



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 769 OF 2015**

**KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT**

**VERSUS**

**KENYA KAZI LIMITED.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 8<sup>th</sup> May, 2015 the claimant seek orders among others that:-

a. That pending the hearing and determination of this suit the Respondent either by itself, its agents and or servants be restrained from dismissing, threatening or intimidating, transferring, revenging of in any way interfering with the Claimants shopstewards Union and members on account of trade union activities.

b. That the claimant be at liberty to hold a meeting at the Respondent premises/shopfloor.

2. The application was supported by the affidavit of Isaac Andabwa who described himself as the general Secretary of the claimant. He deponed in the main:-

a. That for K.K. Commercial, no Collective Bargaining Agreement has been signed to-date, but an Agreement has been reached on 28 items leaving 2 namely: basic pay and house allowance outstanding for further negotiation.

b. That still, the respondent had declined to implement the 28 agreed items, which the Respondent itself acceded to before Court in the withdrawn Industrial Court Cause No. 479 of 2014.

c. That when the negotiations on the outstanding items failed, the union referred the same to a reconciliatory at the Ministry of Labour whose efforts have regrettably inturn also failed.

d. That fortunately, the items for dispute in the two different departments of K.K. Embassy and K.K. Commercial were referred to the same conciliator Mr. Twanga.

e. That the conciliator has issued Certificates of Disagreements, which are annexed hereto and marked.

f. That behind the scenes, the respondent in particular, its Group Resource Manager has worked to undermine the claimant and by extension, frustrating the conclusion of Collective Bargaining

Agreement.

g. That the respondent has either compromised, divided, misled, enticed away shopstewards and formented disputes against the claimant.

h. That on 13<sup>th</sup> October, 2014 I received a demand from 4 out of 18 KK shopstewards demanding interalia: that I adopt the Collective Bargaining Agreement as drawn by the employer and the shopstewards to be paid 30% union dues.

i. That I responded by a letter dated 12<sup>th</sup> November, 2014 warning them to desist from or being used to interfere with negotiations for a Collective Bargaining Agreement.

j. That thereafter, the said four, namely: Mathias Nyoka Ngala, Wycliffe Kakai Kutela, Dominic Moogi Nyamieno and Paul Wafula Wanyama instituted Industrial Cause No. 2212 of 2014 against the union.

k. That I verily believe Mathias, Wycliffe, Dominic and Paul are mere front but is the respondent paying the costs of the said suit.

- That I say so because on 16<sup>th</sup> January, 2015 the employer using the pendency of Cause No. 2212 of 2014 as an excuse purported to decline to implement the 28 items agreed on in respect of K.K. Commercial and began employing divisionary tactics.

m. That the claimants in Cause No. 2212 of 2014 Mathias Ngala has been transferred from Canadian Embassy to ISK while Dominic Nyameino has been promoted from a security guard to a site supervisor, Industrial Area, Wycliffe Kakai from Guard to Senior Guard, Paul Wanyama from a guard to a Senior Guard.

- That the respondent has also used the four to cause discourse in meetings between the claimant and the respondent, ostensibly to heckle the claimant's team and disrupt meetings.

3. The respondent through a Mr. Willis Ayieko Onyango who stated he was the respondent's Group Human Resource Manager deponed in the main that:-

a. The respondent has entered into a collective bargaining agreement with the claimant on the employees working with the US Embassy department. The document produced as GM-2 to the affidavit of Isaac Andabwa is not a true copy of the collective Bargaining Agreement (herein 'the CBA') as some of the information has been changed. A true copy of the CBA is that was agreed upon by both parties and registered in Court is at page 5 to 14 of the exhibit.

b. Clause 17 (Overtime on public holidays) of the copy of the CBA produced by the claimant is different from the CBA that was agreed by the parties herein.

c. On the alleged two outstanding items of commuter allowance and overtime in the US Embassy CBA, the correct position is as follows:

i. The parties submitted the two items before the Conciliator

ii. On overtime, the Conciliator overruled the claimant's objections to the formula used by the respondent. It was agreed that the applicable formula would be set out in the CBA and as set out in the Regulation of Wages (Protective Services) Order. The Respondent has complied.

iii. On commuter allowance, parties reached an agreement in January 2014. It was agreed that all employees of the Respondent covered by the CBA be paid a one off payment of

Kshs.11,000 (gross) to cover commuter allowance. An agreement was reached on 16<sup>th</sup> January, 2014 (page 15 to 20) and each employee received a net payment of Kshs.8,000.

