



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 369 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 14th December, 2015)

BAKERY CONFECTIONERY FOOD MANUFACTURING &

ALLIED WORKERS UNION (KENYA)..... CLAIMANT

VERSUS

BELLA LUNA LIMITED RESPONDENT

RULING

1. The application before the court is a Notice of Motion dated 10th March 2015 brought under Section 4, 5, 6, 7, 48, 54, and 74 of the Labour Relations Act, 2007 Section 87 of the Employment Act 2007, Article 36 and 41 (2) (c) of the Constitution of the Republic of Kenya and Rule 16 of the Industrial Court (Procedure) Rules 2010; where the claimant/applicant seeks orders that:

1. That the Respondent commences deduction and remittance of trade union dues from employees who have acknowledged membership with the claimant/applicant union backdated to the date when such employees joined the Claimant union pending the hearing and determination of the Application and or the suit.

2. That the Respondent restrain from purporting to impose and/or from forcing employees who have acknowledged membership with the Claimant union to execute fixed term contracts pending the hearing and determination of the application and/or the suit.

3. That the Respondent be restrained from victimizing, coercing, harassing, termination, dismissing or disciplining the Claimant/Applicant members whose names appeal in the check off forms appended to the Memorandum of Claim pending the hearing and determination of the Application and or suit.

4. Costs of this Application.

2. The application is supported by the following grounds on the face of the motion and a supporting affidavit of Danchael Mwangure sworn on the same day:

1. That the Claimant Applicant Union recruited 19 out of 23 employees representing simple majority of the Respondent employees into its membership for purposes of collective

Bargaining pursuant to the provisions of Rule No. 3 of its Constitution which allows the Applicant to recruit unionisable employees for the economic sector being undertaken by the Respondent in accordance with the provisions of Section 54 of the Labour Relations Act, 2007.

2. That the Applicant forwarded to the Respondent duly signed check off forms calling for deduction of the trade union dues from its kitty in respect of all the employees who have acknowledged membership with the Applicant union as provided for under Section 48 of the Labour Relations Act, 2007.

3. That the Applicant recruited a simple majority of the unionisable employees as its members being more than the number required for purposes of recognition but was unfairly, unjustifiably, unlawfully and unconstitutional been denied recognition.

4. That the respondent has resorted to victimizing and intimidating its unionisable employees who have acknowledged membership with the applicant union in breach of known provisions of the law and the Article 36 and 41 of the Constitution of the Republic of Kenya, Section 4, 5, 6, and 7 of the Labour Relations Act, 2007 and the Provisions of Article 41 (2) (c) of the Constitution of the Republic of Kenya.

5. That the Respondent unionisable employees were all previously engaged under permanent and pensionable terms which following the inception of the union, were changed to fixed term contracts backdated to the 1st of January 2015 and bound to expire on the 31st of December 2015.

6. That the fixed term contracts are illegal, null and void and are a perpetuation of unfair labour practices meted against unionisable employees.

7. That the respondent has further threatened the unionisable employees with dire consequences including termination of their services in the event of their refusal to execute such fixed term contracts hence the need for timely intervention by this Honourable Court.

8. That the issuance of fixed term contracts is a scheme aimed at victimizing the unionisable employees with the aim to phase them out and deny them any benefits that automatically flow from the collective bargaining process.

9. That the Respondent has placed unionisable employees who have joined the union at a disadvantage for being members of the Applicant union in order to defeat negotiating and collective bargaining.

10. That the Respondent has flouted with contempt statutory provisions under the Labour Relations Act No 14 of 2007 regarding recognition of trade unions and remittance of trade union dues.

3. The Respondents have opposed the application and have filed an affidavit in response to the motion.

4. The gist of the Claimants/ Applicants application is that on or about the 7th of January 2015, 19 out of the 23 employees of the Respondent exercised their constitutional rights and statutory rights and joined the applicant union, but the Respondent refused to deduct union dues from its kitty in respect of employees who had acknowledged membership. Moreover, the Respondent refused to sign a recognition agreement sent to it by the Applicant Union.

