REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

(ON Makau J on 19th March, 2026)

CAUSE NO. 375 OF 2019

BAKERY CONFECTIONERY FOOD MANUFACTURING & ALLIED WORKERS UNION (K).....CLAIMANT

-VERSUS-

SUNVEAT FOODS LIMITED.....1ST RESPONDENT

TEMO TRADING SERVICES LIMITED.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant, is a registered trade union, mandated to represent the interests of employees in food manufacturing, bakeries, confectionery making and related industries. By a Further Amended Memorandum of Claim dated 1st April 2025, the Claimant alleged that the 1st Respondent had refused to

sign a recognition agreement and further failed to deduct and remit union dues as required by law. Therefore, the claimant prayed for the following reliefs: -

a) ***An order directing the 1st Respondent to execute a recognition agreement with the Claimant within 14 days from the date of judgment or such period as this Honourable Court may impose.***
b) ***An order directing the 1st Respondent to deduct and remit trade union dues in respect of all unionisable members who have acknowledged membership with the Claimant in terms of the check-off forms already submitted and/or any subsequent forms as may be lawfully submitted.***
c) ***An order that this Honourable Court be pleased to penalize the 1st Respondent herein to deduct and remit any such delayed trade union dues from its own kitty/accounts in case from the date the same became due for payment.***
d) ***That the costs of the suit be provided for.***

2. The 1st Respondent filed a Further Amended Statement of Defence dated 23rd June 2025 denying the Claimant's averments and contending that the Claimant had not met the statutory threshold for recognition. The 1st Respondent averred that the employees recruited by the Claimant were not its direct employees but rather outsourced employees of the 2nd Respondent, a service provider contracted to offer short-term labour.

3. The 2nd Respondent was joined to these proceedings pursuant to an application by the Claimant but it never entered appearance or filed any response to the suit.

4. The suit was disposed of by written submissions which were highlighted by counsel on 10th February 2026. Mr. Amalemba urged the case for the Claimant while Mr. Okeche held brief for Mr. Ouma for the 1st Respondent.

Facts

5. In March and April 2019, the Claimant recruited a substantial number of unionisable employees of the 1st Respondent into its membership. According to the Claimant, a total of 203 out

of a total unionisable workforce of 220 employees enlisted into membership by subscribing their signatures to check-off forms.

6. The Claimant submitted to the respondent the duly signed check-off forms together with an order from the Minister requiring the Respondent to deduct and remit trade union dues in accordance with section 48(2) of the Labour Relations Act, 2007.

7. Having allegedly met the threshold set out under section 54(1) of the Labour Relations Act, 2007, the Claimant forwarded a model recognition agreement to the 1st Respondent and scheduled a meeting for 11th April 2019 for purposes of execution. The meeting did not take place, and the 1st Respondent did not execute the agreement.

8. Following the refusal by the 1st respondent to sin the agreement, the Claimant reported a trade dispute to the Minister vide a notification dated 26th April 2019 in line with section 62 of the Labour Relations Act, 2007. The Minister appointed a conciliator and conciliation meetings

were held on 10th May 2019 and 24th May 2019, but the dispute remained unresolved. On 29th May 2019, the parties executed a Certificate of Disagreement, paving the way for these proceedings.

9. The 1st Respondent contended that all employees recruited were employees of an outsourcing agent, the 2nd Respondent but by an affidavit sworn by Ezekiel Adagi, a representative of the 2nd Respondent, confirmed that the outsourcing agreement between the parties was terminated and all outsourced employees earlier seconded to the 1st Respondent were reabsorbed by the 1st Respondent.

10. The 1st Respondent denied that the Claimant has met the threshold for recognition. It maintained that the names appearing on the check-off forms were not known to it and did not appear on its payroll as employees. It is annexed a copy of its payroll (appendix 2). It further averred that the Claimant had recruited outsourced employees of the 2nd Respondent, a company whose services had been outsourced for a short period. A copy of the Service Level

Agreement (SLA) together with names of the outsourced employees is annexed as appendix 3.

