REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER 83 OF 2020

KENYA UNION OF COMMERCIAL, FOOD

AND ALLIED

WORKERS.....CLAIMANT

-VERSUS-

MAJID AL FUTTAIM HYPERMARKETS LIMITED

(LOCAL FRANCHISE FOR CARREFOUR RETAIL CHAINS).....RESPONDENT

Coram

Before Lady Justice J.W.Keli

C/A Otieno

JUDGMENT

1. Vide a memorandum of claim dated the 13th of February 2020, the Claimant sued the Respondent and sought the following Orders:-

   a) That this Honourable Court does declare that the Applicant has a right of access to its members and potential members and that such a right cannot be limited in any manner

whatsoever so long as adequate arrangements are put in place so as not to interrupt normal business.

b) That this Honourable Court does and hereby orders the Respondent to recognize the claimant as a labour union representing the interests of its unionisable employees.

c) That this Honourable Court does order the Respondent to deduct and continue remitting trade union dues from employees who have acknowledged their union membership and where such union dues have not been deducted and paid, the Respondent be ordered to pay such outstanding dues from their own funds.

d) That this Honourable Court does order the respondent to enter into collective bargaining with the Claimant within the next 30 days of the order.

e) That this Honourable Court does grant any other appropriate relief as it deems just and fit to meet the ends of justice.

f) That costs of this suit be granted to the claimant.

2. The Claimant in support of the claim filed their list of witnesses dated 13th February 2020; witness statement of MIKE O. ORANGA of even date; and list and bundle of documents of even date. The Claimant later filed two separate further lists of documents dated 11th July 2024 and 27th September 2024 respectively; additional check-off sheets dated 7th February 2025; and an amended witness statement dated 16th June 2025.

3. The Respondent entered appearance through the Federation of Kenya Employers, later changed to the law firm of Hamilton, Harrison & Matthews, and filed an amended memorandum of defence dated 17th April 2025. In support of their response, they filed a witness statement of

CONSTANCE IMBIMI MWONI dated 16th April 2025; list of witnesses dated 17th April 2025; and index and bundle of documents of even date.

Hearing and evidence

4. The claimant's case was heard on September 25, 2025, when Mike Otieno Oranga testified under oath as CW1. He adopted his witness statement as amended on June 16, 2025. He produced documents listed for the claimant dated February 13, 2020, July 11, 2024, September 27, 2024, and February 7, 2025, as the claimant's evidence in chief. He was cross-examined by Mr. Makori for the Respondent and re-examined by the union Industrial Relations Officer, Mr. Nyumba.

5. The Respondent's case was heard on October 29, 2025. The witness was Constance Mwoni, who testified under oath and adopted her witness statement dated April 16, 2025, as her evidence in chief. She also produced documents for the respondent listed as R-exhibits 1-11, dated April 17, 2025. She was cross-examined by the union Industrial Relations Officer, Mr. Nyumba, on behalf of the claimant. The witness was re-examined by her counsel, Mr. Makori.

The Claimant's case in summary

6. The Claimant states that it is a registered Union representing retail and wholesale employees including those of supermarkets such as the Respondent. The Claimant Union's case is that following the dismissal from employment on 24th February 2018 of one Bernard Machani Joram, an employee of the Respondent who was a member of the Claimant Union contributing privately, the Claimant on 8th March 2018, wrote to the Respondent seeking audience with

them to discuss the said dismissal. Further, through a separate letter also dated 8th March 2018, the Claimant addressed the Respondent on trade union representation and sought an introductory meeting with them on unionization and representation.

7. It is averred that on 27th March 2018, the Respondent denied the Claimant Union's request for an introductory meeting for the reason that certain legal requirements must be met prior to such a meeting. It is the Claimant's view that such a meeting would have assisted to resolve the dispute between Bernard Machani and the Respondent, rather than having the same referred to the Ministry of Labour for conciliation.

8. The Claimant states that between 2018 and 2029, it recruited 243 members out of the Respondent's then 476 Unionisable employees, a number above the 51% simple majority threshold set by law. During the pendency of the Claimant's suit, the Respondent expanded their operation's and branch network through their Franchise Agreements with Carrefour Supermarkets, and employed more unionisable employees.

9. The Claimant cites Section 56 of the Labour Relations Act 2007 for the averment that a trade union, through its officials or authorized representatives, should be granted reasonable access to the employer's premises for purposes of recruiting members; holding meetings with its members and other employees within company premises; and representing its members in dealing with the employer. The Claimant admits that, in line with the above provisions of the law, it was

granted structured access to the Respondent's premises in year 2023, and recruited the following additional members:

NO. OF MEMBERS	DATE CHECK OFF SHEETS SUBMITTED TO THE RESPONDENT
51 members	8.2.2024
495 members	1.7.2024
609 members	26.8.2024
31 members	8.10.2024
7 members	30.10.2024
4 members	31.10.2024
74 members	11.11.2024
35 members	20.11.2024
41 member	4.12.2024
20 members	22.1.2025
13 members	7.2.2025

10. As such, it is the Claimant’s case that the number of the Respondent’s employees who are members of the Claimant Union are 1623, against a total of 2177 unionisable employees employed by the Respondent. This accounts for 75% membership, far beyond a simple majority membership or 50% plus one member which is about one thousand & eighty-nine (1089) members, as required for purposes of signing a Recognition Agreement.

11. The Claimant explains that there exists an International Agreement between Carrefour and Uni Global Union, to which the Claimant Union is affiliated, on social dialogue and the protection of basic employee rights. Trade union membership and freedom of association are provided for under Articles 36 and 41 of the Constitution and Section 4 of the Labour Relations 2007, both of which are endorsed by ILO Conventions Nos. 87 and 98. The Claimant has not acted in a manner that disrupts the Respondent's business and should therefore not be denied access by the Respondent.

