



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 334 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 17<sup>th</sup> December, 2015)**

**AGILITY LOGISTICS LIMITED .....CLAIMANT**

**VERSUS**

**KENYA LONG DISTANCE TRACK DRIVERS**

**AND ALLIED WORKERS UNION..... RESPONDENT**

**RULING**

1. There are 2 applications before this Court vis the one dated 6.3.2015 filed the Claimants and one of 6.7.2015 filed by the Respondents.

2. The Application dated 6.3.2015 was filed by the Applicants herein through a Notice of Motion brought under Sections 62, 76, 77, 80 and 81 of Labour Relations Act, Section 87 of the Employment Act, Section 12 Industrial Court Act 2011 and Rule 16 of the Industrial Court (Procedure) Rules 2010 and all the enabling provisions of the law and the inherent powers of the Court seeking orders that:

***1. THAT this Honourable Court certifies this application as urgent.***

***2. THAT service of this application on the Respondent be dispensed with in the first instance and the application be heard ex-parte.***

***3. THAT this Honourable Court be pleased to issue an order restraining the Respondent by itself, its officials, agents and/or members from taking part in, calling, instigating or inciting others to take part in unprotected strike or any form of industrial action pending the hearing and determination of this application.***

***4. THAT this Honourable Court be pleased to issue an order restraining the Respondent by itself, its officials, agents and/or members from taking part in, calling, instigating or inciting others to take part in unprotected strike or any form of industrial action pending the hearing and determination of the claim herein.***

***5. THAT this Honourable Court declares the strike called by the Respondent unlawful and therefore unprotected.***

**6. THAT the Respondent be condemned to pay the costs of this application.**

3. The Application was premised on the annexed affidavit of Satyen Bhojak and on the following grounds:

**a. THAT Respondent herein had started recruiting the Claimant's employees in the year 2014 and in January 2015, it claimed that it had recruited a simple majority. When the Respondent union reported a trade dispute to the Labour office, it was found that they had not attained the required simple majority.**

**b. THAT the Respondent received check off forms from the Respondent seeking deduction of union dues from the Claimant's Employees who had allegedly acknowledged their membership with the Respondent.**

**c. THAT the Respondent Union also submitted to the Claimant a list of employees written and signed with the similar hand writing claiming to be their members.**

**d. THAT on verification with the employees some denied ever having joined the Respondent Union nor signing the check off forms.**

**e. THAT the purported industrial action by the Respondent is rash, unlawful and uncalled for.**

**f. THAT the continued operations of the Applicant are in the interests of the Respondent and its members as they draw their wages and salaries there from.**

**g. THAT the Claimant/Applicant will suffer irreparable injury, loss and damage as a result of the strike which loss and damage cannot be compensated by award of damages in the event that the Respondent and its members go on with the industrial action.**

**h. THAT the consequences of a strike action by the Respondent will render any successful suit by the Applicant in this Court nugatory if no injunction is granted by this Honourable Court against the strike action.**

**i. THAT it is just and equitable to grant the orders sought herein.**

4. When the Applicants 1<sup>st</sup> approached Court, they were granted exparte orders in terms of prayer 1 and 3 of the Notice of Motion.

5. As to the Application dated 6.7.2015, it was brought under Rule 16(2) and (3) and under Rule 27(1) (c ) of the Industrial Court Rules 2010 and all other enabling laws of Kenya. The Applicants sought orders that:

**1. THAT this Application be certified as urgent and service upon the claimant be dispensed with in the first instance.**

**2. THAT this Honourable Court be pleased to issue an order restraining the Claimant by itself, its officials, agents and servants from harassing, dismissing, threatening and or intimidating the Respondent's Union members pending the hearing and determination of this application.**

**3. THAT this Honourable Court be pleased to issue an order restraining the Claimant by itself, its officials, agents and servants from harassing, dismissing, threatening and or intimidating the Respondent's Union members pending the hearing and determination of the counter-claim herein.**

**4. THAT the costs of this application be provided for.**

6. The Application was based on the following grounds:

***(a) THAT the Claimant has been harassing the employees who are members of the Respondent union herein.***

***(b) THAT the Claimant has refused to sign a recognition agreement with the Respondent despite the Respondent union having recruited the required simple majority of members of the Claimant Company.***

***(c) THAT while the counterclaim is pending, the Claimant has been intimidating and causing frustration to the Respondent's members by sacking employees and issuing them with unnecessary letters to show cause in an attempt to instill fear in the employees and cause them to withdraw from the union.***

***(d) THAT this matter is coming up for hearing on the 22<sup>nd</sup> of July 2015 for hearing of the Claimant's application dated 21<sup>st</sup> May 2015.***

***(e) THAT it is fair and in the interests of justice that the Claimant be restrained from harassing and intimidating the employees who are or wish to be members of the Respondent union, pending the hearing of this application as well as the main counterclaim.***

7. And was also supported by the supporting affidavit of Nicholas Mbugua herein the Secretary General of the Respondent Union who deponed that the Claimants had refused to sign a recognition agreement with them despite recruiting the requisite number of members 169 out of 320 members and had now resorted to intimidating and dismissing the Respondents members for joining the union on very flimsy grounds.

8. They stated that one Peter Kimeu Njuguna has been dismissed on 4.11.2013 on allegation that he was warning other employees to join the union or face alleged dire consequences. That e.g. Simon Kinyangi and Simon Kilonzi had been changed or their duties deferred. Others had been dismissed.

9. The Respondents opposed the application dated 6.3.2015 by filing their supplementary further affidavit on 16.9.2015 sworn by Nicholas Mbugua, their Secretary General.

10. The Claimants on other hand opposed the Respondents application filed their replying affidavit deponed to by one Elizabeth Muguchu on 22.7.2015 the Human Resource Manager of Respondent herein.

11. They also filed a further replying affidavit on 20.8.2015 deponed to by the said Elizabeth Muguchu.

12. The Respondents denied calling for any strike and stated that the signing of the Return to Work Formula was for purposes of only settling union disagreements that had ensued between the Respondents drivers and Claimants Transport Manager. They denied faking signatures of their members and stated that the Claimants had adamantly refused to accord them recognition.

13. Having considered the submissions of both parties, the issue of contention are whether the Respondents called for industrial unrest in disregard to this Court's order of 6.3.2015 and whether the Claimants on their part had refused to recognize the Respondents members and harassing and intimidating those that have joined the union.

14. In order to appreciate these issues, this court would need to have a report on the ground as to the true position of things as what has been submitted to court is the Claimant's word against the Respondents and vice versa. The parties had attempted conciliation in May 2015 and appeared before a Conciliator who made a finding that it was necessary that both parties should act in utmost good faith and with the assistance of the Labour office, review the current union membership *vis a vis* the total unionisable staff with a view to signing a formal recognition agreement.

15. The Conciliator also made a finding and recommended that both parties should desist from making any statements or involving any other third parties that are not directly concerned in this dispute.

16. So far, the recommendations of the Conciliator have not been adhered to. It is therefore this Court's directive that the parties must conform to the recommendation of the Conciliator and review their standing with a view of signing a recognition agreement.

17. In the premise, I will refer the parties back to the Conciliator to do a fact finding mission and establish union membership at Claimants premises and report back to Court within 60 days. In the meantime the parties are encouraged to continue negotiating with one another in order to resolve this matter once and for all.

18. Each party will bear their costs.

Dated and delivered in open Court this 17<sup>th</sup> day of December, 2015.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Muturi holding brief Mr. Kimani for the Respondent- Present

Mumia & Njiru for Claimants – Absent