iv. The Respondent has complied with the provisions of the CBA and the agreement reached on the outstanding items as set out above.

d. It is true that the CBA for the US Embassy department lapses on 31<sup>st</sup> May 2015. Although parties have agreed on all the items as set out in the existing CBA, the claimant has insisted on a revision of two items namely: commuter allowance and overtime. Efforts to have the matter resolved by conciliation have not been successful and a certificate of dispute has been issued.

e. The Respondent's position on the two items is as follows:-

i. Commuter allowance: the parties agreed in January 2014 that all employees of the Respondent covered by the CBA be paid a one off payment of Kshs.11,000 (gross) to cover commuter allowance. Pursuant to the agreement that was signed by the claimant and the Respondent, (page 18 to 20) each employee received a net payment of Kshs.8,000. The item is therefore settled and no more discussions or claims can be made upon it.

ii. The proposal by the claimant that its members be paid Kshs.2,500 per month as commuter allowance is without basis for the reasons that:-

a. The ruling of Justice Rika in Cause No. 2212 of 2014 was revised by the parties after negotiations and superseded by the Agreement reached on 16<sup>th</sup> January 2014 (page 18 to 20). The Agreement has already been implemented and the claimant is stopped from bringing up the issue for negotiation. In any event, the contract between the Respondent and the US Embassy has not yet come to an end so that there can be negotiations for more funds to accommodate this demand.

b. The Respondent assigns its employees duties close to their areas of residence; as such there is no requirement to pay them a commuter allowance.

e. Overtime: the current CBA has sufficient provisions for payment of overtime. The provisions of the Regulation of Wages (protective Services Order) that are binding on the parties have been amended from time to time to provide for better terms. The Respondent has implemented the CBA and the ruling of Justice Rika in payment of overtime.

g. The intention of the claimant is to raise the amount paid by the Respondent as overtime to exorbitant figures which are not sustainable. The Respondent has a fixed and budgeted cost for the US Embassy project. The contract between the Respondent and the US Embassy comes to an end in 31<sup>st</sup> August 2016 and the Respondent cannot afford to pay overtime in the proposed new structure given the fixed amount already agreed with the US Embassy.

h. The Respondent's employees who work for the US Embassy department earn the highest salaries and allowances compared to other employees in other departments. For example, before May 2015, a guard in the KK Commercial Department earned a total basic salary of Kshs.10,912/= and a house allowance of Kshs.1,637/= while a guard at the same level working with the US Embassy Department earned a basic monthly salary of Kshs.17,722/= and a house allowance of Kshs.3,500/=. It will be unfair to increase the remuneration of the employees in the US Embassy Department further in isolation to all the other employees of the Respondent. Copies of sample of payslips for employees in KK Commercial and KK US Embassy are at pages 21 to 24 of the exhibit.

i. The issue of basic pay and house allowance remain outstanding on the KK Commercial Department CBA. I am aware that the matter has been referred to the conciliator for resolution.

No certificate of dispute has been issued yet.

j. The Respondent's position on the two items is as follows:-

(i) Basic pay: the respondent pays all its employee above what is prescribed as the minimum wage under the Regulation of Wages (Protective Services) Order that is binding on the parties has been amended from time to time to provide for better terms. From the month of May, 2015, the Respondent has made a 12% increment on all its employees' basic pay. The proposal to increase the basic pay by 20% every year is without basis and is unsustainable.

(ii) It is not correct that the Security Industry has not had a minimum wage for the last two years. The Industry has been using the 2013 minimum wage order but the Respondent has been paying all its employees above the minimum wage. While the prescribed minimum wage for 2013 to May 2015 has been Kshs.10,912 per month (plus house allowance of 15% of the basic pay), the respondent has been paying an extra 2% to each employee per month. A sample of the Respondents employees' payslips for the month of April 2015 are attached as page 21 to 24.

iii. House allowance: the Respondent does not house its employees. The Respondent only pays the employees a house allowance at the prescribed rate of 15% of the basic salary to enable them get accommodation. In addition, the Respondent deploys its employees close to their areas of residence to enable them minimize travel expenses.

iv. The allegation that the respondents employees are housed in Kawagware and Kangemi slums in Mabati structures is without basis. The Respondent has employees across the country who stay in different places of their choice.

v. Once basic salary is raised by 12% the house allowance will also increase by the same margin. The demand for an increase of house allowance by Kshs.2,500/= is without any logical basis and lack justification.

vi. The Respondent's employees are the highest paid in the security industry. It is in the interest of enhancing good labour relations between the Respondent and its employees that the Respondent be allowed to pay its employees' salaries that are economically sustainable. If the proposals demands by the union are implemented, the Respondent might be forced to close its business which will result in loss of jobs by redundancy.

k. On the allegations levelled against me and the Respondent that we have interfered with the affairs of the claimant and frustrated efforts to conclude negotiations on the outstanding issues on the CBA's for the KK commercial and KK US Embassy departments I wish to respond as follows:-

- The Respondent and its management (including myself) are not members of the claimant union and we do not participate in the day to day running of the claimant. The allegations that we interfered with its operations are without basis. I have no personal knowledge of any internal wrangles in the affairs of the claimant. I am therefore not aware of the allegations at paragraphs 13, 14, 22, 23, 35, 36, 37, 41, 43, 44 of the affidavit of Isaac Andabwa.

m. The claimant draws its membership from the unionisable employees of the Respondent. The employees who are members elect shop stewards to represent them in any affairs they have with the Respondent. The names of the shop stewards are forwarded to the Respondent by the claimant.

- All shop stewards are employees of the Respondent with individual contracts of employment. They are entitled to be transferred, promoted, remunerated and treated in all ways as any other employee as per the terms of their employment. When a shop steward applies for a promotion or a transfer and he qualifies, the Respondent cannot deny him the promotion because of his affiliation

with the union.

- I am aware that sometime in 2014, the claimant's unionisable employees, through their shop stewards approached management for financial assistance to file suit against the union and the Respondent to compel the claimant to give its members copies of the constitution of the Union, audited accounts of the union and 30% retention of the Union dues. The Respondent agreed to give the financial assistance because the reliefs that the members were seeking were beneficial to the employees and the money advanced will be recovered from the shop stewards from June 2015. A copy to the letter from the shop stewards seeking financial assistance is at page 40 of the exhibit.

p. It is not true that the assistance that was advanced to the members by the Respondent was malicious or aimed at frustrating the operations of the Union.

q. Further, it is not true that the Respondent has used the proceedings by the shop stewards to stall implementation of the agreed items of the KK Commercial CBA. In the letter of 16<sup>th</sup> January 2015, I advised the claimant to present a CBA on those agreed items to be signed by all parties and registered at the Industrial Court. The Union has not presented any CBA for execution by the Respondent but instead continues to threaten and intimidate the Respondent to agree to all its demands.

4. In his submissions before the Court in support of the application, Mr. Wati for the claimant's submitted concerning the issue of prima facie case that on the sidelines of the process of negotiations the respondent has been intimidating Union members, compromising and enticing away shopstewards in an attempt to outflank the claimant. He further submitted that under section 56 a union is permitted to hold meetings at employer's premises but the claimant has demonstrated that the respondent has undermined this right in several ways for instance the claimant has shown the respondent's direct interference by refusing the claimant permission to hold a meeting at its premises on 26<sup>th</sup> April, 2015. Counsel contended that the respondent has supported and financed a group of respondent's members to eject those who attempted to meet at the respondent's premises. The same group, Counsel argued commenced cause no. 2212 of 2014 which was financed by the respondent. Further the respondent has used the pendency of this case to refuse the implementation of the 28 agreed items of the Collective Bargaining Agreement.

5. On the issue of irreparable injury, Counsel submitted that a Union's effectiveness lies in mobilizing solidarity. In this respect the union depend on shopstewards hence compromising or disorganizing shop stewards is a sure way of crippling the claimant. The injury on the momentum has been shown and damage brought by the compromises demonstrated. Counsel therefore submitted that there cannot be any doubt in the mind of the Court that the claimant has met the test for grant of interlocutory injunction hence the same ought to be granted while awaiting the resolution of the dispute herein.

6. The respondent on the other hand submitted that the claimant had not met the test for grant of the orders sought. According to Mr. Makori, the claimant's members have individual contracts of employment with the respondent hence the respondent had the right to exercise administrative action without external interference. The respondent cannot therefore be gagged by an order of injunction.

7. Regarding the conduct of union affairs, Counsel submitted that the claimants were governed by the recognition agreement Collective Bargaining Agreement and the Labour Relations Act hence could not conduct their affairs arbitrarily.

8. Counsel invited the Court to consider the issues set out in the respondent's application dated 26<sup>th</sup> June, 2015 seeking the Court's intervention over the unlawful conduct of the claimant. According to Counsel, the claimant admitted to being involved in the said acts while enjoying the interim order issued by the Court which restrains the respondent from taking any adverse action against claimant's members. Such a party, counsel submitted, does not deserve the order being sought.

9. Regarding the orders sought in the application, Counsel submitted that they were in their nature mandatory prohibitory injunction and the claimant had not met the test. In this regard Counsel relied on

the case of **Kenya Airport Authority v. New Jambo Taxis Civil App. 29 of 1997(CA)**.

10. Concerning holding of meetings, Counsel submitted that the respondent had explained in the Affidavit of Mr. Willis Ayieko why the claimant could not hold a meeting at the respondent's premises and the reasons were reasonable and satisfied criteria set in section 56(2) of the Labour Relations Act. Besides the respondent offered alternative space which was readily available for the meeting on condition that a proper request was made.

11. Regarding the agenda of the meeting Counsel submitted that the members were informed that the agenda was to inform them of the disagreement on some items of the Collective Bargaining Agreement. According to Mr. Makori, the law recognized that parties can disagree in the negotiations even before the conciliator and the next course of action is to submit the dispute to the Court. There was no provision for convening meetings with members to incite them.

12. Concerning the agreed 28 items, Counsel submitted that the prayer could not be granted because the Court could not implement any items that are agreed upon by the parties negotiating a Collective Bargaining Agreement outside of the lawful process of execution and registration of a Collective Bargaining Agreement. According to counsel, the claimants have not followed the correct process hence the Court lacks jurisdiction to enforce a draft Collective Bargaining Agreement.

13. In conclusion counsel submitted that the outstanding items in the KK US Embassy and KK Commercial Department's Collective Bargaining Agreements can only be resolved by the Court after hearing all the parties and considering the full facts of the matter.

14. This is an interlocutory application hence the Court will only consider whether the applicant has made out a prime facie case with probability of success and that damages would not adequately compensate the applicant if successful in the ultimate. If the Court is not sure the matter will be decided on balance of probabilities.

15. In the memorandum of claim, the claimant seeks the following orders:-

(a) An order restraining Respondent either by itself, its agents, and or servants from threatening, dismissing, intimidating, demoting, transferring or in any other way interfering with the claimant's shopstewards and union members on account of their perceived pro-trade union stance.

(b) For its members attached to the Respondents KK US Embassy Department:-

(i) Pay of Kshs.2,500/= per month for commuter allowance

(ii) Overtime to be calculated as per the formula in their own letter of 2<sup>nd</sup> September 2013.

(c) For its members attached to the Respondents Commercial Department:-

(i) Their basic salary be increased by 20%

(ii) The current house allowance of Kshs.1,636/=

increased by Kshs.2,500/= to Kshs.4,136/=.

(d) The Respondent implements the 28 agreed items in respect of KK Commercial Department.

(e) Conclusion of comprehensive CBA for the two Departments of KK Commercial and KK Embassy.

(f) The KK Embassy Collective Bargaining Agreement be reviewed upwards.

(g) Cost of the suit.

16. Apart from prayer (a) which touches on the claimant's members constitutional rights hence must be protected regardless whether money can adequately recompense them, the other prayers form the ordinary claims in industrial disputes which if proved are reducible to monetary compensation even in arrears. That is not to say that where a party can be compensated by a monetary award, an interlocutory injunction cannot issue. It can issue where the balance of convenience so requires.

17. The claimant in this application seeks more or less orders similar to prayers in the main claim. If these prayers are granted, there will be less incentive to prosecute the main claim. Furthermore, the issues involved in the interlocutory prayers as can be evidenced by the lengthy and contentious affidavits and documents filed by the parties might require the benefit of a full trial where oral evidence will be called and parties cross-examined. It would therefore not be right to issue such fundamental interlocutory orders whose consequence may render a full trial less incentivising to look forward to and an academic exercise.

18. However the aspect of this dispute which requires to be preserved pending the hearing and determination of the main claim concern the protection of the claimants members jobs pending the resolution of this dispute or further orders of the Court.

19. In that regard the Court will order that the respondent does not dismiss or threaten to dismiss any of the claimant shopstewards and union members on account of their involvement in union activities subject matter of the dispute before the Court until the dispute is heard and determined.

20. On the part of the claimant the Court hereby orders that the claimant and or its members will not demonstrate or engage in any form of industrial action regarding the issues pending determination before this Court until this dispute is heard and determined.

21. Either party shall be at liberty to apply.

22. It is so ordered.

Dated at Nairobi this 13<sup>th</sup> day of November 2015

**Abuodha J. N.**

**Judge**

Delivered this 13<sup>th</sup> day of November 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**