



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 301 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA NATIONAL UNION OF NURSES.....CLAIMANT**

**-Versus-**

**THE COUNTY PUBLIC SERVICE BOARD HOMABAY.....RESPONDENT**

**RULING**

**The Application**

The application before me for determination is filed by Kenya National Union of Nurses the Applicant by way of notice of motion under certificate of urgency seeking the following orders –

- (1) That the court grants an order directing the respondent to ensure that all union dues deducted from the wages of member nurses of the claimant herein is remitted to its registered and gazetted account without any further delay.
- (2) That pending the hearing and determination of the application, the court be pleased to issue an order directing the respondent to pay all the unremitted union dues to the claimant's account as prescribed in the forms "S" duly served upon it from its own funds as provided for under Section 19 (6) of the Employment Act, 2007, Laws of Kenya.
- (3) That pending the hearing and determination of the main suit, the court be pleased to issue an order restraining the respondent and its agents from harassing and/or intimidating the claimant's members on the basis of this litigation.
- (4) That the court be pleased to grant such orders or relief as it deems fit and just in the circumstances.
- (5) That costs be borne by the respondents.

In the affidavit of ODONGO ODONGO OKACH sworn on 30<sup>th</sup> June 2017 in support of the Application he deposes that the Claimant is a duly registered trade union and the sole labour organisation with the mandate to represent the interests of nurses in employment and labour relations matters pursuant to the Labour Relations Act, No. 14 of 2007, Laws of Kenya, (the Act) that the Claimant has a Recognition Agreement with the Respondent which gives the Claimant *locus standi* to act on behalf of the nurses who are in the service of the Respondent's County Public Service Board, that the Claimant is entitled

by its constitution and all other enabling labour laws to recruit and represent nurse employees of the Respondent into her membership.

He deposes that the Claimant recruited employees of the Respondent into union membership by check-off, within the meaning of the mandatory provisions of Section 48 of the Labour Relations Act and sent duly signed check-off forms to the Respondent for the deduction of trade union dues from the wages of employees who had acknowledged membership. He deposes that upon receipt of the check off forms from the Claimant, the Respondent neglected, failed and/or refused to deduct and remit all trade union dues from the wages of employees whose names appear on the check-off notices appended from September 2016 up to date with impunity.

That vide letter Ref: KNUN/HBCB/VOL.014/2017 on 22<sup>nd</sup> May 2017 the Claimant wrote to the Respondent requesting for urgent action of deduction and remittance of union dues to no avail. That on 6<sup>th</sup> June 2017, the Claimant again wrote to the Respondent vide letter Ref: NBI/KNUN/HC.4/294/2017 requesting her to effect full deductions of the unremitted union dues. This letter was also ignored by the Respondent.

He deposes that unless the prayers sought in the application are granted in the interim, there is likelihood that the Claimant may not have the constitutional ability to represent its members hence causing huge constitutional infringement by the respondent upon the claimant's members.

### **Respondent's Reply**

The Respondent filed a replying affidavit of GEORGE ILLAH, its Principal Legal Counsel in which he deposes that the Recognition Agreement between the Claimant and the Respondent was to be given a date on which the same was to take effect from subsequent meeting but which date has not been agreed upon and as such the said recognition agreement is not effective until such time that the parties shall have agreed on the effective date. He further deposes that the allegations by the Claimant that deductions were made from the Claimant's members is not true as the same is not vouched by any evidence known in law. He deposes that even if the Recognition Agreement were in force, it would only be possible for the Respondent to effect deductions against the Claimant's members employed by the Respondent if such instructions are received from each individual member of the Claimant and that nothing had been exhibited to give such instructions to the Respondent.

**Mr. Illah** that the mere fact that the Claimant wrote letters to the Respondent (whose delivery the Respondent has denied) does not give life to a contract for check off deduction. He deposes that the Respondent's position is that there was nothing to warrant the Respondent to interfere with the salaries of the claimant's members and that the Claimant's claim is based on nothing as the claim itself is incurably defective. He deposes that the orders sought in the Claimant's application are not tenable as the same are substantive orders which if granted will amount to final orders of the court.

### **Hearing of Application**

The Application was heard *ex parte* in the first instance on 10<sup>th</sup> July 2017 when it was certified urgent and fixed for hearing *inter partes* on 24<sup>th</sup> July 2017. On the hearing date neither the Respondent nor its advocates on record, Nyauke and Company Advocates, attended court. After ascertaining that proper service had been effected upon the Respondent the court allowed the Applicant to proceed with the application in the absence of the Respondent.

Mr. Okach, the Industrial Relations Officer of the Applicant Union, appeared and argued the application

on behalf of the Applicant. He relied on his affidavit in support of the application. He submitted that the applicant has satisfied the provisions of section 54 of the Labour Relations Act, has more than a simple majority and has a recognition agreement dated 14<sup>th</sup> December 2016, a copy of which he annexed to his affidavit as Annex 2. He submitted that the number of its members as at the time of hearing of the application was 226. He submitted that initially the Applicant had a recognition agreement with Public Service Commission but after promulgation of the 2010 Constitution nurses were seconded to the County Governments. He submitted that the Respondent had been deducting union subscriptions until September 2016 when it stopped remitting the deductions to the union, that in 22<sup>nd</sup> May and 6<sup>th</sup> June 2017 the Applicant inquired why the Respondent had stopped making deductions and remitting union subscriptions from its members but there was no response. He submitted that none of the members had had resigned from the union and that it is the subscriptions of members that give the applicant union the mandate and means to represent the members. He submitted that the last cheque for Kshs. 110,372.45 was paid into the Applicant's account by the Respondent on 5<sup>th</sup> June 2016. He submitted that the Respondent has not communicated the reason why it stopped the remittance of union dues.

## Determination

I have considered the application, the grounds and affidavit in support thereof and the annexures thereto. I have also considered the replying affidavit filed on behalf of the Respondent.

I will first make a determination with regard to the issues raised in the replying affidavit then come back to the issue for determination, which is whether the Claimant has satisfied the court that it is entitled to the orders sought in the application.

In the replying affidavit of GEORGE ILLAH, he raises the following issues; that the Recognition agreement between the Claimant and Respondent has no effective date and cannot become effective until such date is agreed upon, that there is no evidence that the Respondent ever made deductions against the Claimant's members, that there are no instructions from the Applicant's members to deduct union dues from their salaries and that the claim is incurably defective. It is further the Respondent's position that the prayers in the application are similar to those in the Memorandum of Claim.

I agree with the Respondent that there is no evidence of the authority to deduct union dues from the salaries of its members which under section 49 of the Act should be in '**Form S**' commonly referred to as the '**Check-off Form**'. I however do not agree with the Respondent that the Recognition Agreement has no effective date. The Respondent is a joint signatory to the Recognition Agreement and the same having been signed on 14<sup>th</sup> December 2016, is binding upon the parties from that date. More fundamentally, the recognition agreement does not affect the deduction and remittance of union dues. The purpose or consequence of signing a recognition agreement is to give the union a right to negotiate a collective bargaining agreement. Deduction and remittance of union dues is not based on recognition agreement but on **Form S** which as I have stated above, is the authority for deduction of union dues from the salary or wages of an employee. The amount deductible is set by the Gazette Notice from the Minister for Labour which also gazettes the Bank and account into which the deductions should be sent. This is provided for in Section 48 as read with Section 54 of the Labour Relations Act which provide as follows –

### **“48. Deduction of trade union dues**

*(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) An employer in respect of whom the Minister 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.”

#### **“54. Recognition of trade union by employer**

(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.

(2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

(3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.

(3) The Minister may, after consultation with the Board, publish a model recognition agreement.

(5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.

(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 a certificate of urgency.*

*(8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.”*

The issue whether or not there have been deductions of union dues before, although not proved by the Applicant, is not a determinant of whether or not the Applicant is entitled to such deductions. The fact that the Respondent signed the recognition agreement is proof that the Claimant has members among its employees as a recognition agreement is signed after a union attains a simple majority of membership from among the employees of the employer with whom the recognition agreement has been signed.

Turning back to the issue for determination, ***has the applicant proved that it is entitled to the orders sought***"

This question must be answered in the negative. As correctly pointed out by the Respondent, the Applicant did not submit copies of check-off forms signed by its members authorising deduction of union dues. Without the check-off forms any deductions would be unlawful.

## **Conclusion**

Having found that the applicant has not submitted check-off forms to authorise deduction of union dues, this application must fail. I accordingly dismiss the same on grounds that the Applicant has not proved that it is entitled to union dues which the Respondent has failed to deduct.

There shall be no orders for costs.

**DATED AND SIGNED ON THIS 22<sup>ND</sup> DAY OF DECEMBER 2017**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED ON THIS 1<sup>ST</sup> DAY OF FEBRUARY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**



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