11. The 1st Respondent also annexed a letter dated 17th August 2019 to the Ministry of Labour and Social Protection, Thika Sub-County, indicating that about 10 employees whose one-year contracts ended on 31st July 2019 had their contracts not renewed because the 1st Respondent had discontinued production operations in the candy department where they were engaged (appendix 4).

12. Regarding the conciliation process, the 1st Respondent states that both parties appeared before the Conciliator, and the management submitted that the union had not met the 50% +1 requirement for recognition. It was the 1st Respondent's position that its workforce was not close to 200 employees, yet the Union claimed to have recruited more than 200 employees. The 1st Respondent also submitted before the Conciliator that some names in the check-offs belonged to employees who had left employment more than two years before the dispute, rendering the check-off list unauthentic.

The Conciliator's report (appendix 7) allegedly agreed with the 1st Respondent that the Claimant had not attained the 50%+1 requirement.

13. The 1st Respondent states that it presently recruits its employees directly, and whether such recruitment involves new hires or individuals previously engaged under different arrangements does not amount to "absorption" but rather reflects the 1st Respondent's legitimate exercise of its right as an employer.

14. Significantly, the 1st Respondent has annexed a copy of a judgment dated 23rd May 2024 from the Magistrate's Commercial Court in Case No. **MCCCE3584/2022** (appendix 8). In that judgment, the court dismissed a claim filed by Ezekiel Adagi, proprietor of the 2nd Respondent, for unfair termination of the Service Agreement against the 1st Respondent, holding that no evidence had been presented to prove wrongful termination. The 1st Respondent contends that the 2nd Respondent's allegation regarding termination of the agreement in 2022 is therefore misplaced.

15. The 1st Respondent also categorically denies the existence of any agreement with the 2nd Respondent beyond the signed 2017 contract and asserts that the purported 2013 agreement referred to by the 2nd Respondent is a foreign document.

submissions

16. Mr. Amalemba, learned counsel for the Claimant, submitted on the following two issues: -

    a) Whether the threshold for recognition was attained by the Claimant.

    b) Whether the 1st Respondent should be ordered to pay union dues.

17. The counsel submitted that in March and April 2019 the Claimant recruited 203 out of 220 unionisable workers of the 1st Respondent, representing approximately 92% of the unionisable workforce. The recruitment of the said members has not been controverted by the Respondent as the 1st Respondent only filed a payroll for September 2019, and not for March and April 2019 when the recruitment was done.

Therefore, he contended that the payroll is not relevant in controverting the numbers as at the material time.

18. He further submitted that the 1st Respondent has not identified the total number of its unionisable staff as the payroll produced includes management workers who are not unionisable.

19. Regarding the allegation that some of the members recruited were outsourced employees, Mr. Amalemba submitted that this has not been proved as the authenticity of the list filed by the respondent cannot be confirmed.

20. Counsel drew the Court's attention to paragraph 8 to 10 of the affidavit of the 2nd Respondent dated 14th November 2023, in (the Claimant's further list of documents) to urge that the 1st Respondent absorbed all the staff after the outsourcing arrangement failed. Consequently, counsel submitted that the alleged outsourcing does not arise, and in the circumstances, the Claimant attained 92% of the unionisable staff for purposes of recognition.

21. As regards union dues, the counsel submitted that check-off forms were submitted from 5th April 2019 as appearing at pages 10 to 33 of the initial bundle. He further submitted that an order of the Minister was attached, but to date no deduction has been made. He urged the Court to find that the Claimant is entitled to an order for deduction of union dues, together with costs of the suit.

22. Mr Okeche, learned Counsel for the 1st respondent, submitted on two issues:

    a) Whether the threshold for recognition was met.

    b) Who should bear the costs of the suit?

