



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1732 OF 2014

THE KENYA JOCKEY AND BETTING WORKERS UNION.....CLAIMANT

VERSUS

RESORT KENYA LIMITED.....RESPONDENT

RULING

1. The claimant, the Kenya Jockey and Betting Workers Union (Jockey Union) through their Notice of Motion filed on 7th October 2014 are seeking for orders;

i. That ...

ii. That pending hearing and determination of this claim the respondents, their workers, agents, auctioneers, advocates and or any other person acting on their behalf be restrained by way of an injunction from deducting union dues, agency fees, from the respondents' union members and unionisable employees respectively and or interfering with the current collective bargaining agreement dated 14th January 2014 in any manner detrimental to the terms thereof

iii. That this court pleases to issue temporary injunctive orders on terms of (ii) above pending hearing and determination of this application

iv. Those costs of this application are provided for.

2. This application is supported by the annexed affidavit of Salim Wilson Makumi the General Secretary of Jockey union and the grounds stated in the body of the application.

3. In reply, the respondents filed their replying Affidavit sworn by Paul Mburu Kamau the Human Resource manager of the respondent. This affidavit is sworn and dated 16th October 2014. Both parties agreed to file their written submissions with the claimant submission being filed on 11th November 2014 and those of the respondent filed on 13th November 2014.

4. The claimant's application is based on the grounds that from April 2014 the respondents without lawful excuse and in breach of the express provisions of the Collective Bargaining Agreement (CBA) stopped remitting union dues and agency fees to the claimant and has now illegally and in breach of the CBA engaged KUDHEIHA. That under section 49 a trade dispute that has concluded a CBA and registered by the Industrial Court with an Employer setting terms and conditions of service for unionisable employees are entitled to agency fees. Under article 2(b) of the Memorandum of Agreement

and negotiations procedure dated 5th September 1997 which remains in force, the respondent undertook not to enter into discussion or negotiations on the interests of the said respondents workers who are in the employment of the said respondent concerning rates of pay, overtime, welfare, medical benefits, collection of union dues, and retirement benefits. The claimant is bound to suffer loss and damage if the court does not intervene.

5. In the Affidavit of Slim Wilson Makumi, he further avers that the respondent in agreement with the claimant agreed to recognise them as the representative body and the sole labour organisation representing respondent's workers through the Recognition Agreement between the parties. On 2nd October 2014, the claimant wrote to the Court to report a trade dispute under section 73(a) of the Labour Relations Act as from April, contrary to the CBA between the parties, the respondent has refused to remit union an agency fees to the claimant. That by March 2014, the claimant had the majority members.

6. In reply, the respondent stated that on 1st April 2014, Mr Makumi wrote to the respondent complaining about the unlawful recruitment of members of his Union by KUDHEIHA. The respondent did a response seeking for certificates of bona fide members of his union. On 23rd April 2014 there were 198 notices of resignation sent to the claimant Union by the respondent. The union did not share a list of their member but wrote to complain about the recruitment. On 7th July 2014 the respondent gave notice of intention to enter into a recognition agreement with another Union but the claimant union only wrote back on 18th September 2014 to complain about the recruitments of his members by a rival union.

7. The respondent has approximately 300 employees, 198 resigned from the claimant union and 281 have joined KUDHEIHA. The majority of the respondent employees have resigned from the claimant and joined another Union. The employees have authorised the respondent to deduct membership dues from their salaries and remit them to the new union. The list of members attached to the claimant's affidavit is not signed and cannot be legitimate and has failed to bring to the attention of the court the key documents in their knowledge and possession. The application before court lacks merit and should be dismissed.

8. In submissions, the claimant stated that they have a recognition agreement with the respondent and have reported a dispute to the court under section 73(a/ of the Labour Relations act. The respondents are in breach of the CBA between the parties No.113 of 2014 where the claimant is noted as the recognised representative of the respondent's employees. In the agreement between the parties, Union dues and agency fees is due to the claimant as deducted by the respondent. the claimant have satisfied the principles for an injunction against the respondent which should be granted in this case as the claimant will suffer loss and damage is the respondent is not stopped from withholding union dues and agency fees due to the claimant.

9. In reply the respondent submitted that article 41 of the Constitution create a right of employees to join or participate in activities of a union of their choice and section 4(1) of the Labour Relations Act provides that every employee has the right to join a trade union or leave a trade union out their own free will. Section 54(1) of the Act the employer is required to recognise a trade union with a simple majority of its unionisable employees. It is the duty of a union to recruit its membership and those not keen to member members has the freedom to resign. Section 49(3) requires an employer to make deductions of trade union dues and remit to the relevant union upon receiving notice signed by the employee in respect of whom deductions are to be made by the employer. Majority of the employees at the respondent are members of KUDHEIHA and the claimant cannot claim any dues from the respondent.

