



THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 456 OF 2014

NATIONAL UNION OF WATER AND SEWERAGE EMPLOYEES.....CLAIMANT/APPLICANT

VERSUS

**NAIROBI CITY WATER AND SEWERAGE COMPANY
LIMITED.....RESPONDENT**

RULING

1. Before me is the Claimant/Applicant's Notice of Motion Application dated 21st March 2014. The Application in the main seeks the following orders:
 1. That pending the hearing and determination of this Claim, the Honourable court be pleased to issue a temporary injunction restraining the Respondent and or its agents and or servants and or representatives from refusing and or neglecting to deduct union dues from salaries of the Claimant union's members and remitting the same to the Gazetted Claimant Union account number 01120201219200 held at Co-operative Bank of Kenya Parliament Road Branch Nairobi.
 2. That pending the hearing and determination of this claim, the Honourable Court be pleased to issue a temporary injunction the Respondent and or its agents and or servants and or representatives from harassing or intimidating and or coercing and or victimizing the Claimant Union members and or interfering and or tampering with its payroll in any manner whatsoever interfering with the claimant union members' constitutional right to join and belong to the claimant union.
 2. The Notice of Motion aforesaid was supported by the grounds on the face of the motion as well as the annexed Affidavit of Elijah Otieno Awach together with the annexures therein. The Claimant union boasted of membership of about 630 employees of the Respondent and asserted that the Claimant Union members who had voluntarily acknowledged their membership to the Claimant union were being harassed and intimidated and victimized by the Respondent to the extent that the Respondent had now refused to even deduct and remit their union dues and were even going to the extent of advising the members to leave the union and join other unions.
 3. The Affidavit annexed signed Check-Off forms for 2014, notes from members of the claimant union on deductions dated circa 2012, lists of recruited members of the Claimant Union, correspondence from the deponent Mr. Awach to the payroll coordinator of the Respondent on deduction to be made from the deponent's salary as union dues, a letter from the Advocates for the Claimant union dated 3rd September 2012 to the Managing Director of the Respondent enclosing

an extract of the Registrar of Trade Unions showing the officials of the claimant union and demanding the actualization of the agreement of the Claimant unions' members to join the Claimant union.

4. The instant Application was opposed by the Respondent who filed a Replying Affidavit sworn by Rose Naliaka on 30th April 2014. In it the deponent deposed that she was the Industrial Relations Coordinator in the Respondent company and that the Respondent appreciated the right of an employee to join a union of his or her choice as provided by the Constitution of Kenya, the Employment Act and the Labour Relations Act and that the Respondent respects and has complied with the statutory provisions. It was deposed that the Respondent its agents and servants or representatives have not harassed and do not intend to harass the Claimant, its agents, servants, representatives or any of its union members. She deposed further that the deposition by Mr. Awach was false and misleading as the letters annexed as consent forms to resign from Kenya Local Government Workers Union (KLGWU) to the Claimant union NUWASE are not addressed to the Respondent informing it of the intended resignation as required under the Labour Relations Act. Additionally some of the union members indicated are in management and therefore not unionisable. The Respondent annexed in the affidavit an analysis of the list availed by the union and demonstrated there were names repeated a number of times, the personal file numbers did not match official records while other 'union members' were deceased and therefore cannot be members of the Claimant Union. Also attached was a Ruling by the Court of Appeal for Kenya (Kihara Kariuki PCA, Ouko, Murgor JJA) against an order of this Court where the Court of Appeal declined to grant stay pending the determination of the intended appeal against my orders in a related suit between the KLGWU and the Claimant Union.
5. Parties agreed to file written submissions on the Application and the Claimant/Applicant filed its submissions on 29th May 2014. In the submissions the Claimant submitted that the depositions in the Respondent's Replying Affidavit to the effect that there were wrangles was a clear indication that the Respondent took advantage of the fact there were wrangles and declined to deduct the union dues from the wages of the Respondent's employees and subsequent remittance to the Claimant. It was submitted that the issues raised now by the Respondent were mere technicalities and also that they were nugatory and should not be considered by this Court as they are an afterthought and hence misleading this Court. The Claimant submitted the Respondent must be forced to obey the Constitution and the Employment Laws as the wages do not belong to the Respondent but to the employees who have already given it authority to deduct and remit the same. It was submitted that Part II on the freedom of association under the Labour Relations Act has been violated by the Respondent especially Section 4, Section 7 and Part IV of the Employment Act 2007 Sections 48 and 50. It was stated that the anomalies alleged have not been reported to the police and the issue of deceased members was not proved by way of evidence hence misleading. The Claimant thus submits the orders sought should be granted.
6. On its part, the Respondent filed its submissions on 6th June 2014. In the submissions the Respondent submitted that the Claimant had misled the Court that the Respondent had admitted most of the Claimant's facts. The Respondent denied that the allegations made by the Claimant and had merely stated that it appreciates that it is the right of an employee to join a union of its choice as provided by the Constitution of Kenya, the Employment Act and the Labour Relations Act. The Respondent submitted that the issues raised were not mere technicalities as defined by the Oxford Advanced Learners Dictionary Fourth Edition to mean a small detail of no real importance. It was submitted that the issues that the Respondent was raising are weighty and go to the root of the matter. The Respondent submitted that under Section 48 of the Labour Relations Act, a duty is imposed on the employee to inform the employer in writing that the employee has resigned from a union. It was submitted that the Claimant annexed consent forms to resign from KLGWU to NUWASE which were neither addressed to nor communicated to the Respondent. The Respondent submitted that the Claimant had failed to disclose that it had filled another suit being Cause No. 823(A) of 2012 which had appeared before me and where this Court had decried the litigation in piecemeal. Reliance was placed by the Respondent on various cases on material non-disclosure and that contradictory affidavit evidence at interlocutory should not be used to