23. On the threshold, he submitted that section 54 of the Labour Relations Act, 2007 requires a simple majority of the employer's unionisable staff, and the employees must belong to the employer. He conceded that there were 220 unionisable staff of the 1st Respondent but the claimant also recruited the staff outsourced from the 2nd Respondent. He argued that the Court should only consider the 1st Respondent’s staff as at the time of recruitment and again

after the outsourced staff were absorbed by the 1st Respondent. He cautioned that the court cannot include the outsourced staff in determining the threshold for recognition. He further submitted that the court cannot determine who were the outsourced staff as this information lies with the 2nd Respondent. Therefore, he prayed for dismissal of the suit with costs.

24. In a brief rejoinder, Mr. Amalemba submitted that the entire response by the 1st Respondent does not state the number of its unionisable staff. He contended that, court should treat the admission by the 1st Respondent's counsel that the company could not determine the outsourced staff, as proof that there was no outsourcing. He further referred to Document 4 of the Respondent's bundle, which indicated that employees were terminated in August 2019, and urged the Court to find that the outsourced staff were absorbed by the Respondent and that the Claimant has established a simple majority.

25. After the highlighting of submissions, the Court closed the hearing and reserved judgment.

Issues for Determination and analysis

26. Having carefully considered the pleadings evidence and submissions by both sides, the following issues fall for determination: -

a) Whether the Claimant has attained the requisite statutory threshold for recognition under **section 54 of the Labour Relations Act, 2007**.

b) Whether the 1st Respondent is bound to deduct and remit union dues under **section 48 of the Labour Relations Act, 2007**.

c) Whether the 1st Respondent should be sought by the penalized for not complying with section 48 above.

d) Who should bear the costs of the suit?

(a) Recognition Threshold

27. The Claimant's primary prayer is for an order directing the 1st Respondent to execute a recognition agreement. This prayer is anchored on section 54(1) of the Labour Relations Act, 2007, which provides as follows: -

"***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."

28. The interpretation of what constitutes a "simple majority" was elaborated by the Court of Appeal in the case of **Civicon Limited v Amalgamated Union of Kenya Metal Workers [2016] eKLR**, where the Court drew a distinction between total workforce and unionisable workforce, stating: -

"***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.*"**

29. The Court of Appeal further addressed the issue of recognition in the case of **Cello Thermoware Limited v Kenya Union of Commercial, Food and Allied Workers (Civil Appeal 120 of 2019) [2022] KECA 54 (KLR) (4 February 2022) (Judgment)**. In that case, the Court held that whether or not a simple majority specified by section 54(1) was achieved at a particular point in time is a matter of fact requiring computation. The Court stated that: -

> "***In effect, whether or not a simple majority specified by section 54 (1) was achieved at a particular point in time is a matter of fact. This is because, the computation of a simple majority at a particular point in time is an arithmetical calculation, based on the total number of the appellant's unionisable employees against the total number of unionisable employees registered by the respondent.*"**

30. In the instant case, the Claimant contends that it recruited 203 out of a total unionisable workforce of 220 employees of the 1st Respondent, representing approximately 92% of the unionisable workforce. The Claimant has produced various check-off forms as evidence before the Court. Vide a letter dated 5th April 2019, the Claimant presented check-offs with names of 83 employees. Vide a letter dated 10th April 2019, the Claimant presented a list of 35 employees. A list of check-offs comprising 48 employees was presented vide a letter dated 15th April 2019 and a further list of 37 employees was presented vide a letter dated 18th April 2019.

31. The 1st Respondent contested these numbers, asserting that the names appearing on the check-off forms did not appear on its payroll. It contended that the Claimant recruited outsourced employees of the 2nd Respondent whose services had been outsourced for short periods and were not direct employees of the 1st Respondent.

32. In support of this assertion, the 1st Respondent filed an outsourcing agreement dated 1st February 2017 between

itself and the 2nd Respondent, pay schedule for 263 employees who were outsourced as at September 2019, a list of 129 members of the claimant and a payroll of the 1st respondent's permanent staff for September 2019. That was 4 months after filing the suit. The 2nd respondent confirmed the existence of the said labour outsourcing agreement that started in 2013 and ended in 2022.