Respondents' case in brief

12. The Respondent is emphatic that it takes seriously the principles of freedom of association and the right of employees to unionize, as enshrined in the Constitution and Kenyan labour laws. It states that it recognizes that employees have the right to join and participate in trade union activities without fear of discrimination or retaliation.

13. The dismissal of Bernard Machani Joram on 24th February 2018 by the Respondent is admitted save that they state that he was lawfully dismissed after being taken through the disciplinary process. They state that the claimant reported the dispute to the Labour Office and a conciliator was appointed, and the Claimant and Respondent participated in the conciliation proceedings. The Claimant was granted access to the respondent's retail outlets countries for purposes of recruitment.

14. The Respondent concedes that by a letter dated 27th November 2019 received by the respondent via courier on 18th February 2020, the claimant submitted to the respondent 243 check off forms. The Respondent issued a response dated 27th February 2020, confirming that it would remit the union dues of the affected employees upon receipt of the requisite documentation from the claimant and with effect from March 2020. The Claimant supplied the requisite documentation in March 2020, but upon analysis of the forms submitted by the Claimant, the Respondent noted that they included 8 persons who had left employment, 5 persons who were not employees of the respondent, 3 double entries, and supervisors who were not unionisable. The claimant therefore only had 202 members. As promised, the respondent effected the deduction and remittances of union dues from March 2020.

15. The Respondent states that the Claimant submitted a draft Recognition Agreement for negotiation and execution. However, the same was not signed because the Claimant has not met the legal threshold for recognition in that it did not represent the simple majority of the respondent's unionisable employees. To illustrate, the Respondent avers that it had 957 unionisable employees as at February 2020, while the Claimant had 202 members.

16. Nonetheless, the Respondent continued to allow the Claimant reasonable access to its premises for the recruitment of members, provided that such access did not interfere with the respondent's business operations. The Respondent agrees that the Claimant recruited members and submitted check off forms to the respondent on various dates as set out below:

    a) 8th February 2024 - 51.

    b) 15th July 2024 - 495.

c) 26th August 2024 - 609.

d) 8th October 2024 - 31.

17. In accordance with fair labour practices, which require the employer to seek and obtain the consent of the employees before effecting any deductions, the respondent sought the employees' consent before effecting the deduction of the union dues. The result was that 341 staff members confirmed that they were members and consented to the union dues deduction, 425 declined and 20 had since resigned. Once the names of the Claimant's members were verified and the employees consented to the deductions, the respondent deducted and remitted the union dues to the claimant.
18. The Respondent explains that by a letter dated 14th October 2024, the Claimant asked the respondent to hold any deductions and remittance of union dues and undertook not to demand any arrears of Union dues in the intervening period. Through letters dated 30th October 2024 (7 members), 31st October 2024 (4 members) and 11th November 2024 (74 members), 20th November 2024 (35 members), and 4th December 2024 (41 members), the Claimant submitted additional check off forms to the respondent. These additional forms caused confusion to the Respondent on whether to continue with the union dues deductions. The Respondent sought clarification from the Claimant and by letters dated 13th November 2024 and 17th December 2024, the claimant confirmed its instructions to hold off union dues deduction. By a letter dated 16th January 2025, the Respondent notified the Claimant that it had already made the deductions and remitted to the Claimant the union dues for the months of November and December 2024. On 30th January 2025, the Claimant refunded the respondent the union dues for November 2024 and December 2024 for onward reimbursement to the employees. The respondent reimbursed

the affected employees and did not make any union dues deductions and remittances. On 22nd January 2025 and 7th February 2025, the claimant submitted check off forms for an additional 33 members. The claimant's letters reiterated that the respondent was to hold off on the deduction and remittance of check off forms.

19. The respondent explains that it has analysed the verification forms presented by the claimant and notes that:
    a) 398 employees confirmed to be members of the claimant.
    b) 481 declined/ indicated that they were not members.
    c) 250 employees had not confirmed their membership.
    d) 18 were not staff members.
    e) 130 names were repeated.

20. They confirm that as at February 2025, the Respondent had 2894 employees. Of these, 717 employees are in management are non-unionisable, and 2177 employees are unionisable. It is the Respondent's conclusion that the Claimant has therefore not recruited a simple majority of the unionisable members to entitle it to recognition, hence the Respondent had no obligation to deduct or remit union dues to the Claimant. Further, the Claimant had issued express instructions not to deduct and remit any union dues expressly revoking the check off instructions on behalf of its members. The Respondent states that they removed the check off instructions from the records of individual employees who had instructed it to deduct and remit on their behalf, union dues to the claimant; it does not have any current register of the unionised members of the Claimant; and the Claimant lacks the legal capacity to agitate for recognition

having revoked the registration of the respondent's employees by its instructions of 22nd January 2025 and 7th February 2025.

DETERMINATION

Issues for determination

21. The court having heard the case and taking into consideration the final prayer in submissions of the claimant finds the issue for determination is whether the claimant met the threshold for recognition by the respondent.

Claimant's submissions

22. The petitioner submitted that - Under Rule No. 5 (a) (vi) of the Claimant's Constitution & Rules, the Claimant is the right Sector Trade Union for the Respondent's unionisable employees. The said Rule No. 5 (a) (vi) provides as follows: RULE No. 5: MEMBERSHIP Membership of the Union shall be open to employees engaged in the following industrial groups provided that such employees are above the apparent age of (16) sixteen years. (a) Distributive & Commerce Sector Which shall embrace all employees engaged or employed in: (vi) Supermarkets, Shops, Retail and Wholesale outlets, Distribution and supply companies. See Exhibit 1. There is no dispute as to the relevance of the Claimant in the Sector in which the Respondent operate its business. The Claimant's engagement with the Respondent's unionisable employees began in earnest at the beginning of the year 2018 when Union membership recruitment exercise began albeit under very difficult and hostile circumstances as Union officials were not allowed access

