



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 116 & 241 of 2013

RIFT VALLEY RAILWAYS WORKERS UNION.....CLAIMANT

VS

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

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

RULING

Background

1. On 29th January 2013, the Claimant came to Court under certificate of urgency seeking the following orders:

- (a) That the retrenchment program effected by the 1st Respondent from December 2012 and scheduled to take place in phases be stayed until the matter is heard and determined;
- (b) That any monies that may have been advanced subsequent to the retrenchment exercise be treated as an advance against any monies that shall be determined by the Court as owed to the grievants;
- (c) That the 1st Respondent engages the Claimant in proper and structured negotiations that will culminate to the grievants earning what is rightfully theirs as affirmed in law.

2. I certified the matter urgent but declined to grant any interim orders and directed the Claimant to serve the Respondents forthwith. *Inter partes* hearing of the Claimant's application was set for 19th February 2013 on which date the 1st Respondent indicated that they wished to file a preliminary objection to the Claimant's claim.

3. In the meantime the Claimant filed another Notice of Motion dated 22nd February 2013 under Cause No 241 of 2013 seeking orders that:

- a) Cause No 116 of 2013 be stood over generally pending determination of Cause No 241 of 2013;
- b) The Respondent that is to say; Rift Valley Railways (Kenya) Limited remits to the Claimant union dues for the months of January and February from its own account;
- c) The Respondent complies with the instructions of the workers to have a specified amount deducted as union dues towards their union;

- d) The Respondent reimburses to the workers the union dues deducted from the workers towards a union to which the workers do not subscribe;
- e) The Respondent recognises the Claimant by signing a Recognition Agreement with the Claimant.

4. This application went before my Sister, Lady Justice Maureen Onyango on 22nd February 2013 who granted the Claimant leave to amend its Memorandum of Claim and directed that the matter be placed before me with a view to consolidating it with Cause No 116 of 2013.

The 1st Respondent's Preliminary Objections

5. On 12th March 2013 the 1st Respondent argued two preliminary objections dated 6th March 2013 and 18th February 2013 respectively. Miss Ogutu for the 1st Respondent submitted that the Claimant's claim was in contravention of Rule 6 (1)(a) of the Industrial Court Rules as it was unclear who had signed the pleadings. Counsel also submitted that the Court lacked primary jurisdiction to handle the issues of recognition raised by the Claimant because the Claimant had not complied with Sections 48, 50, 54 and 56 of the Labour Relations Act.

6. Miss Ogutu further submitted that there was no ministerial order directing the 1st Respondent to deduct and remit union dues to the Claimant and no bank account had been designated for payment of union dues as required by law.

7. On the preliminary objection dated 18th February 2013, Counsel for the Respondent submitted that the Claimant's claim in Cause No 116 was tantamount to asking the Court to sit on review of its decision in Cause No 2567 of 2012. Miss Ogutu also submitted that there was no recognition agreement or collective bargaining agreement on which the Court could grant the prayer for stay of the retrenchment program set out in the Claimant's Notice of Motion dated 28th January 2013 in Cause No 116 of 2013. Further, the Claimant's prayers in the Memorandum of Claim and those in the Notice of Motion in Cause No 116 of 2013 did not correspond or relate.

The Claimant's Response

8. In reply, Mr. Isaac Munayi for the Claimant submitted that with regard to the preliminary objection dated 18th February 2013 the issue of the Claimant's registration had been proved and a certificate of registration attached. The issue of inconsistency in the Notice of Motion and the Memorandum of Claim had been resolved by amendment.

9. On the issue of recognition, Mr. Munayi submitted that the Claimant had met all the conditions for recognition but the 1st Respondent had failed to recognise the Claimant by signing a Recognition Agreement.

10. Responding to the preliminary objection dated 6th March 2013, Mr. Munayi submitted that Article 162 (2) of the Constitution and Section 12 of the Industrial Court Act give exclusive original and appellate jurisdiction to the Industrial Court to adjudicate on employment and labour matters. The fact that the Claimant had not exhausted the dispute resolution mechanism set out in the Labour Relations Act did not therefore invalidate the Claimant's claim. It was not mandatory for the Claimant to first refer the matter to the Minister for Labour.