33. The 2nd respondent never disputed that it employed the said the said 263 employees to render service to the 1st Respondent as at September 2019. The said list of the said 263 employees indicates that it was for the 2nd Respondent. Consequently, I find that the 1st Respondent has proved by evidence that the 263 employees listed in the pay schedule for September 2019 where not its employees, but employees of the 2nd Respondent.

34. I have taken time to compare the list of the 263 employees of the 2nd Respondent with the list of 129 members of the claimant filed by the 1st respondent. There is no doubt that the said members are also in the list of the 2nd Respondent's

employees working as outsourced staff in the 1st Respondent's premises. It follows that 129 out of the 203 recruited by the claimant were outsourced staff and the remaining 74 were not proved to be employees of either of the respondents. They may have left employment as at September 2019 when the staff payrolls were prepared.

35. It was argued that after the outsourcing agreement ended in 2022, all the outsourced staff were absorbed by the 1st Respondent. The 1st respondent admitted during submissions that it has 220 unionisable staff, but maintained that the court should consider the staff at the time of recruitment and not when the 2nd Respondent's staff were absorbed by the 1st Respondent. I agree with the 1st respondent on the foregoing contention, but further clarify that the applicable time is the date of filing the suit.

36. The evidence on record is clear that the Claimant has not proved that it recruited a simple majority from the 1st Respondent's unionisable staff at the time of filing this suit. I say so because there is evidence that 129 of the members

recruited were not employees of the 1st Respondent. The legal burden of proof was upon the claimant to established that the members it recruited were employees of the 1st Respondent.

37. It could only prove a simple majority by tendering evidence in form of numbers or causing the respondent to tender the same. It cannot merely make allegations and prove the same through default of the opposite party. The other party may fail to adduce employment records if for example they are not in its custody. If the claimant desired that the two respondents should produce any information other the one on record, nothing stopped it from using the established procedure for compelling them to produce the same. Besides, the Claimant should have asked the court to call for a census or staff audit to verify the said information before the hearing closed.

38. In **Kenya Union of Commercial, Food and Allied Workers v Builders Warehouse (Kenya) Limited (Cause E068 of 2023) [2023] KEELRC 1596 (KLR) (29**

June 2023) the court emphasized that the correctness of positions taken by parties regarding union membership requires to be established through evidence. In that case, the court directed an audit of the respondent's workforce to confirm the position.

39. The Court is mindful of the provisions of section 107 of the Evidence Act, Cap 80 Laws of Kenya, which states: -

"*107. Burden of proof*

a) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

b) *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*"

40. In the case of **Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR**, the Court of Appeal emphasized that he who alleges must prove. In this case, the 1st Respondent alleges that the employees recruited by the

Claimant were outsourced and has filed documentary evidence to discharge the burden.

41. For the court to determine whether or not a simple majority of the target staff was recruited into trade union membership, the court must be provided with actual numbers of the recruits and the total number of the unionisable staff of the employer. Without full information of what was the actual numbers involved as at the time the suit was instituted, it is impossible for the court to make a finding of fact that a simple majority was achieved.

42. The parties dispensed with discoveries and oral testimonies and opted to proceed by written submissions on the basis of the documents filed. None of the documents filed by either side gives definite figures on the total number of the 1st Respondent's unionisable staff and the actual number of the union members recruited by the claimant from that workforce. The only known number was the 263 outsourced staff employed by the 2nd Respondent in September 2019

out of whom 129 were recruited into membership by the Claimant, leaving 74 members unaccounted for.

43. In the circumstances, I find that the Claimant had not proved that it recruited as members, 203 out of 220 unionisable staff of the 1st Respondent. There was allegation that after the outsourcing agreement was terminated in 2022, part of the 2nd Respondent's employees, if not all were absorbed by the 1st Respondent. No evidence was placed before the court to prove that allegation.

44. The Claimant cited the case of **Bakery Confectionery Food Manufacturing & Allied Workers Union (K) v Sameer Agriculture & Livestock Limited, Cause 469(N) of 2009 (unreported)** the Industrial Court (Tribunal) held as follows: -

> ***"It is the employer's duty to prepare and maintain employment records. We are surprised that in challenging the union's claims the Respondent did not find it necessary to produce its muster roll before the court for verification.***

***The Respondent did not disclose the exact number of its employees. It just stated that it has had about 100 employees. That is not enough. It should have gone ahead to produce the muster roll to back its claims. In the circumstances we have to give the benefit of the doubt to the union who placed the number of Respondent's employees at about 60...*"**

45. Whereas I am persuaded by the legal principles in the above decision, I wish to distinguish the facts in that case from the instant case because in that case the issue was a simple majority and the employer had not produced any evidence to counter the numbers by the trade union. In this case the dispute is first and foremost whether the recruited members were employees of the 1st respondent and then whether a simple majority has been met. I have already established that 129 of the recruited members were outsourced staff and not employees of the 1st Respondent.

46. Consequently, the Court holds that the Claimant has failed proved that it met the statutory threshold under **section 54(1) of the Labour Relations Act, 2007** and is therefore not entitled to recognition by the 1st Respondent for purposes of collective bargaining. However, it is free to go back to the 1st Respondent and recruit members from its actual staff.

(b) Deduction and Remittance of Union Dues

47. The Claimant also seeks an order directing the 1st Respondent to deduct and remit trade union dues in respect of all unionisable members who have acknowledged membership through the check-off forms submitted.

48. Section 48 of the Labour Relations Act, 2007 provides as follows:-

> "***48. Deduction of trade union dues***
>
> ***(1) This section applies to a trade union that is not a federation.***
>
> ***(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, together with a list of the employees in respect of whom the employer is required to make the deductions, in the prescribed form."

49. The Claimant attached copies of the check-off forms submitted to the 1st Respondent from 5th April 2019 onwards. The Claimant also refers to an order of the Minister having been issued. The 1st Respondent does not dispute receipt of the check-off forms and the Minister's order, but denied employment relation with the recruited union members.

50. The right to trade union membership and participation in trade union activities, including subscription and remittance of trade union dues, is constitutionally protected under **Articles 36 and 41 of the Constitution of Kenya, 2010**. In the case of **Kenya Game Hunting & Safari Workers Union v Mictato Safaris [2013] eKLR**, the Court held: -

> ***"In this regard Article 41(1) provides that every person has the right to fair labour practices whereas sub-article 2 provides "Every worker has the right to form, join or participate in the activities and programmes of a trade union." This right is not to be taken lightly by the employer***

***and its violation would attract serious sanctions from the court.*"**

51. The Court notes that trade union dues are not the employer's money. They belong to the employees who are union members and who have voluntarily chosen to contribute to their union. The employer's role is merely to deduct and remit these dues as an agent. The 1st Respondent will therefore not suffer any pecuniary loss or prejudice should such an order be granted.

52. The question that arises is, whether the 203 members recruited by the claimant in 2019 are still in the employment of the 1st Respondent. The parties did not present that evidence before the court and no audit or census was done to verify whether the 203 or some of them are working for the 1st Respondent. There may or may not be any existing members of the union still working in the company. Verification exercise is required before any order is made on the deduction and remittance of union dues.

53. Regarding the prayer that the 1st Respondent be penalized for failure to deduct and remit trade union dues, the Court will have to wait for the verification of whether the claimant still has members working for the 1st Respondent.

Conclusion and Findings

54. I have found that the claimant has failed to prove on a balance of probability that it recruited into membership a simple majority from the 1st Respondent's unionisable staff. I have further found that the existence of the claimant's member in the 1st Respondent's workforce need to be verified before I make final orders on the prayer deduction and remittance of union dues in favour of the claimant and the issue of costs.

55. The verification exercise shall be conducted within 30 days of today by a labour officer appointed by the Commissioner of Labour, and a report duly filed in court before 14th May 2026 when this matter will be mentioned to receive the

report. A copy of this judgment to be supplied to the parties and the Commissioner of Labour for action.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 19TH DAY OF MARCH, 2026.

ONESMUS MAKAU

JUDGE

Appearance:

Amalemba for the Claimant

Okello for Ouma for the Respondent