



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 982 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 8th October, 2015)

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

TOYOTA KENYA LIMITEDRESPONDENT

RULING

1. The Claimants herein filed their Notice of Motion dated 13/7/2014 under Certificate of Urgency seeking various orders. The Notice of Motion was filed under Section 12 of Industrial Court Act 2011 and 74 of the Labour Relations Act 2007 and any other enabling provisions of the law.

2. Section 74 of Labour Relations Act states that:

“A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns:

- a. ***The recognition of a trade union in accordance with Section 62 or***
- b. ***A redundancy, where:***
 - i. ***The trade union has already referred the dispute for conciliation***
 - ii. ***The employer has retrenched employees without giving notice***
- c. ***Employers and employees engaged in an essential service.”***

3. It is due to the above provisions that the Claimants came to court under Certificate of Urgency. They sought orders that:

1. ***This application be heard ex-parte in the first instance.***
2. ***This matter be certified as urgent and heard on priority basis.***
3. ***The Honourable Court issue interim orders against the Respondent to continue complying with the Kenya Gazettee Notice No. 7344 (Vol.CX1-No.62) by way of continuing to deduct agency fee of 2% of the consolidated salaries of all the unionisable employees of the Respondent who are not members of the Applicant and remitting the same on the Union Gazzetted Account till***

the matter is heard and determined.

4. *The hearing date for the main claim be given on priority basis.*

4. The application is supported by the sworn affidavit of Justus Maina Otakwa and the following grounds:

1. ***That, the parties has completed and registered a Collective Bargaining Agreement with the Honourable Industrial Court for the year 2013 and 2014.***
2. ***That, after registration of the Collective Bargaining Agreement between the parties, the then Minister for Labour gazetted the order in Kenya Gazette Notice No. 7344 (Vol. CXI-No.62) by exercising powers conferred to him by Section 49 of Labour Relations Act, 2007 (No. 14 of 2007). Refer to Appendix 1 of Memorandum of Claim.***
3. ***That, after gazettelement the Respondent enforced the Minister's Order by way of deducting and remitting agency fee till the month of September, 2013 when she stopped without any explanation to the Applicant. Refer to Appendix 2(a) and (b) of Memorandum of Claim.***
4. ***That, this Honourable Court has issued such Orders as here sought in Cause 1182 of 2013 between Unity Auto Garage and the Applicant herein. Refer to Appendix 3 of Memorandum of Claim.***
5. ***That, refusal by the Respondent to remit agency fee is crippling the Applicant financially and her members losing trust in the representation capacity of the Applicant herein.***
6. ***That, the issues in dispute are required to be referred to this Honourable court under Section 74 of the Labour Relations Act, 2007 as the Respondent is in violation of the Minister's Order which is mandatory therefore need to be heard on priority basis.***
7. ***That, if the orders sought are not granted the Applicant and her members will suffer irreparable loss and damages.***

5. The main contention by the claimants is that they have concluded a Collective Bargaining Agreement with the Respondents and had it registered in court. However, the Respondents are not honoring the agreement of the parties in the Collective Bargaining Agreement in that they have failed to remit agency fees to the Claimants from September 2013 and that this is crippling the operations of the Claimants.

6. The Respondents filed a reply to this claim on 30/6/2014 through Muia and Company Advocates. It is their claim that the applications offends the provisions of Article 41 of the Constitution on fair labour practices and the right of every employee and employer to form, join for participate in the activities of a trade union.

7. In their reply the Respondents state that the claim herein has no merit in law and in fact because the Respondent has been deducting and duly remitting the agency fees to the Claimant in respect of the applicable employees. They also aver that the claim is misguided, erroneous and with no merit as it is based on a ministerial order in Kenya Gazette Notice No. 7344 (Vol CX1-Vol. 62) dated 17th July 2009 which not only predates the Collective Bargaining Agreement and the 2010 Constitution but is also in conflict with the Constitution.

8. The Respondents have also submitted that the Labour Relations Act Section 49 is explicit on the procedure of the enforcement of deduction of agency fees, and todate, no order has been made in respect of any employees of the Respondent by the Minister.