then into the Respondent's premises. The Unionisable Claimant employees who were perceived at that time to have assisted in the recruitment exercise were victimized and terminated. Some of the said former employees included: - (a) Bernard Chachani Joram (Page 28 of the Claim) (b) Kevin Odhiambo Oriya (Page 34 of the Claim) (c) Kelvin Kung'u Njoroge (Page 38 of the Claim) 5. Attempts by the Claimant to meet with the Respondent to settle the above terminations were not allowed. Exhibit at Page 29 of the Claim. The Respondent cited lack of Recognition Agreement as a tool to deny their employees the Fundamental Right of Trade Union representation. Exhibit at pages 31 and 40 of the Claim. The Respondent thus showed anti Union resolve all against clear provisions of Section 54 (1) of the Labour Relations Act, 2007 which is drafted as herebelow: "(1) an employer, including an employer in the public sector, shall recognize a trade union for purposes of Collective Bargaining if that Trade Union represents the simple majority of unionisable employees." Emphasis mine. Flowing from the above lawful provision, the Claimant had all the right to represent its members save only for Collective Bargaining which require parties to have signed a Recognition Agreement in the first instance.

23. On first recruitment exercise and the quest to sign a recognition agreement - Even in the very difficult circumstances which prevailed in 2018 – 2019, the Claimant managed then to recruit 243 members between February 2018 – May 2019. The Claimant forwarded check off sheets to the Respondent by a letter dated 27th November, 2019, a letter which had clear instructions on deduction and remittance of union dues. Exhibits at pages 42 – 82 of the Claim. The reverse side of the check off sheets bear the Kenya Gazette Notice authorizing deduction and remittance of union dues and where to deposit dues so deducted from union members. By November 2019 the

Respondent had in its employment a total of 476 unionisable employees. This represented 51% membership which, under Section 54 (1) of the Labour Relations Act, 2007, was above the simple majority membership threshold which is 50% plus one member. On 27th November, 2019, the Claimant began the process of signing Recognition Agreement upon achieving the requisite threshold under the law. Exhibit at Page 88 of the Claim. In an attempt to reduce membership threshold, the Respondent, at Paragraphs 5 - 10 of the witness statement of Ms. Constance Imbimi Mwoni dated 16th April, 2025 inflated the total number of their unionisable at 957 but on cross examination it came out clearly that there is no evidence placed before the Court to confirm the veracity of this total number. Section 74 (1) of the Employment act, 2022 provide thus: "(1) An employer shall keep a written record of all employees employed by him, with whom he/has entered into contract under this Act which shall contain the particulars:" Employment records were therefore within the custody of the Respondent as at February 2020 and therefore they should have availed it to prove their allegation that they had in their employment a total of 957 unionisable employees by February 2020 when this suit was filed and not 476 as provided by their employees to the Claimant. On access into the respondent's premises -paragraph 11 of the Respondent's witness statement states that the Respondent continued to allow reasonable access to the Claimant for recruitment of members. A letter at Page 16 of the Claimant's Bundle of Documents (claimant's further list of documents) dated 11th July, 2024 confirm that access into the Respondent's premises was granted at a meeting between the parties held on 14th December, 2023. 19. Following the grant of access into the Respondent's premises, parties further agreed on structured visits which can be confirmed through Exhibits at pages 4 - 8 of the Claimants Further List of Documents dated 11th July 2024. 20. The Respondent's witness confirmed on cross examination that between January 2018

- 13th December, 2023, the Claimant had no right of access into the Respondent's stores. It is the Claimant's conduct which respected the Respondent's right to run and manage the affairs of their business in terms of human capital and the intervention of the Federation of Kenya Employers which, at the end, softened the Respondent to grant the right of access. The said grant of access was however, not welcome by some of the store managers who many a times created barriers which interfered with structured access. Exhibit at Page 2 of the Claimant's Further List of Documents Dated 11th July, 2024.

24. FURTHER OR ADDITIONAL RECRUITMENT OF MEMBERS - Paragraph 12 of the Respondent's witness statement confirm that the Respondent received further or additional lists of members. This followed: (i) The limited grant of the right of access, and (ii) Expansion of the Respondent by opening and operationalizing additional Stores/Branches. The Respondent confirm that the Claimant recruited more members as below: (i) 51 members - Claimants List of Documents dated 11.7.2024 (Pages 40 – 60) (ii) 495 members Claimant's list of Documents dated 11.7.2024 (Pages 61 – 122) (iii) 609 members Claimant's List of Documents dated 27.9.2024 (iv) 225 members - Claimant's Additional Check Off Sheets pursuant to leave granted on 3rd February, 2025 or a total of: - 1380 Additional Members after the first recruitment exercise. The Respondent admitted having received the additional check off sheets, documented save that in the Claimant's Bundle dated 7th February, 2025, they only 31 members submitted on 8th October, 2024 and omitted all other check off sheets in that Bundle. No explanation was given for that glaring omission. The Claimant having previously recruited 243 members as stated herein at paragraphs 9 - 16 the total Union members finally submitted to the Respondent stood at (1380 + 243) = 1623 members. At Paragraph 22 of the Respondent's witness statement,

they indicated and confirmed that the total number of unionisable employees as at the time of filing their witness statement stood at 2177. The Union therefore recruited an overwhelming majority membership of 1623 x 100 = 74.5% or 75% membership.