11. The Claimant had submitted names of 600 employees of the 1st Respondent who had subscribed to the Claimant Union together with a check off form. It was the Claimant's position that a ministerial order was not mandatory for deduction and remission of union dues, all that was required was for the Claimant Union to demonstrate that it had recruited a simple majority of employees as its members.

12. Mr. Munayi took issue with the fact that the preliminary objection dated 6th March 2013 was not supported by a verifying affidavit and that the affidavit of Hellen Njagi sworn in support of the

preliminary objection in Cause No 116 of 2013 was untruthful. The Claimant asked that both preliminary objections be dismissed and the 1st Respondent be ordered to deduct and remit union dues to the Claimant.

1st Respondent's Final Reply

13. In final reply, Miss Ogutu submitted that the 1st Respondent has not been served with the Amended Memorandum of Claim in Cause No 116 of 2013 but had been served with an Amended Memorandum of Claim in Cause No 241 of 2013 which did not address the issues in Cause No 116 of 2013. There was no affidavit by Helen Njagi but there was one by Sophie Njagi. Only a list of employees and not check off forms had been submitted to the 1st Respondent. The written notices of resignation from the 2nd Respondent in Cause No 241 of 2013 had not been received by the 1st Respondent.

14. The 1st Respondent therefore prayed that the preliminary objections be upheld and the Claimant's applications dated 22nd February 2013 and 28th January 2013 as well as the Memorandum of Claim dated 22nd and amended on 26th February 2013 and the one dated 28th January 2013 be struck out with costs to the 1st Respondent.

Findings and Determination

15. This matter has had many twists and turns. The Claimant has come to Court under certificate of urgency at least three times on substantively the same subject, that is to say recognition by the 1st Respondent. The Claimant first filed Cause No 2567 of 2012, which was struck out on technical grounds. It then filed Cause No 116 of 2013 and before it was heard it filed Cause No 241 of 2013. For coherence and good order, the Court consolidated the last two causes.

16. The main issue before me is whether this matter is properly before the Court in view of the conciliation process set out in the Labour Relations Act.

17. Section 54 (6) & (7) of the Act provides that:

(6) If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.

(7) If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under certificate of urgency.

18. The Claimant chose to come directly to Court and was admitted under certificate of urgency.

19. Section 74 of the Labour Relations Act provides for urgent referral of matters to the Court as follows:

74. A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns-

(a) the recognition of a trade union in accordance with section 62, or

(b) a redundancy where -

(i) the trade union has already referred the dispute for conciliation

under section 62(4) ;or

(ii) the employer has retrenched employees without giving notice; or

(c) employers and employees engaged in essential service

20. In my view, Section 74 of the Labour Relations Act provides an opportunity for trade unions to seek the urgent intervention of the Court to arrest a situation where there is imminent fundamental breach of the law. It cannot therefore be used to circumvent the conciliation process set out in the law.

21. The Claimant submitted that the 1st Respondent has refused to recognise it. The 1st Respondent in turn claimed that the Claimant has not fully complied with the conditions for recognition. Section 50 of the Act sets out the conditions for deduction and payment of union dues among them being designation of a specific bank account.

22. Moreover, Section 48 provides that a trade union may make an application to the Minister for an order directing an employer of more than five employees belonging to the union to deduct union dues from the employees and pay the same to a designated bank account of the union.

23. Indeed, the Court took notice of a letter dated 20th March 2013 written to the Claimant by the Chief Industrial Relations Officer asking the Claimant to complete Form 5 and provide Bank details to enable preparation of a Ministerial order. There was no evidence of any response from the Claimant. It seems to me therefore that the Claimant is moving the Court to undertake duties that rightfully belong to the Minister for Labour.

24. Having examined all the circumstances of this case, I have come to the conclusion that this dispute ought to have been referred to conciliation and I therefore invoke Section 15 (4) of the Industrial Court Act. Consequently, these proceedings are stayed and the dispute referred to conciliation under the Labour Relations Act. To that extent only the 1st Respondent's preliminary objections are upheld with no order for costs.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF MAY
2013**

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**