9. It is the Respondents position that the Claimant did not request the Respondent to remit deductions in respect of any specific employees nor did the Claimant follow the laid down dispute resolution mechanism both in the Collective Bargaining Agreement and in the Labour Relations Act. That the claim

is therefore an abuse of the court process vexatious and ought to be struck off summarily.

10. The Respondents also sought to rely on a relying affidavit sworn by one Anne Kirumba, the Respondent's General Manager filed in court on 30/6/2014 which reiterates the contents of their reply.

Issues for determination

11. I have considered submissions of both parties and the issue for determination is whether the Respondents have breached their duty to the Claimant by refusing to remit agency fees.

12. In determining this case, I take note of the fact that the parties herein have a registered Collective Bargaining Agreement for the period 2013 and 2014. Under Clause 31 of the Collective Bargaining:

“The union shall be entitled to charge agency fee upon non-members who benefit from such Collective Bargaining Agreement. The amount chargeable shall be approved by the Minister as provided for in the Labour Relations Act 2007”.

13. This Collective Bargaining Agreement was to run from 1st July 2012 and remain in force for a period of 2 years. Thereafter, it shall continue in force until amended by mutual agreement between the parties provided that the party intending to amend it gives three months' notice in writing setting out in details all the amendments required.

14. The submission by the Respondent that the Collective Bargaining Agreement does not exist is therefore erroneous as its tenure was saved by the above captioned provision.

15. The claimants had stated that the Minister for Labour had made an order authorizing deduction of agency fees vide Kenya Gazette Notice No. 7344 (Vol CX1-No.62). I have looked at this gazette notice which was made on 17/7/2009 in relation to deduction of agency fees.

16. Under Section 49 of Labour Relations Act:

“Deduction of agency fees from unionisable employees covered by collective agreements

1. ***A trade union that has concluded a collective agreement registered by the Industrial Court with an employer, group of employers or an employers' organisation, setting terms and conditions of service for all unionisable employees covered by the agreement may request the Minister to issue an order requiring any employer bound by the collective agreement to deduct an agency fee from the wages of each unionisable employee covered by the collective agreement who is not a member of the trade union.***
2. ***A request in accordance with subsection (1) shall:***
 - a. ***be signed by the authorized representatives of the trade union and employer, group of employers or employers' organisation;***
 - b. ***supply a list of all employees prepared by the employer in respect of whom a deduction shall be made;***
 - c. ***specify the amount of the agency fee, which may not exceed the applicable trade union dues; and***
 - d. ***specify the trade union account into which the dues shall be paid.***
3. ***An employer in respect of whom the Minister has issued an order as specified in subsection (1) shall commence deducting agency fees from the employees named in the Minister's notice within thirty days of receiving the Minister's notice.***

4. *The Minister may vary an order issued under this section on application by the trade union and the employer, group of employers or employers' organisation concerned.*
5. *A member of a trade union covered by a collective agreement contemplated by subsection (1) who resigns from the union, is immediately liable to have an agency fee deducted from his wages in accordance with this section.*
6. *If a collective agreement is implemented retrospectively after registration by the Industrial Court, the agency fee shall be deducted and paid to the trade union for the period of retrospective implementation in accordance with this section.*

17. The reading of this section shows that agency fees is collectable after signing of a Collective Bargaining Agreement. The Applicant and Respondent had Collective Bargaining Agreements before, even one from 1st July 2008 to 30th June 2010 which Respondents have annexed to their submissions and which preceded the current Collective Bargaining Agreement.

18. Section 49 does not relate to the signing of a particular Collective Bargaining Agreement so long as the parties have a subsisting Collective Bargaining Agreement. Since there is already an order made by the Minister in respect of deduction of agency fees, the order does not expire simply because the Collective Bargaining Agreement existing lapses when there is in existence yet another renewed Collective Bargaining Agreement.

19. The argument by the Respondent that there is no current gazette notice from the Minister in respect of deduction of agency fees is erroneous and I find that the Claimant's case has merit and I find for Claimant and direct the Respondent to remit all outstanding agency fees and in any case not less than 30 days from today and to continue to do the remittances when they fall due.

The Respondents will meet costs of this suit.

Read in open Court this 8th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent