Krystalline Salt Limited v Kenya Chemical Workers Union (Civil Appeal E079 of 2022) [2024] KECA 573 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 573 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E079 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

KRYSTALLINE SALT LIMITED ..... APPELLANT

AND

KENYA CHEMICAL WORKERS UNION ..... RESPONDENT

(Being an appeal from the Judgement of the Employment and Labour Relations Court of Kenya at Mombasa (Byram Ongaya, J.) dated 13th May 2022 in Employment and Labour Relations Case No. 77 of 2019)

JUDGMENT

1. By a memorandum of claim filed at the Employment and Labour Relations Court (ELRC) at Mombasa, the respondent, Kenya Chemical Workers Union, a Trade Union representing employees working in Chemical and Allied Industries in Kenya, commenced a suit against the appellant in ELRC Case No. 77 of 2019. The substantive issues in dispute were the refusal by the appellant to sign a recognition agreement and its failure to Judgement MSA Civil Appeal No. E079 of 2022 Page 1 | 31 effect deduction and remission of union dues for some of the recruited members of the respondent.

2. The respondent's case was that it started the recruitment of the appellant's workers in March 2019 and, by 4th May 2019, it had recruited 324 employees who had consented to be its members; that the relevant check-off forms were delivered to the appellant on 7th May 2019 duly signed by the recruited employees together with a draft recognition agreement to be signed by the appellant; that, between 17th May 2019 and 13th August 2019, it further recruited 85 more employees, bringing the total number of employees recruited by the respondent from the appellant's unionisable workforce to 409; and that, since the unionisable members of the appellant were 600, the appellant's employees recruited by the respondent constituted 68.1% of the total unionisable employees, which was above the simple majority required

under section 54 of the *Labour Relations Act* (the Act) for the appellant to recognise the respondent for purposes of collective bargaining.

3. According to the respondent, on 21st June 2019, it reminded the appellant about the need to conclude the recognition agreement to which the appellant replied on 28th June 2019 proposing amendments to the draft recognition agreement; that the respondent took the view and explained to the appellant vide the letter of the same date that the draft recognition agreement was in the standard form of the tripartite committee meeting between the Ministry of Labour, Federation of Kenya Employers (FKE) and Central Organisation of Trade Unions, Kenya (COTU (K)) concluded in 1962; that, as a result of failure by the appellant to sign the recognition agreement, the respondent reported a trade dispute to the Ministry of Labour pursuant to section 62(1) of the Act vide a letter dated 5th July 2019; by a letter dated 22nd July, 2019, addressed to the respondent's General Secretary and the appellant's Managing Director, the Ministry informed both parties that a conciliator had been appointed to deal with the said issues, and that the conciliator would get in touch with them; that the appellant's advocates wrote to the Cabinet Secretary responsible for labour a letter dated 2nd August 2019 confirming the appellant's receipt of the respondent's letter of 5th July 2019 reporting the trade dispute; and that the advocate's letter stated that they were unable to file a replying memorandum as the letter reporting the dispute did not contain details of the dispute.

4. In the meantime, by an email dated 8th July 2019, FKE invited parties to discuss the recognition agreement at a meeting scheduled for 31st July 2019 at 10.00 am at FKE Mombasa Office; that the appellant declined to participate in the meeting on the premises that the trade dispute had already reported with the Ministry; that, at that meeting, the respondent's Secretary General disclosed that he could facilitate the appointment of a conciliator and made a telephone call to a Senior Officer at the Ministry requesting for a conciliator; that, on the same day, the Secretary General called the appellant's Human Resource Manager to confirm the appointment of a conciliator, and the letter appointing the conciliator was received by the respondent on 1st August 2019; that the appellant's advocates raised the issues regarding the impartiality of the said conciliator; and that, by a letter dated 13th September 2019, the conciliator invited parties over to discuss the two issues at a joint meeting at the conciliator's office in Nairobi scheduled for 25th September 2019; that, by a letter dated 23rd September 2019, the appellant's advocates sought to have the meeting rescheduled to await the resolution of the issues that they had raised in their letter of 2nd August 2019 in which they had sought details of the dispute; that, on its part, the respondent wrote to the Cabinet Secretary on 25th September 2019 stating that the Secretary General had called the Ministry on 31st July 2019 when the appellant declined to participate in the compromise meeting convened by FKE; that, in the same letter, the respondent raised its concern over delay in the appointment of the conciliator; and that the respondent took the view that the issue of bias and influence on the conciliator did not arise as the due process of law was followed in the appointment.

5. The respondent's case was that, under section 67 of the Act, the conciliation process was to be concluded within 30 days of appointment of the conciliator. As the parties were unable to agree on the extension of time under that section, on 9th October 2019, the conciliator, properly within his mandate, issued the certificate of unresolved dispute in accordance with section 69 of the Act.

