other directions of court.*

At the date of mention to ascertain compliance on 28th October 2013, counsel for the respondent prayed for time highlight the submission and also indicated that she had instructions to file an application for recusal of the trial judge in hearing the matter. In retrospect, I am suspicious that this could have been another case of utter frustration in the developments on the matter. All the parties were agreeable on highlighting but Mr. Panyako submitted that he would submit on the application for recusal on such service. It was ordered thus;

1. *The Respondent and the Intended Interested Party and on any other parties to this suit do make a highlight of their submissions on 30th October, 2013 at 1400hours.*
2. *The pending parties be at liberty to file any further pleadings and an application in this cause as they deem appropriate.*

Subsequently, the respondent sought directions on the application for recusal dated 30th October, 2013. The parties ultimately agreed to dispose off the matter by way of written submission which were heard and a ruling made on 24th April 2014. This application was dismissed and therefore this judgment is to facilitate a final determination of the issues in dispute in the application dated 23rd May, 2013.

We have gone at length to replicate the proceedings in this cause because we felt this would form an insight and preview of the nature of proceedings and relationship of the parties in the cause of these proceedings. It is this courts observation that this was tempered with immense mistrust *inter parties* to an extent that a fruitful outcome would not have come out even with the most genuine and sincere attempt at reconciliation. My observation tells me that the respondent and Intended Interested Party were bent on elongating the proceedings *ad infinitum*. This is demonstrated by the frustrated attempts at negotiation and the ever aborting verification exercise. This led the court to order the parties to file written

submissions with a view to a disposal of the matter one way or the other. This was borne out of continued frustration in these proceedings.

It was intended that the written submissions would incorporate all aspects of the application dated 23rd May, 2013, the responses and finally the issue of the veracity and or otherwise of the application by the Intended Interested Party to be enjoined as such. It is our duty to scrutinize and analyse the parties written submissions *vis-a-vis* the pleadings by the parties in this cause.

At the onset, the applicant in her written submissions present themselves as a trade union registered under the Labour Relations Act, 2007 whereas the respondent is a hospital registered under the State Corporations Act, 1987 and the Kenyatta National Hospital Board Order, 1987. She describes the Intended Interested Party also as a trade union registered under the Labour Relations Act, 2007.

The background of this cause is informed as follows in the Interested Party's written submissions;

“This matter was instituted by way of application under certificate of urgency by the claimant and the intended interested party sought to be enjoined in the said application as a matter of urgency through its application dated 16th July 2013, which application heard on 29th July 2013 and the court ordered for filling of the written submission.

The Claimant oppose to enjoinder of the interested party on grounds that the intended interested party is not legally constituted to represent the respondent employee working under category of nurses.

It is upon this basis and through the order of this honorable court issued on 29th July 2013 that we make our humble submissions as follows:”

Opening with the application for joinder by the Intended Interested Party dated 16th July, 2013 the Claimant/Applicant sets out the following issues for determination;

1. Whether the intended interested party is legally constituted to represent nurses among other employees as per its constitution.
2. Whether the purported members of the claimant are still paid up members of the intended interested party.
3. Whether it is in the interest of justice for all in view of the foregoing to enjoin the intended interested party in the main application.

It is the Intended Interested Party's case and submissions that it is constitutionally and duly registered to represent nurses and other employees in both private and public institutions as per rule 3(a) (iv) of its constitution and registration certificate number 18 made in 1951 under the then Trade Union Act, Chapter 233 Laws of Kenya. In 2009, this registration was updated to conform to the Labour Relations Act, 2007.

The Intended Interested Party's further submits that upon registration, it recruited over and above the simple majority of the respondents nurse employees and was therefore accorded registration vide a signed recognition agreement. This situation has persisted to date with the Intended Interested Party enjoying trade union activity with the respondent. She therefore rubbishes the claim of recruitment of a majority membership of the respondents employees by the claimant/applicant and submits receipt of union dues from the respondent. She therefore opposes the orders of court dated 31st October, 2013 for remission of union dues to the claimant and prays that the same be temporarily suspended pending a determination of this application. This is because the claimant has no members in the respondent's establishment by virtue of Section 48 (6) (7) and 8 of the Labour Relations Act, 2007 and Rule 3(e) of the Intended Interested Party's constitution.