25. 2177 ALLEGED UNION MEMBERSHIP VERIFICATION AND ALLEGED CONSENTS TO DEDUCT UNION DUES - The Respondent, at Paragraph 13 of their witness statement stated that they conducted membership verification exercise for members of staff to confirm that they were union members and that they consented to and agreed on union dues deductions. Section 48 (2) & (3) of the Labour Relations Act, 2007 provide 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. "(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 whin 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 deduction. The Law governing deduction and remittance of union dues is simple and clear. When check off sheets are presented to an employer, such employer is required to commence deduction of union dues from employee's wages within thirty (30) 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. With provided all due respect to the Respondent, the verification exercise is not for and is only a form of coercion and intimidation meant and intended to force employees

out of the Trade Union. In any case, the only lawful membership confirmation lie in signing a check off sheet (Form S). There is no other membership verification style prescribed under the Labour Relations Act, 2007. In any event, the Respondent acknowledged that they were verifying union membership from the check off sheets submitted to them but admitted in cross extermination that they did not involve the Claimant Union in the verification. said exercise yet it was union membership which was their subject of the Respondent's Volume I Bundle of Documents from Pages 20 – 355 & 371, 455 - 467, 475 - 486 and the same documents are also in the Respondents' Volume II Bundle from Pages 501 – 623 & 698 – 771. These are letters drafted by the Respondent's top Management and given to their employees by their respective Store Managers/Supervisors, standing on guard, and demanding letters withdrawing or denouncing Union membership. The Respondent allege that their employees withdrew or denounced their Union membership and produced the alleged letters in Court. It is worth noting that 95% of those letters are not addressed to anybody and about 98% have no dates on them. Pages 353 – 354, pages 468 – 473 & pages 487 - 500 of Respondent's Volume I Bundle and pages 613, 621 – 622 & Documents. 624 - 634 & 743 - 751 of Respondent's Volume II Bundle. The long and short of the alleged union membership withdrawal letters is evidence they are not valid and cannot count as authentic and verifiable before the Court. The list at pages 782 - 814 of Respondent's Volume II Bundle was therefore prepared in vain and was thus an exercise in futility as the verification exercise itself was unlawful and coercive and that the validity of dated. the said letters are questionable as they are not properly addressed and VI. RESPONDENT'S ATTEMPTS TO REDUCE UNION MEMBERSHIP NUMBERS - At Paragraph 21 of the Respondent's Witness Statement, it is alleged that after the verification exercise, they established THAT: - - 481 employees had declined membership -250 employees

had not confirmed their membership 6 -18 persons were not staff members -130 names were repeated. The Claimant has already made submission on the verification exercise and stated that under the Labour Relations Act, 2007, the said verification exercise is not provided for. Further, instructions on the reverse side of the check off sheets did not require the Respondent to conduct a verification exercise. Indeed there are concise and clear instructions, none of which touch on Union membership verification exercise by an employer. The above argument, a Union membership verification exercise carried out by the Respondent without the involvement of the Claimant could only have been a ploy to coerce and intimidate employees to withdraw their membership, nothing else could have been the reason. It is already pointed out that a big number of letters allegedly withdrawing union membership or denouncing such membership were not addressed to the Respondent and did not bear any dates on them. The same cannot therefore count as authentic and verifiable evidence. The allegation that 481 employees declined their membership while 250 workers did not confirm their membership is thus null and void ab initio in the circumstances already argued herein above. There is also an indication that 130 names were repeated while 18 others were not staff members. The said 18 persons who ended up in the store serving customers could have been merchandisers from suppliers serving in the Shop. All the same, by removing 130 names of employees allegedly repeated in the check off sheets and a further removal 18 people who are alleged not to have been employees, gives a total of 148 names removed from the check off sheets. When 148 names are removed from the total list of 1623 names in the check off sheets, it leaves a balance of 1475 strong membership which, out of 2177 unionisable employees, account for: - 1475 x 100 + 67.75% 2177 or 68% membership. The Respondent's attempt to reduce union membership was therefore an exercise in vain. The workers resolve and decision to have Union representation resoundingly stands unchallenged.

26. WITHHOLDING DEDUCTION AND REMITTANCE OF UNION DUES - On 14th October, 2024 the Claimant addressed the Respondent on deduction and remittance of union dues and asked the Respondent to put on hold any deduction and remittance of union dues until: - (i) Finalization of out of court efforts to settle the dispute on Recognition Agreement which was ongoing, and (ii) Recognition Agreement was signed to formalize the parties' relationship. Exhibit at page 773 of the Respondent's Volume II Bundle of Documents. At the end of November 2024, the Claimant still received remittance of union dues amounting Kshs.67,000. By a letter dated 6th December, 2024 the Claimant addressed the Respondent requesting for a list of deduction, amount deducted and specific month of deduction. Exhibit at page 776 of the Respondent's Volume II Bundle of Documents. The information requested in the letter under reference in the immediate last paragraph was not provided. By a letter dated 17th December, 2024 the Claimant addressed the Respondent in reference to the earlier letter dated 6th October, 2024 and at paragraphs 2 & 4 of that letter, this is what the Claimant communicated to the Respondent. "Through our letter dated 14th October, 2024 subsequent to our meeting with your team on 12th November, 2024 at FKE, we agreed to put on hold union dues deductions until we finalize our relationship. It is against this backdrop that we reiterate our position on zero deductions and remittance of union dues for all our members including this month payroll until the Recognition Agreement is settled and a contrary communication from our end” Exhibit at page 777 of Respondent’s Volume II Bundle of Documents. The letter quoted at paragraph 54 above confirm that withholding of deduction and remittance of union dues was discussed at the Federation of Kenya Employers and an agreement reached on 12th November, 2024. This has not been controverted by the Respondent in any way or by way of evidence. 56. By a letter

dated 16th January 2025, the Respondent wrote back to the Claimant and this is what they stated: - "The General Secretary, KUCFAW, Comfood Building, Kilome Road P. O. Box 46818– 00100 8 NAIROBI 16th January, 2025 Attention: Boniface Kavuvi Dear Sir, RE: UNION DEDUCTIONS Reference is made to your letter dated 17th December, 2024 and reviewed on 13th January 2025 upon resumption from leave. We acknowledge receipt of your communication concerning the deductions made against our employee's dues in accordance with your letter dated 20th November, 2024. We appreciate the clarity that union fees should not be deducted moving forward. However, as the payroll for December, 2024 had already been processed prior to receiving your letter, the deductions for that month had already been made. In this regard, we request that you promptly refund the amounts received for union fees from our employees for both the months of November and December, 2024. Upon receipt of the refund, we will reimburse the affected employees for the amounts deducted. Please ensure that the refund is processed directly to our account as detailed below: Majid Al Futtaim Hypermarkets Limited Standard Chartered Bank Kenya Limited Account Name Bank Name Swift Code SCBLKENXXXX KES Account No 0106040511300 Branch Name Chiromo We look forward to your prompt response and action on this matter. Yours faithfully, Christoper Orcet Regional Director - EA Majid Al-Futtaim Hypermarkets Limited." Exhibit at page 779 of Respondent's Volume II Bundle of Documents. It is the Respondent's letter quoted in the immediate last paragraph which led the Claimant to refund Kshs.165,231 being union dues refund for the month of November and December 2024. Exhibit at page 780 of Respondent's volume II Bundle of Documents. Prior to the Claimant's letter dated 6th December, 2024 aforementioned at Paragraph 52 herein above, the Respondents decided on their own to 9 choose decline whose union dues to deduct and remit and from who they would to make deductions. 59. Legal Notice

7 issued on 5th January, 2022 in the Kenya Gazette required an employer upon whom check off sheets have been served to notify the Trade Union in writing, within one month of the payment. This is done by submitting a list of deductions made which the Respondent ignored to do. This followed their irregular/unlawful and lopsided membership verification exercise. The deduction did not therefore come from the total union membership as submitted to them and cannot therefore be used to determine Union membership numbers. 62. As already stated, the refund of Kshs.165,213 was for two months (November/December 2024). This would roughly mean that for one month, the total deduction was (165,213 ÷ 2) = Kshs.82,606.50. 63. Assuming that all employees were deducted Kshs.400/= in one month, it means then that the subscription of Kshs 82,606.50 + 400 was for 206.5 members. 64. At Paragraph 21 of the Respondent's witness statement, they peg and confirmed Union membership at 398. This multiplied by 400/= would give a total of Kshs.159,200 in one month alone and not Kshs.82,606.50 as being portrayed by the Respondent. This confirms that the Respondent is being expressly mean with the truth leading them to tread on a delicate route that is difficult to explore as figures do not lie.

27. DID THE CLAIMANT WITHDRAW UNION MEMBERSHIP BY ASKING THE RESPONDENT TO WITHHOLD DEDUCTION AND REMITTANCE OF UNION DUES - The Claimant has taken time to explain the agreement to withhold deduction and remittance of union dues. Evidence has been availed and communication between the parties highlighted to dispel a wrong notion that the union withdrew membership through its letter dated 14th October, 2024. (Page 773 of Respondent's Volume II Bundle of Documents). The entire Section 48 of the Labour Relations Act 2007 cover deduction and remittance of union dues. In particular, Section 48 (6) & (7) of the Labour Relations Act, 2007 provide as here below: - "(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." 10 "(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given." A reading of this law disagrees with the Respondent's assertion that the union terminated her membership. Unionisable employees register their union membership by signing the check off sheets. They equally have a right to resign from the Union. The Claimant's letter dated 14th October, 2024 was not a membership withdrawal or membership resignation letter. It was a letter which the Claimant made a specific request which was discussed and agreed upon. The Claimant has already dealt with the alleged membership withdrawal letters placed before the Court by the Respondent in their Volume I and II Bundle of Documents. The same have been lawfully challenged as inauthentic, invalid, null and void.

28. It has come out clearly in this submission THAT: - (i) The Respondent was adamant to engage with the Claimant in resolving workers grievances by unlawfully hiding behind lack of a Recognition Agreement to do so. (ii) Even at that time when the Claimant faced enormous challenges and when the Respondent's operations had not expanded, the Claimant still recruited 243 members out of total 476 unionisable employees which accounted for 51% membership, above 50% plus one member required for signing of a Recognition Agreement. (iii) Limited and structured access into the Respondent's stores was granted on 14th December, 2023 albeit with many challenges imposed by reluctant Store Managers. (iv) Following the limited and structured access and arising from the expansion of the Respondent's Stores, the Claimant recruited 1380 additional members which together with the first recruit of 243 members gives a strong membership of 1623 members as at February 2025. (v) 1623 members out of 2177 unionisable

employees account for 75% membership far above the simple majority threshold under Section 54 (1) of the Labour Relations Act 2007. (vi) It is the 1623 members which the Respondent subjected to a verification exercise. 11 (vii) By removing 130 repeated names and 18 people who are alleged not to have been employees of the Respondent or a total of (130+18)= 148, it still leaves union membership at (1623 – 148) = 1475. (viii) Even with that reduced number the Claimant still commanded 67.75 or 68% membership, still above the necessary threshold. (ix) It has come out clearly that the parties agreed to withhold deduction and remittance of union dues and this did not mean termination or withdrawal of Union membership. (x) It also again came out clearly that the Respondent decided on the number of members from who they would deduct and remit their union dues and left out a huge number only for reason of arguing their defense. The Claimant having met the membership threshold under the law and all other factors being in her favour, it is only reasonable that the Respondent's unionisable employees be granted their Right of Freedom of Association to join and participate in the programmes and activities of the Claimant Union. It is regrettable that the Respondent, who has a total of 2177 unionisable employees, has not embraced a Trade Union to represent their employees such that at the moment there are no known channels of grievance handling mechanisms and as it is, employees are at the mercy of their management at all times. Collective Bargaining remains a mirage as without a Recognition Agreement, workers cannot engage their employer to fix and agree on their terms of service. The right of access into the Respondent's premises having been granted, it is no longer an outstanding issue. Equally, parties having agreed on withholding of deduction and remittance of union dues, so that the prayer for remittance of union dues is no longer an issue. In conclusion, therefore, prayers I and III are withdrawn as indicated in the Claimant's Replying Affidavit sworn and dated 23rd May, 2025 and in the Claimant’s Amended Witness

Statement dated 16th June, 2025. REASONS WHEREFORE, the Claimant prays THAT: - (i) A Judgment be entered in her favour that the membership threshold necessary for signing a Recognition Agreement was achieved by the Claimant and an order do issue directing the Respondent to sign Recognition Agreement with the claimant within fourteen (14) days of the Judgment date. 12 (ii) An Order do issue directing the Respondent to engage the Claimant in Collective Bargaining within 30 days of the Judgment date. (ii) Cost of the suit be granted to the Claimant in quantified amount under Rule 70 (4) of the Employment and Labour Relations Court (Procedure) Rules, 2024 as the Claimant acts by self and does not benefit from the Advocates Remuneration Order.