10. The agreement signed between the parties herein on 14th January 2014 was on the basis that the claimant was the union with majority employees of the respondent. This has changed with majority employees joining another union that now enjoys majority. The application herein thus lacks merit and should be dismissed with costs.

11. Article 41 of the Constitution has created a fundamental shift in labour relations in Kenya as by this article forming the rights under the Bill of Rights, the far-reaching impact of it is that they cannot be curtailed for whatever reason unless by constitutional means. Any claw backs on article 41 of the

Constitution must be within the parameters permissible under the Constitution. In this case article 41 (2);

(2) Every worker has the right—

(a) To fair remuneration;

(b) To reasonable working conditions;

(c) To form, join or participate in the activities and programmes of a trade union; and

(d) To go on strike.

12. Thus allows an employee to join and participate in the activities of a union of his choice without any restrictions by the employer or any third party. This is a basic right.

13. Trade unions have a right to form and recruit members in a set industry or sector as set out under its constitution and its purpose objectives. Once such a union has been able to recruit a simple majority of employees with a particular employer, and these simple majority employees represent the unionisable employees in such workforce, section 54 of the Labour Relations Act allow such a union to be granted recognition by the employer. The presence of *a simple majority* is not given. It is dynamic. It keeps on changing based on the employee's turnover, continuation of employment and other factor of labour like terminations, resignation and movements from unionisable employees to management positions. Thus a union that enjoys the status of recognition by an employer, is not given that such recognition is automatic, efforts must be put in place to ensure the simple majority retention at all times. The continued enjoyment of union dues and agency fees are not by themselves permanent. The factors as above are relevant at all material times. Where membership of a union has changed and there is no simple majority, there is the possibility of the subject union losing on recognition that they have previously enjoyed due to the simple fact of lack of a simple majority. The right here belong to the employee to join or not join a union of his choice. This right must then be seen together with the right to associate as under Article 36 of the Constitution.

14. In this scenario therefore, section 4 (1) of the Labour Relations Act is important to refer;

4. (1) every employee has the right to -

(a) Participate in forming a trade union of federation of trade unions; and

(b) Join a trade union; or

(c) Leave a trade union

15. This therefore creates the freedom for an employee to join or leave a trade union. The modalities for such joining or leaving a trade union by a member or employees are also outlined under section 48(6), (7) and (8);

(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.

16. These provisions have the implication that an employee who has resigned from his union must notify the employer in writing that they have resigned for the same to take effect and once such notice is received; the employer has the duty to forward a copy of such notice to the trade union. This would then

mean that since the employer and employee share a relationship of an employment contract, any deductions from the employer's salaries, wages or dues must be with the consent and approval of the employee. Where an employee no longer wishes to be a member of any union, such an employee must notify his resignation to the employer for the same to take effect. The employer being the one who remits union and agency fees to the union, must then, in the alternative of submitting the union dues or agency fees forward the notice of resignation hence stopping the union deductions. The duty of h employer is to ensure proper notification is effected. The duty of the employer is to issue their written notice of resignation. The trade union must at all times ensure they have recruited a simple majority so as to retain their status of recognition. Where the simple majority lapses due to factor that more employees have resigned and issued notices to the employer, then the recognition of the trade union becomes frustrated by operation of the law.

17. In this case, the submissions by the respondent with regard to the operations of section 48 of the labour Relations Act have not been challenged by the Claimant in any material way. Equally the actions of the employees subject of membership to the claimant union by their resignation and joining a third party union has not been challenged as being contrary to the law. The recognition agreement between the claimant and the respondent where there is no proof of simple majority cannot therefore be sustained for the purposes it outlined that union dues and agency fees be deducted and forwarded to the claimant. A fundamental element of that agreement has since changed. The claimant cannot therefore seat back even where they have no proof of this simple majority and demand that union dues and agency fees be remitted to them. This would be to go contrary to Article 41 and 36 of the Constitution and the provisions of the Labour Relations Act, the law governing unionisation and the membership thereon.

18. with this recognition that employee have their right to associate and unionise as desired, the claimant must agree/accept to take stock and work towards regaining their vibrancy for simple majority. Where a rival union has entered the claimant's sphere of operations without justifiable cause, then a claim lies with that third party and not the respondent as herein sued. To therefore sustain the suit as filed and the nature of orders sought in the same, would be a gross miscarriage of justice. This suit cannot stand upon the findings in this ruling.

The court therefore orders;

- a. The suit as filed cannot be sustained in its current form noting the ruling herein and the same is dismissed;**
- b. The application filed herein lacks merit and stands dismissed;**
- c. Each party will bear their own costs**

Delivered, dated and signed in open Court at Nairobi this 25th day of November 2014.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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