Kenya Union of Pre-Primary Education Teachers v Cabinet Secretary Ministry of Labour (Cause 1984 of 2016) [2016] KEELRC 29 (KLR) (19 December 2016) (Ruling)

Kenya Union of Pre-Primary Education Teachers v Cabinet Secretary Ministry of Labour [2016] eKLR

Neutral citation: [2016] KEELRC 29 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1984 OF 2016

M MBARŨ, J

DECEMBER 19, 2016

BETWEEN

KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS ..... CLAIMANT

AND

CABINET SECRETARY MINISTRY OF LABOUR ..... RESPONDENT

RULING

1. The claimant, through application and Notice of Motion dated 26th September, 2016 and filed under the provisions of section 82 and 48(2) of the *Labour Relations Act* is seeking for orders that the Respondent be compelled to issue notice through gazette Notice directing any employer with more than 5 employees who are members of the Claimant to deduct 300.00 trade union dues from the wages at every month end and deposit such with the Claimant and that the Respondent be made to compensate the Claimant for the period union dues have not been remitted to the Claimant due to the non-publication of the requisite notice.

2. The application is supported by the annexed affidavit of Samuel Opiyo the secretary general of the Claimant and on the grounds that the Claimant is a trade union duly registered and has since mobilised members who have singed check off forms per Form S as under section 48 of the *Labour Relations Act*. On 30th July, 2015 the Claimant requested the Respondent to issue trade union dues collection order directing all employer with more than 5 members of the Claimant to deduct union dues and remit to the claimant. The Claimant also submitted a list of members.

3. That the Respondent has refused to issue trade union dues collection order by gazette notice as required under section 48(2) of the *Labour Relations Act*. Follow up letters have not been honoured thus the application and orders sought herein.

4. In reply the Respondent filed Replying Affidavit sworn by Isaiah Bundi Kirigua, Senior Deputy Labour Commissioner in the Ministry of East African Community, Labour and Social Protection. Hr avers that upon the Respondent receipt of the request by the Claimant processed the same as under section 48(2) of the *Labour Relations act* with a view to establish whether the Claimant had fulfilled the minimum requirements precedent to assurance of the request order. Upon examination of the application, the Respondent noted that the Claimant was properly mandated under its registered constitution to represent all teachers working in Early Childhood Education sector but only a list of 57 members was submitted as having joined the union and no check off forms were provided as proof of membership.

5. Mr Kirigua also avers that 57 alleged members of the Claimant were not indicated to enable the Respondent determine whether the union had attained the minimum threshold of 5 employees per employer as provided for under section 48(20 of the *Labour Relations Act*. The draft gazette Notice submitted by the Claimant was not specific to any employer as required under section 48(2) of the Act.

6. That the Claimant did not disclose material facts necessary and sufficient to enable the Respondent act as requested and hence adversely affecting the application. The list submitted did not aggregate the recruited number for each school/employer to enable the Respondent determine whether the minimum membership of 5 had been attained. The Claimant was informed by letter of 25th August, 2016 on the necessary steps to take and make fresh request. The Claimant had not accepted the advice and directions given and instead has filed this case. The application has no merit and should be dismissed.

Determination

7. A registered trade union under the *Labour Relations Act* has the right to seek union dues from its membership deducted through the employer. However, before enjoying such right, the trade union is required to comply with the requirements of section 48 of the Act as any deduction(s) from an employee's salary or wages must be lawful and comply with the provisions of section 19 of the *Employment Act*. Any wage deduction must be by the consent of the subject employee or through a lawful order published by the Minister in terms of section 22(2) of the *Employment Act* which section must be read together with section 20 and 21 of the Act. Where the subject deductions herein as sought for by the Claimant are to take effect, the Minister and office of the Respondent cannot effect the publication of the gazette Notice for the deduction of trade union dues from an ambiguous public or populace unless and until there is strict compliance with all the prerequisites of the law.

8. Therefore, Section 48(1) of the *Labour Relations Act* creates such right 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.

9. The condition thus for the deduction of trade union dues is proof of membership. Has the Claimant met this criteria? To show such compliance, section 48(2) must be read together with section 48(1) thus;

   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.

10. The duty is placed upon the trade union to apply to the Minister using the prescribed form and setting out the member; the employer; and a confirmation that indeed such a member has indicated their consent to have trade union dues deducted for the benefit of the union. Such consent is set out under the check off forms singed by each individual member of the union.

11. The list of the Claimant attached to the affidavit of Mr Opiyo sets out a list of 57 persons whose details are not included. A matter serious as this one that is likely to affect the wages of an employee should not be casually treated. Despite the attachment of membership application forms attached to the affidavit of Mr Opiyo, it is not clear is such application got approval by the Claimant union. These applications remain as such, application for membership. There is no endorsement by the Claimant union in acknowledgement of confirmation that indeed such application got acceptance and that the listed applicants are the same persons set out in the list of

12. This task cannot be left to the respondent. It is the duty of the Claimant to set out its members so as to enjoy the rights set out under section 48 of the *Labour Relations Act*.

13. In this case, I find the response by the Respondent vide letter dated 26th august, 2016 reasonable and appropriate. The directions given are lawful and once complied with, the Claimant can enjoy the deduction of trade union dues as of right. Save that the requirement to have recognition with the employers is not necessary at this stage. Where the Claimant is able to;

    Recruit union members from various employers;

    Sing/seek to effect the check off forms and submit to the requisite employers with more than 5 members so recruited into the membership of the claimant; and Submit the due application with the Respondent in terms of section 48(2).

14. This is a court of justice and can only direct the enforcement of lawful orders. The orders sought in the instant case by the Claimant cannot issue in their form or character without the Claimant first complying with mandatory provisions and requirements of establishing a membership base. Such a membership will then give the Respondent the rationale upon which to publish the required Notice to employers to deduct trade union dues for the benefit of the claimant. Before that can be done, the Claimant has to invest in the recruitment of members with each employer and have such members execute the required forms. This is the duty of the Claimant and cannot be shifted upon the respondent.

15. The orders sought with regard to compensation of the Claimant by the Respondent for non-compliance with trade union dues deduction does not arise on the premise that the Claimant has not addressed its art adequately by ensuring the recruitment and execution by such recruited members of the appropriate forms. As such, the order for compensation does not arise.

16. I have had chance to go through the Memorandum of Claim, the orders sought in the interim are essentially the same. To maintain the suit on the basis that the application is without merit will not serve any useful purpose. The suit is therefore dispensed together with the application.

    In conclusion and noting the above, Application dated 26th September, 2016 is hereby dismissed; with the application so addressed the main claim is also dealt with a dismissal; save that each party shall bear own costs.

READ IN OPEN COURT AT NAIROBI THIS 19TH DECEMBER, 2016

M. MBARU JUDGE

In the presence of: