



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT ELDORET

CAUSE NO.189 OF 2017

[Formerly Cause No.351 of 2017 Nakuru]

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

COUNTY PUBLIC SERVICE BOARD UASIN GISHU COUNTY GOVERNMENT.....RESPONDENT

KENYA NATIONAL UNION OF NURSES, UASIN GISHU BRANCH PROPOSED 2ND RESPONDENT

RULING

1. The ruling herein relates to application dated 27th November, 2017 and filed by Kenya National Union of Nurses, Uasin Gishu Branch as the Proposed 2nd Respondent herein and the Notice of Motion is premised on the provisions of Rules 14. and 17 of the *Employment and Labour Relations Rules, 2014* and seeking for orders that;

- a. The court be pleased to grant leave to the applicants to be enjoined in this suit as the 2nd respondent.
- b. The proposed 2nd respondent be granted leave to file its pleadings in this cause in terms of the draft response to memorandum of claim herein
- c. The claimant be at liberty to file and serve the amended memorandum of claim within 14 days of service of the response to the statement of claim
- d. Costs be provided for.

2. The application is supported by the annexed affidavit of Kibii Simon and on the grounds that members of the applicant, Proposed 2nd respondent are members of the claimant union and make monthly contributions to the claimant. The claimant has defaulted in perpetuity to make remittance of contributions to the applicant which amounts as at September, 2017 stood at Kshs.1, 300,000.00 and the actions of the claimant are deliberate and calculated at frustrating the functions of the applicant. The claimant failed to disclose to the court that they are a proper and necessary party to these proceedings and the final prayers sought herein by the claimant directly and substantially affect the applicant.

3. Other grounds in support of the application are that the addition of the applicants in this suit is necessary for the purpose of determining the real matters in controversy. The presence of the applicants is necessary to enable the court effectively and completely adjudicate upon and settle all questions raised in this suit. The applicants have a genuine interest in this cause and unless the orders sought are allowed there shall be irreparable loss and damage.

4. Other grounds are that the applicants have a good defence to the suit by the claimant and deserve a chance to be heard to ventilate the same. The claimant will not suffer any prejudice if the orders sought are granted.

5. In his affidavit, Mr Kibii avers that he is the Branch Chairman of the Proposed 2nd respondent, Kenya National Union of Nurses, Uasin Gishu Branch and conversant with the suit herein. On 14th December, 2016 the claimant and the applicant [1st respondent] entered into a Recognition Agreement to which it was agreed the 1st respondent would deduct monthly rebates from its members and remit to the claimant. The claimant was then expected to channel the same to the applicant but on 27th February, 2017 the claimant withheld an amount of the rebates amounting to Kshs.750, 000.00 and by 24th September, 2017 the claimant had withheld 13 months of the same and amounting to Kshs.1.3 million.

6. Mr Kibii also avers that the applicant found out a solution to the problem with the claimant and thus wrote to the 1st respondent, County Service Board, Uasin Gishu County Government on 27th February, 2017 requesting that they channel their rebates directly to their account to enable the smooth running of its office and meet the needs of its members.

7. On this basis the final orders sought by the claimant directly and substantively affect the applicant.

8. In reply, the respondent filed Grounds in Support of the Application dated 27th November, 2017 and on the ground that the substance of the claim directly affect the applicant and its members and the reliefs being sought by the claimant affect the applicant and its member and therefore they are a necessary party to these proceedings. The applicant being a reregistered entity has the right to enjoy protection and hearing as under Article 50(1) of the Constitution, 2010 and for a just and conclusive determination of the suit herein, the injunction is necessary.

9. The claimant filed Grounds of Opposition to the application and on the grounds the application is defence as filed under the wrong provisions of the Court Rules which have since been repealed.

10. Other ground in position to the application are that the applicant in its application has contravened section 2(a) and (e) read with section 73(3) of the Labour Relations Act and acted contrary to the claimant's constitution as the applicant is legally not authorised officer of the union to act on its behalf.

11. The applicant branch was dissolved vide letter from the Registrar of Trade unions dated 10th April, 2018 and hence there is no capacity to sue as the applicant is not a juristic person. The intention of the application is to negate the purpose and office of the General Secretary and who is the authorised representative of the union including the branch officials and who can refer disputes to the court under section 73(3) of the Labour Relations Act, 2007.

12. The applicant is a disbanded branch and by filing the application offends the provisions of section 21 of the Labour Relations Act, 2007 and thus overtaken by events and lacks *locus standi*. In Cause No.866 of 2014 (Nairobi) where the claimant national executive Council had sued the general secretary the court held that only the general secretary can file suit for and on behalf of the claimant union.

13. Other grounds are that the application by the applicants offend section 48(1), 50(1) of the Labour Relations Act, 2007 read together with Chapter XI(3) of the claimant's constitution on allegations that over Kshs.1.3 million is owing as all funds for the claimant are regulated under its constitution and by letter dated 7th March, 2018 the Registrar of Trade Unions advised the branch that all remittances of the branch rebates must be in accordance with the claimant union constitution unless there are express provisions of the law or by orders of the court. All remittances to the claimant branches must be authorised by the general secretary

and in accordance with the constitution.

14. On 10th July, 2018 the claimant filed Notice to Withdraw the Notice of Motion dated 27th November, 2017.

15. On 25th June, 2018 parties attended court and took directions and agreed to address the application dated 27th November, 2017 by way of written submissions. Mention on 12th July, 2018 to confirm but on due date; only the applicant had filed its written submissions and the claimant and respondent opted to reply on their responses. The claimant representative however submitted that they had filed the Notice to Withdraw the Notice of Motion as the applicant had no authority to file the same.