6. On 12th March 2020, the appellant filed the reply to memorandum of claim and, while admitting that the respondent had made attempts to recruit the employees, contended that the recruitment exhibited inconsistencies such as double entries of a single unionisable employee, entries of persons who were no longer in the appellant's employment or were strangers to the appellant and that there was inclusion of supervisors who otherwise were part of the management. The appellant notified the respondent of

the anomalies by a letter dated 24th May 2019, but the respondent failed to address them and instead pressurised the appellant to sign the recognition agreement. The appellant's case was that, as at 13th August 2019, the respondent had not recruited a simple majority of unionisable employees because the genuine unionisable employees were only 302 against a workforce of 640 employees. With regard to the allegation by the respondent that the appellant had, in a meeting at KFE, agreed to sign the draft recognition agreement, the appellant stated that it had responded to the letter dated 21st June 2019 by the respondent requesting the appellant to sign the same by its letter dated 28th June 2019.

7. It was the appellant's case was that, in the letter dated 5th July 2019 reporting the trade dispute, the respondent did not raise the issue of numbers of recruited staff, but simply referred to the dispute as being the refusal to sign a recognition agreement and refusal to deduct union dues – and, further, that the report of the dispute was misconceived as the appellant was willing to resolve the issue per meeting convened by FKE on 31st July 2019. In the appellant's opinion, the respondent's Secretary General had influenced the appointment of the conciliator as expressed in the letter by the appellant's advocates, Arwa & Change Advocates, dated 2nd August 2019. According to the appellant, the conciliator issued the letter of disagreement or unresolved dispute pursuant to section 69 of the Act without responding to the advocates' letter and did not give the conciliation process a chance.

8. The appellant insisted that it was committed to conferring its employees due labour rights as manifested in the deduction of union dues in respect of recruited unionisable employees. The appellant's case was that rival unions such as Kenya Salt Workers Union and Kenya Private Security Workers Union had made requests to it for recognition hence there appeared to be a competition between the respondent and those other unions regarding recruitment of the employees of the appellant. Further, the appellant contended that the respondent had resorted to unfair tactics, such as intimidation, coercion and threats to enhance recruitment of union members. The appellant contended that over time the some of the recruited members resigned from the respondent hence reducing the respondent's membership to 216 out of 664 employees which number was below simple majority.

9. The respondent therefore sought to have the suit dismissed.

10. Before the trial court, the parties opted not to call witnesses and urged the court to determine the case on the basis of the pleadings, documents on record, and final submissions filed by the parties.

11. In its judgement the court found that the respondent was the sector trade union with respect to the appellant's enterprise as envisaged in section 54(8) of the Act; that there was no evidence that other trade unions had made similar requests as the respondent's as alleged by the appellant and that in any event, the appellant did not challenge the fact that the respondent was the sector union; that, in those circumstances, the respondent's claims for recognition fell within its sector of operation; that the respondent had exhibited Forms S showing that it had recruited 409 workers as at 13th August 2019 out of 600 workers, making 68.1%, thus achieving simple majority as envisaged in section 54 (1) of the Act for signing of recognition agreement; that, even after taking into account the appellant's allegation in its letter dated 24th May 2019 regarding the double entry of two employees, one dismissed employee, 13 employees in supervisory and managerial positions, and withdrawals by two employees, did not establish that the respondent had not hit the simple majority threshold; that the effect of the letter by the respondent dated 21st June 2019 read together with the appellant's letters dated 24th May 2019 and 28th June 2019 was that at the meeting of 30th May 2019 the parties thrashed out the issue of recruited employees and agreed to sign the recognition agreement subject to such agreeable amendments or concurrence by the appellant's directors and advocates; and that the appellant's dispute and case that

the appellant had not attained the simple majority recruitment envisaged in section 54(1) of the Act was an afterthought.

12. The Court therefore found that the respondent's actions were not misconceived when it reported the dispute to the Cabinet Secretary. In arriving at his decision, the learned Judge relied on the judgement of this Court in Cello Thermoware Limited v Kenya Union of Commercial, Food and Allied Workers [2022] KECA 54 (KLR) where it was held that whether or not a simple majority specified by section 54(1) of the Act is achieved at a particular point in time is a matter of fact.

13. The learned Judge found from the evidence adduced that the appellant failed to address the numbers as at the time the dispute was referred to the Cabinet Secretary, and that it did not deny the recruited numbers as pleaded by the respondent in the memorandum of claim (and which the Court had already found to meet the simple majority threshold). Further, regarding the appellant's allegation that the genuine unionisable employees were only 302 out of 640 employees, the court found that no evidence was adduced on the particulars of the unionisable employees and the 640 full workforce so as to facilitate comparison with the employees already recruited by the respondent.