5. Both parties engaged each other, however, the Respondent committed acts of victimization targeting all employees who had acknowledged membership with the union by executing fixed term contracts for a period of one year.

6. The Respondent filed their Replying Affidavit sworn by Richard Edmund Barrow on the 24th of April 2015 summarizing their case as follows.
7. That the Respondent was agreeable to the Collective Bargaining agreement and had no reservations signing one, but felt that such an agreement should not restrict the employees from joining any other union should they in future wish to do so as that would be in contravention of Article 41 of the Constitution of Kenya and Section 4(1) of the Labour Relations Act which position was pointed out to the Claimant whose presented draft seemed to place the Respondent in a position not to recognize any other union and was contrary to the law.
8. The Respondent asked the Claimant to amend the agreement but they refused insisting on execution in its current form, irrespective of the inconsistencies with the Constitution of Kenya and the Labour Relations Act amongst other international instruments and was therefore fatally flawed and would lead to a breach of fundamental rights of both the Respondent and its employees.
9. The Claimant rejected all proposal presented in their letter dated 2nd March 2015 insisting that the document presented was standard and originated from the Government and was not subject to any amendments. The Respondent felt that this was seeking to exploit the ignorance of the Respondent to be able to present the Respondent with a legal dilemma on the sanction of a legal suit.
10. The Respondent alleges that the Claimant refused to negotiate or act in good faith insisting on execution of the flawed agreement.
11. The Respondent did not refuse to make payments on the check off forms as alleged by the Claimant but duly paid the dues once it had confirmed with the affected employees a sign of good faith on their behalf even as negotiations on the terms of the Recognition Agreement were still on going. Annexed to the affidavit are the payment receipts for the dues copies of Barclays Bank Cash receipt and I & M Bank cheque respectively paid to the Central Organization of Trade Unions).
12. The Respondent had purchased the bakery in April of 2014, where it inherited staff, and it is only after an audit of the human resource department that it established all the employees were as a matter of practice contracted on fixed term contracts running for a period of 12 months which were renewed from time to time. (Annexed is a copy of the Transfer Shares Form).
13. A perusal of the Memorandum of Claim at page 84 as well as an annexure by the Claimant confirms that all past and present employees enjoy yearly contracts and in particular a contract by Ms. Veronica Nalika which is dated January 5th, 2014 indicates that it is for a one year period that is its January 2014 to 1st December 2014 well before the current management took over. (Annexed are copies of the said contracts as well as other employee contracts that show the running basis to be one year).
14. Most contracts by the previous management had lapsed on the 31st of December 2014, and the same were coming up for renewal and the subject employee contracts were merely a renewal of contracts and not victimization as the Claimant alleges. Such allegations are unfounded, incorrect, and calculated to mislead this Honourable Court.
15. The suit presented to the court is therefore frivolous, lacks merit and should be rejected and dismissed with costs by the Honourable Court.
16. There is one issue for determination by this Court:

“Whether the Applicants have established a prima facie case to warrant issuance of orders sought.”

17. The Applicants aver that they have recruited 19 out of 23 members as their members representing a simple majority as envisaged under Section 54 of Labour Relations Act 2007. The Respondents have

admitted to this recruitment and even stated that they have infact effected deductions and remitted union dues from the members concerned.

18. The issue that the Respondent contends is that in relation to the recognition agreement, the draft presented by the Applicants could not be executed as it had a clause where the Applicants were insisting that they be recognized as the sole union in the organization which the Respondents contend is in breach of Article 41 of the Constitution. This in my view is a matter the parties can resolve without much delay by removing the offending clause.

19. The other issue under contention is that the terms of the contracts between the Respondent and Claimants members have been altered to yearly contracts instead of permanent and pensionable ones.

20. From the above analysis, it is clear there is a prima facie case established by the Applicants which this Court must resolve and this can only be resolved upon hearing this claim conclusively so that the substratum of this claim is not destroyed, this court finds that the application has merit and I allow it in terms of **prayer 2 and 3**. Prayer 1 having been affected by the Respondents, the deductions for Union dues should continue.

Dated and delivered in open court this 14th day of December, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Amalemba for Claimants– Present

No appearance for Respondent