



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSES NO 116, 241 AND 587 OF 2013

RIFT VALLEY RAILWAYS WORKERS UNION.....CLAIMANT

VS

RIFT VALLEY RAILWAYS (KENYA) LIMITED.....1ST RESPONDENT

RAILWAYS AND ALLIED WORKERS UNION.....2ND RESPONDENT

RULING

Introduction

1. On 24th January 2014, I delivered a ruling in which I made the following orders:
 - a. That upon service of resignation letters and check off forms on account of employees of the 1st Respondent who had expressed their wish to join the Claimant the 1st Respondent shall deduct and remit union dues to the Claimant.
 - b. That no agency fees was payable by the 1st Respondent to the 2nd Respondent on account of employees of the 1st Respondent who had opted to join the Claimant.
2. I also directed the parties to file additional evidence to enable the Court to determine the issue of agency fees deducted by the 1st Respondent and remitted to the 2nd Respondent in spite of a court order issued on 11th June 2013 as well as the issue of recognition of the Claimant by the 1st Respondent for purposes of collective bargaining. Both issues remain pending before this Court.
3. In the meantime, the 1st and 2nd Respondents filed separate applications seeking stay orders pending appeal. It is these applications that are the subject of this ruling. When the applications first came up for hearing, the Court invited the parties to explore the possibility of reaching an agreement on the issues of union dues and agency fees in order to pave way for determination of the issue of recognition. The parties however made no progress in this regard.

The 1st Respondent's Application

4. The application by the 1st Respondent filed on 17th April 2014 seeks the following orders:
 - a) That pending the hearing and determination of the intended appeal in the Court of Appeal, the Court do grant a stay of execution of the order from the ruling delivered on 24th January 2014 requiring the 1st Respondent to deduct and remit to the Claimant union dues on account of all employees whose resignation letters and check off forms will have been received by the 1st

Respondent.

b) That pending the hearing and determination of the intended appeal the Court do grant a stay of the proceedings herein.

5. In a supporting affidavit sworn by Grace Wamiti on 14th February 2014, it was deponed that the resignation letters served on the 1st Respondent by the Claimant were all dated January 2013 and their authenticity could not therefore be established.

6. Wamiti further deponed that an audit of the list of members submitted by the Claimant revealed that 1 person was deceased, 6 had been dismissed, 1 had retired, 47 had been retrenched, 4 had been terminated, 332 were active members of the 2nd Respondent, 33 were management staff and 4 were contract staff.

The 2nd Respondent's Application

7. The 2nd Respondent filed its application on 10th February 2014 seeking orders that pending the hearing and determination of an intended appeal, there be a stay of all proceedings in relation to Causes No. 116, 241 and 587 of 2013.

8. The 2nd Respondent's application is supported by the affidavit of John T. Chumo sworn on 10th February 2014. Chumo deponed that if agency fees, which is substantial in amount, is not remitted to the 2nd Respondent its operations will be adversely affected and the Claimant's members would not be in a position to refund the agency fees in the event that the 2nd Respondent's appeal succeeds.

The Claimant's Response

9. The Claimant responded to the applications by the 1st and 2nd Respondents by two separate Replying Affidavits sworn by Munayi Isaac Opondo on 20th February 2014. In the Replying Affidavit filed in response to the application by the 1st Respondent, it was deponed that the resignation letters and check off forms on account of the Claimant's members were first served on the 1st Respondent on 9th January 2013. These documents were served again on the 1st Respondent pursuant to the orders of the Court issued on 24th January 2014.

10. Munayi further deponed that the 1st Respondent had continued to deduct agency fees from the Claimant's members in spite of the orders of this Court issued on 11th June 2013 which suspended deduction of agency fees. According to Munayi, the Claimant had been greatly prejudiced by the actions of the 1st Respondent.

11. In the Replying Affidavit sworn in response to the 2nd Respondent's application, Munayi deponed that if the prayer for stay of the proceedings herein is granted then the Court would be abdicating its mandate of adjudicating employment and labour matters.

12. Further, the funds in issue do not belong to the employer but its employees who are members of the Claimant. The employer would not therefore be prejudiced in any way if the orders of the Court issued on 24th January 2014 are implemented.

Determination

13. Section 17 of the Industrial Court Act, 2011 provides for appeals from decisions of this Court to the Court of Appeal on matters of law.

14. The applications by the Respondent are somewhat unique in as far as they do not only seek stay of execution of the orders already made by this Court but also stay of further proceedings before the Court.

15. The issues that remain pending have to do with recognition of the Claimant by the 1st Respondent for purposes of collective bargaining and deduction of agency fees from the Claimant's members in spite of the orders of this Court issued on 11th June 2013 stopping deduction of agency fees. It seems to me therefore that the orders sought by the 1st and 2nd Respondents are within the province of injunctive orders.

16. The conditions upon which injunctive orders may be granted are well articulated in the well known case of ***Giella Vs Cassman Brown & Company Limited [1973] EA 358*** as follows:

- a) That the applicant must show a *prima facie* case with probability of success;
- b) That the applicant must show that they will suffer irreparable harm if the orders sought are not granted;
- c) That if the court is in doubt it will make a decision on balance of convenience.

17. In the case of ***Reliance Bank Limited Vs Noriake Investments Limited [2002] 1EA 227 (CAK) Case No. 937 of 2002*** the Court of Appeal held that in considering an application for stay pending appeal, the Court is to be guided by the following basic principles:

- a) That the appeal or intended appeal is an arguable one not frivolous;
- b) That if an order for stay is not granted, the appeal would be rendered nugatory.

18. The 1st and 2nd Respondents are dissatisfied with my order directing the 1st Respondent to deduct and remit union dues to the Claimant on account of employees who have indicated their wish to join the Claimant. They are also dissatisfied with my order that deduction of agency fees from these employees in favour of the 2nd Respondent must cease.

19. It was submitted on behalf of the Respondents that if these orders are not stayed, their respective appeals will be rendered nugatory since the funds involved would be irrecoverable from the Claimant and /or its members. According to the draft Memoranda of Appeal filed by the Respondents which are identical, the issues for appeal are based on my interpretation of Sections 48(2) and 49(1) of the Labour Relations Act vis a vis Article 41(2) of the Constitution.

20. On its part, the 1st Respondent has difficulty remitting union dues to the Claimant because the resignation letters and check off forms served on the 1st Respondent by the Claimant are dated January 2013. Additionally, some of the employees on the Claimant's list of membership have left the 1st Respondent's employment either through natural attrition or termination of employment in various forms while others are either active members of the 2nd Respondent or are non unionisable.

21. To my mind, these are matters of fact and I find it strange that the 1st Respondent would take issue with the date of the resignation letters and check off forms submitted by the Claimant yet the dispute giving rise to the issues before the Court commenced in January 2013. In my view, the documents served on the 1st Respondent by the Claimant cannot be invalidated by the mere fact that they are dated January 2013.

22. With regard to the issue of some of the members of the Claimant having left the 1st Respondent's employment or being otherwise unavailable for membership within the Claimant the simple answer is that employee establishment is fluid in nature and numbers are matters of fact which are always subject to reconciliation. I therefore find that the documents submitted by the

Claimant cannot be invalidated by the shift in numbers. At any rate, the question of membership as between the Claimant and the 1st Respondent is highly contested and is pending determination before this Court.

23. During the hearing of these applications, Counsel for the 1st Respondent told the Court that 30 employees are available for membership within the Claimant. Munayi told the Court that arising from the 1st Respondent's failure to deduct and remit union dues to the Claimant, the activities of the Claimant had literally ground to a halt. I see no reason why the 1st Respondent has difficulty deducting and remitting union dues on account of the 30 employees who are not conflicted at the very least.

24. The 2nd Respondent's case is that if the order stopping recovery of agency fees from the Claimant's members is not stayed, then the accrued fees will be irrecoverable from the Claimant or its members in the event that the intended appeal succeeds.

25. Section 50(3) of the Labour Relations Act provides that deductions made by an employer on account of union dues and agency fees are not recoverable from the employer by the employee. The effect of this provision is that if the Court of Appeal were to find that the 2nd Respondent was in fact not entitled to agency fees from the Claimant's members as I have ruled, then the affected employees would have no recourse against their employer. With this in view, I find that the balance of convenience in this case tilts in favour of the Claimant and its members.

26. Moreover, the issue of recognition that remains pending before this Court is closely related to the issues of union dues and agency fees which I have already determined. It seems to me therefore that by asking the Court to stay these proceedings, the Respondents seek to subvert the course taken by this Court towards determination of the issue of recognition.

28. At the time of writing this ruling, the 2nd Respondent has filed a list of names as evidence that a majority of the unionisable employees of the 1st Respondent are its members. No check off forms were submitted in this regard and the Court has therefore arrived at the conclusion that the issue of membership as between the Claimant and the 2nd Respondent merits urgent inquiry by the Court and staying the proceedings herein as asked by the 1st and 2nd Respondents does not aid that end.

29. Even more serious is the issue of deduction of agency fees in spite of the orders of this Court issued on 11th June 2013, which if proved would amount to contempt of court. In the case of *Econet Wirelss Ltd Vs Minister for Information & Communication of Kenya & Another [2005] eKLR* it was held that once a matter touching on contempt of court is raised, it must be addressed with utmost seriousness and urgency. What the Respondents are asking this Court to do is to ignore the allegations of contempt of court and allow them to proceed to the Court of Appeal after which they may then come back for canvassing of the issue of contempt of court. I do not agree. In my view, the Respondents need to address this Court on this issue even as they proceed to the Court of Appeal.

30. For the foregoing reasons the applications by the 1st and 2nd Respondents for stay of the orders of this Court issued on 24th January 2014 and the succeeding proceedings are dismissed with costs to the Claimant.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF MARCH 2014

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*1st Respondent*

.....*2nd Respondent*