Respondent's submissions

29. By a Memorandum of Claim dated 13th February 2020, the claimant filed suit against the respondent seeking: - a) Declaration that it has a right of access to its members and potential members which cannot be limited so long as adequate arrangements are put in place so as not to interrupt normal business. b) Order the respondent to recognize the claimant as a labour union representing the interest if its unionisable employees. c) Respondent to deduct and continue remitting Trade union dues from employees who have acknowledged their union membership and where such union dues have not been deducted and paid, the respondent be ordered to pay such outstanding dues from their own funds. d) The respondent to enter into collective bargaining with the claimant within the next 30 days of the order.

30. In response to the Claim, the respondent will rely on the following documents filed on 17th April 2025: a) Amended Statement of Response dated 17th April 2025. b) Witness statement of Constance Imbimi Mwoni dated 16th April 2025. c) Index and Bundle of Documents dated 17th April 2025. The matter was heard on 25th September 2025 when the claimant's witness testified and on 29th October 2025 when the respondent's witness testified. In his cross-examination CW1, confirmed that: a) The claimant has had access to the respondent's premises for purposes of recruitment of members. The declaratory prayer was abandoned. b) The claimant had instructed the respondent to hold any deductions and remittance of union dues by a letter dated 14th October 2024(pages 773 of the respondent's bundle). It had not communicated to the respondent to resume the deductions. As 1 such, the prayer directing the respondent to deduct and remit union dues was abandoned. The remaining issues for determination are whether: a) The respondent should recognize the claimant. b) The respondent should enter into a collective bargaining agreement with the claimant. c) The respondent is entitled to the costs of the suit. This position is corroborated by the claimant at paragraph 77 of its submissions. . The respondent operates within the laws of Kenya. It has no objection recognizing the claimant provided that the claimant meets the legal threshold for recognition. 8. The allegation that the respondent victimized and terminated the employment of persons who were seen to have assisted the claimant in the recruitment exercise lacks basis and is not supported by evidence. Bernard Machami Joram was terminated for gross misconduct after he was found in possession of two pieces of 1kg Kabras sugar without control stickers contrary to the respondent's policies. The termination was conducted in accordance with fair process. The claimant reported the dispute to the Labour Office and a conciliator was appointed. The Claimant and Respondent participated in the conciliation proceedings. (Pages 28 to 33 of the claim) Kennedy Odhiambo

was terminated for gross misconduct after he failed to scan several items brought to the counter by a customer and posted less items sold in the system leading to a loss is Kshs. 16,655/-.. The claimant reported the dispute to the Labour Office and a conciliator was appointed. The Claimant and Respondent participated in the conciliation proceedings. The conciliator found that the termination was for valid reasons and in accordance with due process. (Page 34 to 37 of the claim) Kelvin Kung'u Njoroge was dismissed for gross misconduct for scanning and later voiding two KCC salted Butter brought to the counter by a customer leading to a loss of Kshs. 1,558/-. He also misrepresented the actual sale to the customer. No report to the conciliator or suit was filed challenging his termination.

31. Recognition of the Claimant 9. Section 54 (1) of the Labour Relations Act provides that an employer shall recognize a trade union for purposes of collective bargaining if that trade union represents a simple majority of unionisable employees. In determining this issue, we invite the court to determine whether the claimant presently has any members.Section 48 of the Labour Relations Act defines trade union dues as the subscription to be paid by a member of the trade union as a condition of membership. Clause 4 (f) of the claimant's constitution (see page 27 of the claimant's bundle of documents dated 23th February 2020) provides that every eligible worker shall be required to apply for membership and pay a monthly subscription fee. In cross examination, CW1 testified that the claimant's constitution was still in force. He also testified that its members were required to pay the subscription fee monthly and if they default after 6 months, they relinquish membership. The claimant suspended payment of union dues in October 2024 (See pages 773 of the respondent's bundle). This was admitted by the claimant in cross-examination. Given that no employee has been paying union dues, the respondent lacks any

members and therefore cannot claim a simple majority. In any event and without prejudice to the foregoing, the respondent submits that the claimant has not attained the legal threshold necessary for recognition in that it does not represent the simple majority of the appellant's unionisable employees. The court in Krystalline Salt Limited v Kenya Chemical Workers Union [2024] KECA 573 (KLR) stated: "From the section aforesaid, it is clear that what determines recognition of a trade union by an employer is a purely arithmetical venture. It is upon the trade union seeking recognition to show that, at the point atwhich it seeks recognition, it represents a simple majority of unionisable employees of the respondent. To do so, the trade union must show the total number of unionisable employees in a particular employment unit, and then prove that amongst them a majority are members of the trade union. It is a matter of fact whether or not a trade union has met this threshold." (Emphasis added) In the case of Civicon Limited vs Amalgamated Union Of Kenya Metal Workers [2016] eKLR the Court held that. 18. "Unionisable employees must not be confused with the total work force engaged by the employer. Only members of staff who are eligible for membership (unionisable members) are targeted....It must be borne in mind that the trial court is only concerned with the numbers as at the time the claim is made. If verification has to be done it must relate to the number of employees stated in claim against that asserted by the employer." (Emphasis added) Position in 2020. The claimant's claim for recognition was lodged in February 2020 when it filed suit. At the time, the claimant asserted that it had recruited 243 union members out of total of 476 unionisable employees - see paragraph 14 of the affidavit of Mike O. Oranga sworn on 13th February 2020 and paragraph 9 of the Memorandum of Claim.In the witness statement of Constance Imbimi, she avers that upon verification of the check off forms, the respondent established that of the 243 members, 8 persons had left employment, 5 persons were not

employees of the respondent, there were 3 double entries and 41 supervisors who were not unionisable. An analysis of the names provided by the claimant are at pages 11 of the respondent's bundle. These averments have not been denied or rebutted by the claimant. The claimant had 202 verified members. As of February 2020, the respondent had about 957 unionisable employees. The claimant's union therefore represented 21.1% of the respondent's employees and was therefore not entitled to be recognition. Even if the court were to take the claimant's number of 476 unionisable employees, which we submit it should not, the claimant's percentage of membership would be 42.4% (202/472) falling short of a simple majority. In Kenya Union of Commercial Food and Allied Workers v Amritlals Wholesalers Limited (Cause 4 of 2019) [2023] KEELRC 3017 (KLR), the court held that "Membership of any trade union is always a shifting target. New members are always joining while others are always leaving for various reasons. The date on which a union seeks recognition is always therefore the determinate date as to whether or not it was entitled to recognition on the date it sought the same." The date at which the claimant sought recognition was 2020. We have demonstrated that it had not attained a simple majority. The claim ought to be dismissed on this point alone. Position in 2025-If the court is minded considering whether the respondent has attained a simple majority as of 2025, at the close of pleadings, we submit that the claimant has still not attained the simple majority. The respondent went on to verify the check off forms presented by the claimant to confirm that the names presented related to current, unionisable employees, and that there were no duplications or inaccuracies. The respondent revealed that 130 names had been repeated, 18 persons were not staff members, 31 employees were no longer in employment. See analysis at page 814 of the respondent's bundle. Given that union membership necessitates deduction of union dues and as a matter of fair labour practice, the respondent invited the

employees whose names appeared on the check off forms to confirm their consent to the deductions. During this process: a) 398 confirmed that the deductions may proceed (see pages 20 to 351 of the respondent's bundle). Of these, one was a supervisor and not unionisable.) 481 declined/indicated that they were not members or that they are withdrawing from the membership of the union (pages 352 to 754). Of these 3 were supervisors and 1 team leader and not unionisable. One of the reasons indicated in the employee's letters was that they were not aware that their membership included deductions of their salaries. c) 250 employees did not provide any confirmation. The allegation that the claimant was not aware of withdrawals from membership is not factually correct. Several employees wrote to the claimant informing them of this. (see samples pages 377,387, 406,408 564, 709 to 718, 720 to 723, 725 to 732, 739, 742). At the conclusion of the verification exercise, 398 employees were confirmed as members of the union. Even when added to the initial 202 members from 2020, the total of 600 members represents only 27.56% of the 2,177 unionisable employees and is below the threshold of simple majority. As a matter of practical reality, at the point of recruitment and execution of check-off forms, human error, lack of employee awareness, or other administrative oversights may occur. This may result in employees signing check-off forms more than once, nonunionisable employees executing such forms, or employees leaving employment due to normal labour mobility. Recognition being a purely arithmetic exercise, it is both necessary and reasonable for the respondent, as with any employer, to conduct verification checks to confirm that the names presented relate to current, unionisable employees and are free from duplication. There is no legal obligation on the respondent to involve the union in this internal verification process. It is denied that the verification process was an attempt to coerce or intimidate employees and force them out of the union. 398 employees confirmed membership into the union. The claimant has

not provided any evidence to show that they were intimidated, harassed or penalized for joining the claimant. Similarly, the claimant has failed to adduce any evidence to show that the employees who withdrew from the union did so as a result of intimidation, coercion, or undue influence by the Respondent. In the absence of a simple majority, the Claimant has failed to meet the statutory threshold for recognition. The claim must therefore fail. Without prejudice to the foregoing, the respondent submits that if the court is minded to grant the recognition order, then the same should be preceded by a balloting exercise to determine the number of unionisable employees subscribing to the claimant. This court has previously exercised its discretion to order a ballot in circumstances where the question of simple majority was contested. In Kenya Union of Printing, Paper Manufacturers and Allied Workers v Packaging Industries Limited & another [2014] eKLR, the Court ordered a balloting of unionisable employees to 5 determine whether the statutory threshold had been met. We submit that this Court has similar jurisdiction and power to do so in the present case.

32. Collective Bargaining Agreement - Pursuant to section 54 (1) and 57 of the Labour Relations Act, the right to engage in collective bargaining with an employer crystallises only upon lawful recognition of a trade union in accordance with the Labour Relations Act. The claimant has failed to meet the statutory threshold for recognition. In the absence of recognition, there can be no enforceable right to collective bargaining.

33. Costs. Costs follow the event. The claimant has failed to prove its claim and is not entitled to costs. In light of the foregoing we pray that the claimant's suit is dismissed and the respondent is awarded costs.

Decision

34. The claimant placed before the court evidence of recruitment of members from the unionsable employees of the respondent(Check off forms from 2018-2019 filed with the claim, and lists for subsequent years under further lists dated 11th July 2020, 27th September 2024, and 7th February 2025) as summarized in paragraph 9 above. The respondent also placed 4 check off forms before the court as summarized in paragraph 16 above. The court finds that the claimant's recruitment of the respondent's employees as members was not disputed. The claimant's witness, Mike Otieno Oranga, told the court that they had pleaded to have recruited 1623 members out of the unionisable staff of the respondent. He confirmed that on page 775 of the respondent's bundle, they gave the number as 1296. He confirmed that the payment of remitted dues for November and December 2024 was for 167 members. He confirmed that the claimant had stopped the union deductions by communication to the respondent, alleging hardship. Vide a letter dated 17th December, 2024 the Claimant addressed the Respondent in reference to the earlier letter dated 6th October, 2024 and at paragraphs 2 & 4 of that letter, this is what the Claimant communicated to the Respondent. "Through our letter dated 14th October, 2024 subsequent to our meeting with your team on 12th November, 2024 at FKE, we agreed to put on hold union dues deductions until we finalize our relationship. It is against this backdrop that we reiterate our position on zero deductions and remittance of union dues for all our members including this month payroll until the Recognition Agreement is settled and a contrary communication from our end" . The witness confirmed to the court that under the union constitution, membership ceased on non-payment of membership dues for 6 months. He

