



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 684(B) OF 2014

**KENYA UNION OF DOMESTIC, HOTELS,
EDUCATIONAL INSTITUTIONS,
HOSPITALS AND ALLIED WORKERS (KUDHEIHA).....CLAIMANT**

VERSUS

BRITISH ARMY TRAINING UNIT KENYA.....RESPONDENT

RULING

1. The application herein is by the Claimant and dated 28th August 2015. Parties agreed to prosecute the application by way of written submissions. The Respondent filed their Grounds of Opposition on 30th September 2015. On 15th October 2015, the Court directed the parties to file such written submission on or before the 30th of October 2015. Only the Claimant filed their submissions on 26th October 2015. There are no written submissions by the respondent.
2. On 28th August 2015 the Claimant filed application through Notice of Motion under the provisions of section 16 of the Industrial Court Act [Employment and Labour Relations Court Act], rule 16(1) and 32 (c), (d) and (e) of the Court rules and seeking for orders that the firm of Ongicho-Ongicho & Company Advocates to come on record for the claimant; a restraining order stopping the Respondent from harassing the Claimant members; the Respondent to continue deduction union dues from the Claimant members; and the Court to review judgement dated 10th June 2015. This application is supported by the annexed affidavit of Albert Njeru.
3. The application is on the grounds that the Respondent has threatened to stop deductions of union fees [dues] from members of the Claimant without their authority; there is coercion and cajoling of such members so as to resign from the Claimant union and the Claimant being aggrieved by the judgement of the Court seek a review. Other grounds are that the Claimant members will lose their right of joining a union of their choice if the Respondent is not stopped from intimidating them and the Respondent will not suffer any prejudice if the orders sought are granted.
4. In the affidavit of Albert Njeru he avers that as the Secretary General of the Claimant union there is recruitment of members within the Respondent employment which form 50+1 simple majority. The judgement of the Court on 10th June 2015 did not direct the Respondent to seek its employees or support staff to withdraw from the union. His judgement did not address the Claimant member's plight who have a right under article 41 of the constitution to join and form a union of their choice. The Respondent

conduct is inconsistent with the constitution as they have asked the support staff to resign from the Claimant union. The Claimant is aggrieved and seek the judgment herein be reviewed.

5. In the Further Affidavit of Albert Njeru filed on 8th October 2015, he avers that the Respondent averment that they have a works council is not correct as this has never been in operation. The elections called on 1st October 2015 were in violation of the Court judgement. The Respondent should be directed to deduct union dues. The Respondent newsletter of September 2015 has the effect of cajoling and intimidating Claimant member and was done with the sole intent of defeating the Court process by procuring mass withdrawal of the Claimant membership. The Court judgement did not grant the Claimant recognition with the Respondent but that did not also mean the Respondent could fill the vacuum by way of creating a works council. The work council created by the Respondent does not meet the requirements of article 41 of the constitution as it will not perform the fundamental functions of a trade union especially collective bargaining hence the application for the Court to review the judgement delivered on 10th July 2015 with an order that the Claimant has fulfilled the criteria for recognition; and that the Claimant members to continue being deducted union fees until their voluntary resignation. The Claimant is aggrieved by the judgement of the Court and thus seek a review.

6. In reply, the Respondent filed Grounds of Opposition and a replying Affidavit of Lucille Kirk. I will consider the grounds of Opposition.

7. The Respondent is opposed to the application filed by the Claimant on the grounds that the Court when addressing the same in the interim granted final orders in terms of payer 3 and 4 as the Claimant was seeking for restraining orders on harassment and intimidation, deduction of union fees and such were granted. The grant of such orders was not merited as the Claimant had not met the legal requirements, there is no prejudice to be suffered and no review matters/issues have been set out for the Court to consider.

8. The application for review is defective as it offends that provisions of rule 16(1) of the Court rules and lacks merit in terms of rule 32. The application is supported by documents illegally obtained from the Respondent as they relate to the internal running of the Respondent operations and should be expunged. The Court has already delivered judgment herein and nothing arise for review. The Respondent has not prevented any of its members to join the Claimant union; no rights have been violated or the rights under article 41 of the constitution; an joining and recognising a union does not exist in a vacuum and this is regulated by section 54(1) of the Labour Relations Act. The Court is thus *factus officio* as the application is now an attempt to reopen the case.

Submissions

9. In the submissions by the Claimant stated that on 25th August 2015 the Court granted prayers (1) to (4) save for the prayer for review as the Court did not address the facts that the Respondent has been cajoling Claimant members to resign their membership from the union. The respondents have admitted the existence of works council as a substitute to the Claimant union which is a direct attempt to bring a new issue which was not covered in the judgement under review. Where the judgement did not allow recognition, it equally did not allow a works council to act in place of the union. The judgement did not create a vacuum and did not direct for a works council on the set date 1st October 2015.

10. The Claimant also submitted that the Respondent has not stated as to what transpired on 1st October 2015 and if any elections took place for a works council is an affront to the provisions of article 41 of the constitution. The Respondent cannot have a works council as it is not a registered union.

11. The Claimant is asking for a review of the judgement delivered on 10th June 2015.

Determination

12. The Court judgement herein delivered on 10th June 2015 addressed matters relating to alleged threats,

harassment and intimidation of termination of Claimant members. Such matters arose in the context that the Respondent had failed to recognise the Claimant union for purposes of entering into collective agreement negotiations. To thus apply as herein citing similar matters of harassment, threats and intimidation, the Court having rendered a judgement thereon, its role is *fanctus officio*.

13. With regard to the orders relating to prayers (1) to (4), I note the Court in the interim had granted these orders but reference must be the judgement of the Court that already directed herein and the only arising matter that can be revisited on the same is an appeal to the Court of Appeal or by a review as herein. Such a review is allowed under the provisions of Rule 32 of the Court rules. As submitted by the claimant, such a review has its set principles which require there to be a new matter, an error apparent on the face of the record or a sufficient ground.

14. The Claimant has submitted that since the judgement, the Respondent has since convened an election for a works council to replace the union contrary to article 41 of the constitution. That there is need for a review as the judgement of the Court did not address the plight of the Claimant members under article 41 of the constitution to join or form a trade union and that the Claimant is aggrieved by the judgment of the court.

15. The matters set out by the Claimant in support of the application, the affidavit of Albert Njeru and the grounds thereto do not outline the new and important evidence that has emerged to warrant a review. I find no sufficient cause established to warrant the review. Where the judgement of the Court did not allow for the recognition of the Claimant by the respondent, the reasons of the Court are in the judgement herein. To require the Court to now address the plight of the Claimant members is to invite the Court to seat in the same matter in an appeal as this is not a matter sufficient for a review. However, where the Claimant members wish to have any deductions made on their salaries for the benefit of the claimant, nothing stops such members from directly writing to their employer to make such deductions. However such deductions and communication cannot be made by the Claimant as there is no recognition between the parties. I will only say that much as the judgement of the Court in this regard is sufficient.

16. Works council is a prerogative of the respondent. Such a Works committee cannot be equated to a trade union as such a union is well defined in law. The role of the claimant cannot be performed by such a committee as the roles of a trade union such as the claimant union is set out in statute. However, Where the respondent finds that meeting the needs of their employees is to organise them as such, the Claimant union has no mandate to direct or seek the Respondent to act otherwise. The membership of the Claimant in the employment of the Respondent notwithstanding, such membership is out of individual choice but cannot form a basis of the Claimant having direct decision-making within the Respondent policy, mandate, operations or other concerns.

The application dated 25th August 2015 is hereby dismissed in its entirety. Each party to bear their own costs.

Delivered in open Court, dated and signed in Nairobi on this 5th day of November 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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