The Intended Interested Party further submits that it is in the interest of justice that it be joined into this suit as it has a standing Collective Bargaining Agreement with the respondent and continues to take

union dues and the only balance is the check off list received from the purported claimant's members so purportedly recruited. The Intended Interested Party prays for a more detailed verification of the check off system of her members and the claimants members in the employ of the respondent so as to determine the threshold of issues in dispute.

The Intended Interested Party in the penultimate submits that any ouster from this suit would be prejudicial to its interest more so if the court proceeds to enforce its orders made for remission of union dues to themselves. It also prays for costs of this application.

The claimants made and filed their written submissions dated 16th October, 2013 on the same date. In these, they identify the issues in dispute as;

1. Refusal to remit trade union dues, and
2. Refusal to sign Recognition Agreement

The claimants file their respective pleadings in support of this cause and crown the same with ground of opposition dated 22nd July, 2013 in which they oppose the joinder of the intended interested party to the suit. The claimant in their written submissions are emphatic that they a registered Trade union in accordance with the Labour Relations Act, 2007 and enjoined with the legal capacity to represent nurse employees in the republic of Kenya. She further submits that it would be bad in law and fact to allow the participation of the intended interested party in this suit as this would occasion miscarriage of justice as this would be in contravention of Article 2 of the Convention No.98 which provides as follows:

1. *Worker's and employer's organizations shall enjoy adequate protection against any acts of interference by each member or each others agents or members in their establishment, functioning or administration.*
2. *In particular acts which are designed to promote the establishment of workers organisations under the denomination of employers or employers organizations or to support workers organizations by financial or other means, with the object of placing such organizations under the control of employers organizations, shall be deemed to constitute acts of interference within the meaning of this article.*

It is the claimant's further case that the Intended Interested Party has continued to fraudulently receive union dues from the respondent despite having no members through any check off forms with the respondent. Further, Kenyatta National Hospital in itself lacks the legal capacity to conduct legitimate business on behalf of Kenyatta National Hospital Board and therefore the illegality of any purported agreement between Kenyatta National Hospital and the Intended Interested Party. This enterprise is therefore was wrongful, unlawful, illegal and in contravention of Section 54 of the Labour Relations Act, 2007.

The Claimant also faults and challenges representation of the parties in that the Intended Interested Party's representation through, one, Tonge Yoya is improper for lack of compliance with Section 2 (a) and (e) of the Labour Relations Act, 2007 and also that the firm of Lubulellah Associates Advocates is incompetent in that the firm of advocates is not properly on record as no notice of appointment is served onto the claimant. This renders their appearance unlawful for want of compliance with Section 22 (2) of the Appellate Jurisdiction Act, which provides as follows;

“A corporation may appear by either advocate, by director, manager or secretary appointed by the resolution under the seal of the company, a seal copy of which resolution shall be lodged with the Registrar”.

The claimants position is that it has proved without doubt its recruitment of the requisite simple majority of the respondents nurse employees and therefore qualifies for the signing of a recognition agreement in accordance with Section 54(1) Labour Relations Act, 2007. Failure to accord recognition to the claimant indeed violates Rule B III (I) of the Industrial Relations Charter 1984 on employers

responsibilities which stipulates as follows;

“That each employers organization group employers or individual undertakings shall accord tribunals appropriate to their industries as negotiation bodies for the employee of such organizations undertakings in respect of terms and employment.”

The claimants further posits and submits that it is currently the only appropriate industrial trade union to represent nurse employees of the respondent and that the participation of the Intended Interested Party in this suit is meant to interfere with the programs administration and activities of the claimant. The respondent was now duty bound to remit union dues to the claimant, the same having been recovered through check off and in accordance with the law.