16. In addressing the application by the applicant herein for joinder as a respondent, I have put into account the responses by the respondent in support and the claimant in opposition. I have also put into consideration the extensive submissions filed by the applicant.

17. The applicant's reliance on the provisions of Rule 14 and 17 of the *Employment and Labour Relations Rules, 2014* is a misnomer. Such Rules do not exist. Even where the court had Industrial Court (Procedure) Rules, 2011 the new Rules published in 2016 are the Employment and Labour Relations Court (Procedure) Rules, 2016 (Court Rules) and not as set out by the applicant. However, the court guided to address substantive justice with regard to matters at hand, the misapplication of the rules is not fatal to the application.

18. The court shall address the issue in question, the joinder of the applicant to these proceedings.

19. A 'respondent' in proceedings before the court is defined by the Rules, the Employment and Labour Relations Court (Procedure) Rules, 2016 to mean;

"Respondent" means a person against whom a suit has been instituted in the Court or who replies to any proceedings in Court;

20. This definition is important as where a claimant has filed a claim with the court and failed to include the correct 'respondent' and the person/party/entity against who should give a reply, the orders sought against such party would not apply. It is therefore the duty of a claimant to include the 'respondent' or 'respondents' against whom the orders sought from the court should issue.

21. In essence, where a respondent has been sued and is required to reply to the claims made and notes that liability lies elsewhere, and then it becomes imperative on such a respondent to seek the joinder of the correct and or proper respondent through third party proceedings and at the cost of the claimant. Such would ensure that the claimant is put into task and the court is apprised of the proper party/parties against whom liability lies.

22. This is not a matter envisaged under the Court Rules but I make reference to the Civil Procedure Act and the Rules thereto and which provides that under Order 1 Rule 10(1) of the Civil Procedure Rules, it provides for the substitution and addition of Parties to a suit, where the suit has been instituted in the names of the wrong persons as plaintiff or where it is doubtful whether the suit has been instituted in the name of the right plaintiff. Order 1 Rule 15 of the Civil Procedure Rules deals with enjoining of a Third Party by the Defendant. See **Yusuf Abdi Adan & another v**

Hussein Ahmed Farah & 3 others [2016] eKLR.

23. Where an applicant is keen to be enjoined in proceedings such as these, the window is not closed where there is a defined interest in the outcome of the same. There is the right to be an interested party where a respondent does not apply for third party

proceedings. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as;

A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation.

24. Such entry into the proceedings would ensure all necessary parties are given a right to be heard as secured under Article 50 (1) of the Constitution, 2010 and which provides that;e 5

Every person has the right to have any dispute that can be resolved by the application of the law decided by the application of law decided in a fair public hearing before a court or if appropriate, another independent and impartial tribunal or body.

25. To this extent, the applicant by moving the court thus to be enjoined as a respondent and not interested party is not proper. The claimant must chose who the respondent in proceedings is or are. Where such a respondent or respondents find another party as necessary, then the court must be moved appropriately. The applicant has the chance to be enjoined as an interested party by stating its interest(s).

26. Indeed as set out by the claimant in their Grounds of Opposition, section 2 read together with section 73 of the Labour Relations Act, 2007 allow the General Secretary of a trade union to initiate suits such as this with the court. Such authority is to be donated or delegated in writing from the right holder, the GS.

27. Section 25 of the Labour Relations Act, 2007 allow for registration of trade union branches by application to the Registrar of Trade Unions. Such a branch once registered may be dissolved by notice to the Registrar of Trade Unions and issued by the authorised representative as defined under the Labour Relations Act, 2007being the office of the GS. Upon receipt of such notice of the General Secretary the Registrar of Trade Unions must make an enquiry and once satisfied, proceed and remove the name of the branch from the register.

28. Section 25(5) provides that;

5. No person shall act or purport to act as an official of a branch of a trade union, employers' organisation or federation if that branch is not registered or has had its registration cancelled.

29. In this regard, the applicant filed its application on 27th November, 2017 but the claimant General Secretary set in motion a process which has led to the dissolution and removal of the applicant branch from the registered by the Registrar of Trade Union.

With the dissolution of the applicant, the court is left without a proper party to urge the application.

30. However, where the claimant's notice to the Registrar of Trade Unions with regard to the dissolution of the applicant was served to the office vide letter dated 6th March, 2016 a decision was not taken until 16th February, 2018 and during the pendency of these proceedings. On various dates the parties have attended court for hearing directions. With the notice of dissolution, the applicant did not urge the court to make the appropriate application to attend in these proceedings properly. This cannot now be argued under the applicant's name or as a 'respondent' as proposed and as set out above.

31. Where indeed the applicant as it existed or its members are aggrieved by the actions of the General Secretary or the decision of

the Registrar of Trade Union, a remedy exists but not in these proceedings.

32. Before conclusion, on 24th November, 2017 the court delivered ruling herein and issued orders requiring the respondent to continue making deductions and to keep the same in a suspense account until hearing and determination of the suit. Such orders cannot be circumvented by the respondent seeking to support application for the joinder of the applicant as a respondent. Also, to allow the non-compliance with orders subsisting and where the respondent has not lodged appeal, review or setting aside would be a travesty of justice.

Accordinging, application dated 27th November, 2017 shall not be allowed and is hereby declined. Each party to bear own costs.

Delivered in open court at Eldoret this 26th day of September, 2018.

M. MBARU

JUDGE

In the presence of:

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