make conclusive or definite findings of fact. It was submitted in conclusion that the Respondent had adduced sufficient facts to warrant setting aside the orders granted at *ex parte* stage.

7. The Court has been called upon to determine two critical aspects which I have captured at the top of the Ruling. The Claimant urged the Court to grant the orders pending the hearing of the suit. From the evidence adduced by way of Affidavit, the Claimant Union has some members who joined the union as per the check off forms. The Respondent denies it was notified of the membership as required by law and that the lists advanced by the Claimant are inaccurate and misleading.
8. It is not in dispute that Article 41(1)(c) of the Constitution is applicable and that the employees of the Respondent who are not in management position have a right to form, join or participate in the activities and programmes of a trade union. The Respondent asserts that it has no intention to harass or intimidate its employees in exercise of this right by the employees. The Claimant union has the burden of proving the allegations made about the harassment. Other than the explosive allusion to the same in the application and affidavit and submission there is nothing placed before the Court to show there has been any harassment, intimidation or other forms of infringement of the right to unionise.
9. Sections 48 and 50 of the Labour Relations Act, Part IV of the Employment Act have come into sharp focus. Section 48 provides as follows:

48.(1) In this Part, “trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.

(2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to?

(a) deduct trade union dues from the wages of its members; and

(b) pay monies so deducted –

(i) into a specified account of the trade union; or

(ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.

(3) has issued an order under subsection (2) shall commence deducting the trade union dues from an employee’s wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

(4) The Minister may vary an order issued under this section on application by the trade union.

(5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.

(6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.

(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

(8) An employer shall forward a copy of any notice of resignation he receives to the trade

union.

10. The law is clear. The steps to be taken by the employee, the union and the employer are clearly set out. I have not seen evidence of strict compliance with this section by the Claimant Union and the Respondent. Once the employee resigns from the union he was a member of or joins a union which notification MUST be in writing and addressed to the appropriate addressees, the Claimant is then compelled to forward a notification under Form S and then the Respondent is bound to execute the instructions and remit the union dues to the designated account. Due to the massive failure to demonstrate the notifications were made under Section 48 I need not delve into the other matters raised. I would disallow the Application and vacate the orders given at *ex parte* stage. The Respondent is however to commence remitting the funds it had held in escrow for any of the employees who notify it of intention to cease being members of the rival union in favour of the Claimant union. The notifications MUST be made in strict compliance with the law.

11. I see no need to analyse all the decisions cited before me only noting that the dispute between the parties herein is one which can be resolved if the Labour Institutions Act, the Labour Relations Act and the Employment Act are adhered to strictly. It does not aid the industrial relations at all for parties to incessantly seek redress in Court when the matters giving rise to the dispute are matters that both parties can resolve by following the law. It is time consuming and energy sapping to hear ad infinitum about the wrangles for membership in trade unions. Can we all move along? It is hoped the orders I have given will be adhered to enable a finalization of the matter without recourse to litigation.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of June 2014

Nzioki wa Makau

JUDGE