At paragraph 21 of the claimants written submissions, the claimant submits that this presentation of a certificate of the intended interested party dated 15th April, 2009 is in contempt of this courts order in Industrial court cause No. 36 of 2009 which ordered the Intended Interested Party to amend rule 3 of its Constitution as hereunder;

- a.
- b. *That the interested party (Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals, and Allied Workers KUDHEIHA do amend Rule No.3 of its Constitution deleting the words Hotels, Restaurants, Casinos, Catering and similar establishments providing lodging, food, beverages or both categories and further categories or related establishments, tourism services within 90 days.”*

This annuls the Intended Interested Party's action in this cause. It is also the claimants submissions that the recognition of the Intended Interested Party by Kenyatta National Hospital which lacks legal capacity to deal as such renders the entire exercise null and void.

The claimants further submits that this court has severally directed membership verification of the nurse employees of the respondent but this has been outrightly frustrated by the respondent and Intended Interested Party. They have now recruited eight hundred and twenty seven nurse employees all totaling to 90.2% as is apparent in the verified report and master roll by the respondent. This is on the record of court and therefore the need to be accorded recognition thereof.

The claimant also submits a case of disobedience of the courts orders made on 31st July, 2013 despite service of the same. She urges the court to subject the directors of the respondent to contempt of court and penalties of or Khs. 100,000.00 fine or six months imprisonment. She also prayers for;

1. *A declaration by the respondent collect and disburse union dues for all recruited members of the claimant to the said union from the month next following the month shown on date thereof on all the check off form received by the respondent from its kitty forthwith.*
2. *A declaration that the respondent sign the recognition agreement with the claimant union herein with seven (7) days from the date of judgment of this suit.*
3. *Declaration that the firm of Lubellelah and Associates Advocates is not properly on record hence all the document filed by the firm of Lubellah & Associates advocated be declared null and void and hence, all documents filed by the same on court record, be expunged forthwith.*
4. *A declaration prohibiting Kenya Union of Domestic Hotels, Educational Institution, Hospitals and Allied KUDHEIHA WORKERS from further interference with activities, programmes and administration of the claimant union, forthwith.*
5. *A declaration that costs be provided for by the respondent and Intended Interested Party herein.*

The respondent opens her written submission by outlining the historical development of the proceedings in this until the 16th September, 2013 when this court directed that the parties conduct tripartite verification exercise and report back on 1st October, 2013 but this was not be due to an impass in the exercise. The court thereon directed all parties to file their written submissions regarding the issues on record and report back for a mention on 27th October, 2013. The court further stayed all pending

application and the orders of 31st July, 2013.

The respondent at the onset submits that she has raised a preliminary objection on grounds that the entire suit is incompetent, premature and bad in law and offends sections 48, 50 and 54 of the Labour Relations Act, 2007. She argues that the claimant has not complied with the procedure for deduction of trade union dues per Section 48(2) Labour Relations Act but only goes out to indulge on irrelevant issues of the respondents counsel's is retainer. The claimant should have sought and served onto the respondent an order from the Minister directing deduction remission of union dues to herself. She submits that no such order has been served onto the respondent. She puts it thus;

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3. *Notwithstanding the afore going paragraph, Section 48(2) of the Act provides for the procedure to be followed by a trade union before any union dues can be remitted to it by the Employer. The trade union is required to 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.*
4. *Thereafter an employer in respect of whom the Minister has issued an order shall commence deducting the trade union dues from its employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule of the Act signed by the employees in respect of whom the employer is required to make a deduction. **No such Notice as statutorily prescribed has been served upon the Respondent.***

The respondent further submits that recognition can only be had if a trade union has made a simple majority of the unionsable employees. This is discounted by the verification exercise which found that the claimant has recruited 772 of the possible 1614 unionsable nurses. This does not meet the legal threshold of 50+1%.