confirmed that since December 2024, there had been no deductions on the recruited members. The respondent submitted that the claimant, for lack of union dues deductions had no members in the employment of the respondent. At re-examination, the CW1 told the court that the union refunded its members through the respondent, the union dues deducted in November and December 2024 and that the stoppage of further deductions was communicated as stated above. Taking into consideration the stoppage of membership dues deductions more than 6 months, did the employees continue to be members of the claimant? Trade unions are free to recruit any or all unionisable employees at the workplace and the employer should grant access. It was not in dispute the claimant had been granted access and recruited several of the employees of the respondent. The employee's right to unionise is guaranteed under Article 41 of the Constitution to wit – '41 (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.'' The contractual relationship between a union and an employee is the payment of union dues. The law provides for the deduction of union dues. Section 48 of the Labour Relations Act states 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 Cabinet Secretary 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 Cabinet Secretary 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 Cabinet Secretary 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.'' "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(emphasis given). The Claimant's constitution provided that on non-payment of union dues for 6 months, membership ceased. The court finds that , the Claimant's act of stopping the deductions until further notice vide letter dated 30th October 2024 and taking into account the cessation of membership on default of dues for 6 months under the union constitution, the claimant constructively terminated the membership of all its members who were unionisable employees of the respondent. As it stands, the Claimant has no valid union members with the respondent. This is a self- inflicted loss.

34. On whether the respondent violated the law by undertaking a verification exercise of the recruited members.- The respondent submitted as follows- Given that union membership necessitates deduction of union dues and as a matter of fair labour practice, the respondent invited the employees whose names appeared on the check off forms to confirm their consent to the deductions. 29. During this process: a) 398 confirmed that the deductions may proceed (see pages 20 to 351 of the respondent's bundle). Of these, one was a supervisor and not unionisable.

) 481 declined/indicated that they were not members or that they are withdrawing from the membership of the union (pages 352 to 754). Of these 3 were supervisors and 1 team leader and not unionisable. One of the reasons indicated in the employee's letters was that they were not aware that their membership included deductions of their salaries. c) 250 employees did not provide any confirmation. 30. The allegation that the claimant was not aware of withdrawals from membership is not factually correct. Several employees wrote to the claimant informing them of this. (see samples pages 377,387, 406,408 564, 709 to 718, 720 to 723, 725 to 732, 739, 742). 31. 32. 33. At the conclusion of the verification exercise, 398 employees were confirmed as members of the union. Even when added to the initial 202 members from 2020, the total of 600 members represents only 27.56% of the 2,177 unionisable employees and is below the threshold of simple majority. As a matter of practical reality, at the point of recruitment and execution of check-off forms, human error, lack of employee awareness, or other administrative oversights may occur. This may result in employees signing check-off forms more than once, nonunionisable employees executing such forms, or employees leaving employment due to normal labour mobility. Recognition being a purely arithmetic exercise, it is both necessary and reasonable for the respondent, as with any employer, to conduct verification checks to confirm that the names presented relate to current, unionisable employees and are free from duplication. There is no legal obligation on the respondent to involve the union in this internal verification process. 34. It is denied that the verification process was an attempt to coerce or intimidate employees and force them out of the union. 398 employees confirmed membership into the union. The claimant has not provided any evidence to show that they were intimidated, harassed or penalized for joining the claimant. 35. Similarly, the claimant has failed to adduce any evidence to show that the employees who withdrew from the union did so as a result of

intimidation, coercion, or undue influence by the Respondent. In the absence of a simple majority, the Claimant has failed to meet the statutory threshold for recognition.

35. Taking into account the provisions of section 48 of the Labor Relations Act cited above, the role of the employer on receipt of the check off is to make deductions and remit . According to Section 48 (3) the employer is to make deductions on receipt of Form S –'(3) An employer in respect of whom the Cabinet Secretary 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.'' The section further states the circumstances in which the employer may stop deductions being variance of the form and notification of resignation by the employee from the union and of which the employer must notify the union thus- '48((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.'' There was no evidence of the employer having communicated the alleged resignations of some members to the union as per the law.

36. The court applying the provisions of section 48 of the Labour Relations Act cited above returns that the respondent violated the law by undertaking the verification exercise without consultation with the union. The verification exercise amounted to anti-unionism. The employer ought to have proceeded and deducted dues for all unionisable employees in the check off(Form S) unless they gave notice of resignation and the same was communicated to the union by the respondent(section 48(3) above). The court finds that the numbers of employees recruited by the claimant (as tabulated in paragraphs 9 and 16 above and 16)without the irregular verification by the respondent on account of employee consent being sought on deductions, but for the stoppage of dues deduction, the claimant would have met the threshold of simple majority which is 50+1 of the unionsable employees and entitled to recognition under section 54(1) of the Labour Relations Act to wit- '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.'' The court unfortunately finds that, for lack of union deductions, the said employees who were recruited are no longer valid members of the claimant, thus the recognition cannot arise.

36. Having made the above findings, the court concludes that the claimant, having constructively terminated the membership of the unionizable employees it had recruited, has no valid members employed by the respondent and is therefore not entitled to recognition.

37. Regarding costs – the litigation principle is that costs follow the event. In this case, the court found that the claimant had no valid membership under the respondent's employment, and therefore was not entitled to recognition. The respondent was guilty of conduct amounting to anti-unionism. Given the circumstances, each party will bear their own costs.

38. The file is marked as closed. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MARCH 2026.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant: Muunda

Respondent: Muthiani h/b Makori