



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO. 460 OF 2015

KENYA CHEMICAL & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

BASE TITANIUM LIMITEDRESPONDENT

RULING

Introduction

1 The claimant brought this suit on 13.7.2015 seeking the orders of this court to compel the respondent to sign recognition agreement. The suit was brought after the parties disagreed during conciliation proceedings before the Labour office. Simultaneously the claimant filed the Notice of Motion under certificate of urgency dated 13.7.2015 seeking the following orders:

a) That, pending hearing and determination of this application, this honourable court be pleased to grant an injunction prohibiting/restraining the Responded , its officials, representatives, and Agent from threats/intimidation, and verifying of the employees signatures at the factory.

b) That, pending hearing and determination of this application, this honourabel court be pleased to grant an injunction prohibiting/restraining the respondent, its officials, representatives and agents from forcing employees/workers to resign from the claimants union.

c) That pending hearing and determination of this application, this honourable court be pleased to grant and injunction prohibiting/ Restraining the respondent, its officials, representatives and agent from forcing their supervisors who are members of the claimant's union to resign.

d) That, the costs of this application be proved for.

2 The motion is supported by the affidavit sworn by Mr Were Dibo Ogotu on 13.7.2015. The gist of the affidavit is that the claimant has recruited members from the unionisable staff of the respondent but the latter has refused to sign a recognition agreement in favour of the union as required by Section 54 of the Labour Relations Act (LRA) and instead the respondent has resorted to verifying signatures in the clock off forms and victimizing the recruited union members by denying them the right to joint the union of their choice. That according to the claimant the conduct by the respondent amounts to violation of section 4 and 54 of the LRA and Article 20, 28, 36 and 41 (1) (2) (c) of the Kenya Constitution and the ILO convention 87 and 98.

3 The respondent has opposed the Motion by the replying affidavit sworn by Mr John Denham Vickers on 22/7/2015. The gist of the replying affidavit that is she has not violated the right of her employees to joint their trade union. That the claimant has only recruited 227 out of 540 unionisable

employees which represents only 42% of her unionsable work force. That the reasons for not according recognition is that the union has not recruited a simple majority as required under section 54 (1) of LRA. That she has since August 2014 honoured her employees' instructions to deduct and remit union dues. That she has not threatened or victimized any of the union members in any way or forced them to resign. That the only exercise of verifying signatures on the check off forms was meant to identify employees who were not illegible to join union and who had signed more than one check off forms. The motion was disposed off by way of written submission filed by both parties.

Analysis & Determination

4 There is no dispute that the claimant has recruited members from the respondent's unionisable staff. There is further no dispute that the respondent has since August 2014 deducted and remitted union dues in respect of the said recruited union members. The dispute in the main suit is whether the members recruited represent a simple majority of the respondent's unionsable staff while the main issue for determination in this motion herein is whether pending the hearing and determination of the main dispute, the court should grant interlocutory injunction to restrain the respondent from threatening, intimidating or forcing the employees or workers to resign, and from verifying employees or workers signatures at the factory. The questions that arises is whether the motion meets the threshold for the grant of the interlocutory injunction sought.

Threshold

5 The threshold for the grant of interlocutory injunction in Kenya was established in the celebrated case of **Giella vs Caseman Brown (1973) EA 753**. That the applicant must first demonstrate that he has a prima facie case with probability of success. Second he must show that if injunction is denied, he will suffer irreparable harm or damages which cannot be adequately compensated by an award of damages. Third, if the court is in doubt, it will decide the application on a balance of convenience. In addition to the foregoing principles of grant of interlocutory injunction, the applicant must comply with the rules of this court in making the application.

6 In her submissions filed on 5.8.2015, the claimant said nothing to demonstrate that her application for the interlocutory injunction has satisfied the 3 principles established by **Giella case**. She has also not demonstrated that the motion has been brought in compliance with the strict provision of the rules of procedure of this court. On the other hand the respondent has submitted that the motion is incompetent because it is not supported by the suit. In her view the claimant is not entitled to any interlocutory injunction. She cited several decisions of this court where similar applications were dismissed because the applicant had not prayed for injunction in the main suit as required by rule 16 (3) of the Industrial court procedure rules (ICPRs).

7 On without prejudice basis, the respondent has submitted that should the court wish to determine the motion on merits, the same should still be dismissed because the applicant has not proved a prima facie case with probability of success. That she did not prove that the respondent is intimidating, victimizing or threatening unionisable employees or that is forcing them to resign from the union or on other manner infringing on freedom of association of the unionisable employees and has not identified any victims of the alleged infringement. That the applicant has not demonstrated that she will suffer irreparable harm if injunctive orders sought is denied.

8 The dispute herein was first lodged with the Ministry of Labour under the provision of section 62(1) of the LRA but it was not resolved prompting the claimant to file this suit. Section 73 (1) of the LRA provides that:

“ if a trade dispute is not resolved after conciliation, a party to the dispute may refer the dispute to the industrial court in accordance with the rules of the industrial court”.

9 There is no dispute that the suit herein was brought under scion 73 (1) of the LRA. That means that any reliefs or orders being sought must only be granted within the purview of the said Rules of procedure.

The respondent has objected to the injunction order being granted because it is not sought within the provisions of Rule 16 (3) ICPRs. Rule 16 (3) of ICPRs provides, thus:

“ in a suit where an injunction is sought, a claimant or an applicant may, irrespective of whether he is seeking compensation, any time after the commencement of the suit apply to the court for an interim or temporary injunction to restrain the respondent from a breach of contract or an injury complained, or any injury of a like kind arising out of the same contract or relating to the same property or right.

10 There is no doubt that the motion before the court is not compliant with the foregoing Rule. The reliefs sought in the main suit do not include injunction against the respondent. That prima facie renders the motion incompetent for offending the provision of Rule 16(3) of the ICPRs. The court will therefore not proceed to consider its merits. This court has previously reached the same decision in **ELRCC NO. 88 of 2015 Paul Kamau Maina & others vs Kenya Civil Aviation Authority (2015) e KLR**. No good reason has been shown as to why the court should abandon that stance.

Disposition

11 For the reasons stated above the claimant's Notice of Motion dated 13.7.2015 is dismissed. Costs in the cause.

Signed, Dated and Delivered at Mombasa this 13th day of November 2015.

ONESMUS MAKAU

JUDGE