The respondent further submits that the claimant the claimant has not pursued the procedure provided under Section 54(6) and (7), Labour Relations Act which demand that in disputes over recognition a trade union may refer the matter to reconciliation failure of which a reference to court is had. The court therefore comes in as a last resort. On these grounds, the respondent urges this court to find this suit incompetent and have the same struck out.

The respondent further submits that the claimants application dated 23rd May, 2013 seeks a myriad of orders but principally two on deduction and remission of union dues and signing of a recognition agreement *inter partes*. It is the respondents submission is that the claimant has sought an order for injunction which order is interlocutory but seeks to dispose off the suit at an interlocutory stage and therefore should fail. Further, the application for an order restraining and on prohibiting the respondent from *harassing, intimidating, victimizing, unlawful declaring redundant, wrongful dismissing or unfairly terminating employment of the claimant members is sought in bad faith as there is no evidence of any intimidation, harassing or victimization of any employees who are members of the claimant union.*

The respondent has in its employ over 2000 nurses and only 772 were verified as being members of the claimant. Further the Intended Interested Party, the rival union should be given an opportunity to be heard as some of its members are interlocked in the claimants recruitment forms submitted to the respondent. It is not clear as to which nurse belongs to which union as the verification exercise has so far failed to get to a conclusion. No resignation of membership of the other union have been reported to the respondent.

The respondent in the penultimate argues and submits that the claimant was registered on 19th April, 2013 whereas the recognition agreement was sent to the respondent on 18th September, 2012. Then the claimant was not constituted or recognized as a trade union and therefore the issue as to whether the claimant had the capacity to undertake recruitment. She prays that this application be

dismissed with costs.

The 4th area of submissions by the respondent touches on the claimants Preliminary Objection dated 28th June, 2013. Here the claimant objects to the documents filed by the respondent advocates on grounds that these offends the provisions of the Public Procurement and Disposal Regulations 2006, the Public Procurement and Disposal Act 2005, the Appellate Jurisdiction Act, The State Corporation Act, Interpretation and General Provisions Act, the Industrial Court Rules and the Labour Relations Act.

The objection is incompressible and brought in bad faith and a misinterpretation of the law.

The 5th limb of the respondents submissions is the Intended Interested Party's application dated 16th July, 2013. Here, the Intended Interested Party seeks joinder in the proceedings and the respondent submits that she has no objection to this as this would enable her to defend her position regarding her unions membership of the respondents nurses. Again, any orders of this court would affect the Intended Interested Party, though unheard. This would also resolve the rivalry of the two unions amicably on hearing their respective cases.

The last limb of the respondents submissions relate to the respondents application dated 26th August, 2013 and the claimants one dated 11th September, 2013. Both relate to the orders of court made on 31st May, 2013.

The application dated 26th August, 2013 was filed after the orders of 31st August, 2013 and seeks stay pending hearing and determination of the same and the intended appeal. The claimant files grounds of opposition dated 9 September, 2013. The claimant further seeks leave to institute contempt proceedings for failure to comply with the orders of 31st July, 2013.

The respondent submits that they have exercised the right of appeal against the orders of court and also that the claimants application seeking leave to commence contempt proceedings is fatally and incurably defective in that the application lacks compliance with section 5(1) of the Judicature Act, Chapter 8, Laws of Kenya on this nature of applications. Moreover, these has no personal service of the order to the respondent or leave of the Attorney – General therefore rendering the application defective.

The order does not have a Penal Notice and was served by an unqualified person by name Eunice Nyambura who is not an authorized process server.

The respondent in the penultimate urges this court to uphold her preliminary objection dated 3rd June, 2013 and dismiss the claim and all applications and preliminary objections by the claimant.

The Intended Interested Party in her written submissions introduces the subject and moves onto identify three(3) issues for determination as herein before referred. She further moves on to submit that she is eligible to recruit the nurse employees of the respondent by the virtue of being a registered trade union and also rule 3(a)(iv) of her constitution. She further submits that upon registration, she has recruited over and above a simple majority of the respondents employees including nurses between years 2000 to 2006 and has been accorded a recognition agreement under section 54 of the Labour Relations Act. She has thereon negotiated a CBA signed on 12th April, 2013 that benefits her membership.

The Intended Interested Party further submits that the purported members of the claimant are still her paid up members and the claim for recognition goes against the grain of section 48 of the Labour Relations Act. These continues to remit their monthly union dues to the Intended Interested Party and have not complied with the law on resignation from membership of a union thus, rendering membership of the rival union unclear. She prays that the orders dated 31st July, 2013 be temporarily suspended pending a determination of the application dated 16th July, 2013 as in law. The claimant has no members with the respondent corporation.

The Intended Interested Party in the penultimate submits that it is in the interest of justice that she be included and enjoined in this application so as to enable a more inclusive verification exercise of

membership of the respondent.

This court from the onset noted some curious developments in the relationship of the parties to this suit and application. Notable and most conspicuous was the hostility of the respondent towards the claimant/applicant. It is most unhealthy in a situation of improved or even sustainable industrial relation. It felt penetrating and stinks of very personalised vendetta. It never occurred like it was institutional. This to me appeared a situation where public officers misappropriate public office to pursue their very diabolic and personalized agenda. This is evil. A pursuit of appropriate industrial relations under all circumstances is the best option to all parties to a dispute. This is not only healthy but saves on misguided energies, time, space and appraises our collective wealth and economy.

Secondly, the liason between the respondent and the Intended Interested Party seems to be a collusion to defeat the ends of justice. The respondent from the onset supports a case for inclusion of the Intended Interested Party as a party to the suit. She further submits a case for the Intended Interested Party and that a verification of resignation from the Intended Interested Party by the new found members of the claimant was the only way out for establishment of recruitment by the claimant/applicant. Really? Is this the most practical way of resolving the issues? Is this the issue? Would this not fuel antagonism between the two rival unions? Would this not be justice delayed?

My finding is that the respondent is trying to exploit a fluid situation to cut deals and foment confusion and smog in industrial relations. The Intended Interested Party may be unaware of this situation but is certainly upon in the respondent diversionary and delay tactics. I am not certain, but I also suspect short term gain on the part of the Intended Interested Party could be at play. This has been a constant hindrance to sustainable industrial relations in this country. It is unfortunate.

Dilly dallying and the application for recusal did not appear genuine/legitimate but were attempts at delay/delay tactics. I wish I was wrong. This would be the favourable option in the circumstances.

The issues for determination therefore are;

1. Is the Intended Interested Party entitled to joinder as a party to this application and suit?
2. Is the claimant entitled to a Recognition Agreement and or Collective Bargaining Agreement.
3. Do the circumstance of this cause call for a dismissal of the suit.
4. Is there due dilligence on the part of the claimant/applicant?

The 1st issue for determination is whether the Intended Interested Party is entitled to joinder as a party to this suit and on application. At the hearing of the application by the Intended Interested Party on 29th July, 2013, the Intended Interested Party sought joinder on grounds that it is a registered trade union and mandated to represent employees in this cadre vide certificate no.18 dated 11th September, 1959 and later 15th April, 2009. She further argues that she has recruited 50 + 1 of the respondents nurse employees and was awarded a recognition agreement on 13th November, 1996. She has, on this vein continued to negotiate better terms and conditions culminating in a Collective Bargaining Agreement with the respondent no revocation of her members is evidenced in any way.

The Intended Interested Party further contends and submits that the claimants claim to recruitment of the respondents workers is not supported by any evidence of withdrawal of her members and this clearly offends Section 48 (6), (7) and 8 of the Labour Relations Act, 2007 all of which determine the legal criteria for dealing with union deductions in the event of resignations by members from a union. She further contends and claims that the claimant has continued to interfere with the membership in the respondents industry and therefore the necessity of his joinder to participate in the deliberations and thrashing of issues in this relationship. I agree.

The above position and opposition from the claimant poses adequate grounds for joinder of the intended interested party as a party, to this litigation. This is more so to facilitate a situation where all the

issues in dispute can be adjudicated effectively on an open hearing of all interested parties.

The 2nd issue for determination is whether claimant is entitled to a Recognition Agreement and on the subsequent signing of a Collective Bargaining Agreement with the respondent. The respondent from the onset was always opposed to a recognition of the claimant/applicant as a qualified player in her industrial relations. In her preliminary objection dated 3rd June, 2013, the respondent posits that the entire suit is premature and bad in law and offends Sections 48,50 and 54 of the Labour Relations Act. Act No.14 of 2007. These provisions of the law on the subject specifically provide for the process deduction of Trade Union dues by an employer and remission of the same to the trade union (Section 54) and the authority of the Minister to desist from enforcing deductions from members who have resigned from a trade union.

Section 50, Labour Relations Act provides for the application of deductions between the parties whereas Section 54 provides for Recognition Agreements and Collective Bargaining Agreement's *inter parties*.

Section 54 (1) of the Act provides that an employee shall recognise a trade union for purposes of negotiating a Collective Bargaining Agreement if the trade union represents a simple majority of there unionsable employees. This is to date a disputed position with each party coming up with unverified figures on recruitment of members. The various verification exercises which this court notes were badly resisted by the respondent and intended interested party did not come up with a concensus. The claimant comes up with a figure of 827 or 90.2% while the respondents puts this at 772 out of a possible 1614 union sable nurses. This, she submits does not meet the 50+1 threshold established by Section 54 (1).

The respondent further submits that Section 54 (6) and (7) provide for a procedure for settlement of disagreements on recognition. The claimant was not pursued this and therefore this application should be struck out *in limine*.

Throughout these proceedings, lots of tension developed *inter parties* on the issue of a determination of the rights of the parties. The respondent was always up and about that the claimant was not right in his approach to the subject matter. It never occurred that this would be the position as we fought it out from a stand point of raw data and emotions. I wish we were able to identify the issues and delve into these from the onset. This is sad and extremely unfortunate should be a guide in the future. Learning is an endless pursuit.

Despite the vociferous arguments and submissions from the claimants, it now clearly appears that all this time, they were lost and perhaps inadvertently involved all parties in this confusion and lack of bearing. Rights would never have any basis outside the clear confines of legal provisions. Even here, the law sets out the guidelines to be pursued by all a sundry in this kind of game. The absence of compliance by the claimant/applicant with the law, to wit, Sections 48,50 and 54 of the Labour Relations Act puts their entire endeavour in jeopardy. It is not sustainable, or at all.

The 3rd and 4th issues are undeserving of any further elaboration. They come out clearly in the analysis of the first two.

Again, let me repeat that this nature of circumlocution in pursuit of good industrial relations, however sincerer, was not worth it. The respondents and Intended Interested Party insisted on their ground and stood by it. Well done. However, this would have been brought out without undue acrimony and hostility as espound in this litigation. It was always easier to appraise your position from a start point of courtesy, good sense and reason. This would be better for industrial relation now and in the future.

This matter must stop here to allow the parties to redirect their energies on the right cause. I therefore uphold the respondents preliminary objection dated 4th June, 2013 and dismiss this claim and all attendant applications *in toto*.

However, due to the nature of the suit and its public interest orientation, I order that each party bears

its own costs of the suit.

In the penultimate, I order as follows;

1. That the Intended Interested Party, KUDHEIHA be and is hereby enjoined as a party to this suit.
2. That this application and the entire suit be and is hereby dismissed.
3. That each party bears its own costs of this cause.

Dated and signed this 20th day of February, 2015.

D.K. Njagi Marete

JUDGE

Delivered, dated and signed in open court this 25th day of February 2015.

Monicah W. Mbaru

JUDGE

Appearances

1. Seth Panyako for the Union
2. Miss Ngeresa instructed by Lubellah & Company, Advocates for the respondent.
3. Tonge Yoya the Intended Interested Party.