14. In the foregoing circumstances, the trial court found that the respondent had established that it had recruited a simple majority of the unionisable employees as at the time the dispute was reported to the Cabinet Secretary; that the parties at the meeting at FKE Mombasa office held on 30th May 2019 agreed on the list of recruited unionisable employees, and further agreed to sign the recognition agreement once the appellant agreed on the draft with or without amendments; that the appellant's concerns on the independence of the conciliator and the scope of the dispute was clearly misconceived; that the respondent's Secretary General telephone call to a Ministry official resulted from failure to reach an amicable settlement on the signing of the recognition agreement; that the said call was an open follow-up telephone call on delayed appointment of a conciliator, but who in fact had already and earlier been appointed vide the letter dated 22nd July 2022; that the dispute as set out in the letter appointing the conciliator and conciliator's letter inviting the parties to the conciliation meeting was sufficient in material details to enable the respondent to file a replying memorandum as was expected; that the dispute being refusal by the respondent to sign the draft recognition agreement, and the appellant not having raised any objections to the substance or content of that draft, the respondent had established that the same ought to be signed by the appellant; that, pursuant to section 48(6) of the Act, whereas unionisable employees recruited by the respondent may have notified that the appellant that they had resigned from the union, the appellant was obligated to act accordingly and stop the deductions from such employee, but that such employees' resignation did not impair the simple majority threshold attained by the appellant as at reporting of the dispute to the Cabinet Secretary, and for purposes of recognition of the respondent by the appellant pursuant to section 54(1) of the Act; and that the appellant was obligated to continue deducting and remitting union dues with respect to all duly recruited unionisable staff as provided in section 48 of the Act, and for such employees where there had been non compliance, deduction to commence and to continue effective payment for end of June 2022.

15. To foster future good industrial relations between the parties, the learned Judge directed the appellant to pay only 50% costs of the suit to be agreed upon within 30 days from the date of judgment, failing which to be taxed in the usual manner.

16. In conclusion, judgment was entered for the appellant against the respondent in the following terms:

    1. The respondent to sign the draft recognition agreement herein by 30th June 2022 to pave way for parties' conclusion of a collective agreement as per section 54(1) as read with section 57 of the *Labour Relations Act*, 2007.

2. A declaration that the respondent is obligated to continue deducting and remitting union dues with respect to all duly recruited unionisable employees as provided for in section 48 of the Act and for such recruited employees where there has been no compliance, deduction to commence and to continue effective the payment for end of June 2022.

3. The respondent to pay 50% costs of the suit to be agreed upon within 30 days from the date of this judgment and failing which to be taxed in the usual manner.

1. Dissatisfied with the said decision, the appellant lodged the instant appeal in which it set out six grounds of appeal, but which may be condensed into 3. They are whether the learned Judge erred in law and in fact: in concluding that the respondent had met the statutory threshold requirements necessary for execution of a recognition agreement; in ordering the parties to sign a recognition agreement; and in failing to analyse the binding authorities presented in the appellant's submissions.

2. We heard this appeal virtually on the Court's GoTo platform on 6th December 2023 when learned counsel, Ms. Eunice Arwa, appeared for the appellant while learned counsel, Mrs. Oluoch Wambi, appeared for the respondents.

3. In the appellant's submissions dated 30th August 2023 filed by Arwa & Change Advocates, it was submitted that the trial court erred in failing to consider the appellant's contention that strangers had been indicated in the check off sheets relied upon by the respondent to prove that it had met the threshold prescribed in section 54 of the Act. In that regard, the appellant relied on Transport Workers Union v Etihad Airways [2019] KLR where it was held that, in determining the threshold, the claimant must show the number of unionisable employees engaged by the respondent. It was submitted that the learned Judge misdirected himself by relying purely on the respondent's evidence to come to the conclusion that the respondent had reached the statutory threshold notwithstanding the fact that there were withdrawal letters directed to the appellant by its employees expressing their desire to withdraw from the respondent's union. Further, the learned Judge failed to consider the several withdrawal notices and resignations tendered by the appellant. The appellant cited Cello Thermoware Limited v Kenya Union of Commercial, Food and Allied Workers (supra) on the need by the trial court to interrogate the evidence in order to arrive at the computation demonstrative of a simple majority. The appellant also relied on Kenya Jockey and Betting Workers Union v Resort Kenya Limited [2014] KLR where it was held that the presence of a simple majority is not given, but is dynamic and keeps changing based on the employees' turnover, continuation of employment and other factors of labour, such as termination, resignation

and movements from unionisable employees to management positions.

20. It was submitted that, the respondent having not proved that it had majority membership at any given time, the court erred in directing the parties to execute a recognition agreement. In this regard, the appellant relied on Kenya Union of Printing Paper Manufacturers and Allied Workers v Packaging Industries Limited & Another [2014] eKLR where it was held that the right to recognition to represent a defined collective bargaining unit rests on its strength and that its de-recognition may occur if the membership had changed and the recognised union no longer holds the simple majority.

21. The appellant argued that its submissions were aptly reasoned, and we were urged to consider the same and allow the appeal with costs to the appellant.

22. On its part, the respondent relied on the submissions dated 29th September 2023 by Oluoch Kimori Advocates and cited section 54 of the Act as well as the case of Cello Thermoware Limited (supra) for the considerations to be taken into account in determining whether a simple majority has been achieved. It was submitted that, before the trial court, the respondent adduced evidence showing that it recruited 409 members out of 600 employees, which was equivalent to 68.1%. According to the respondent, the appellant acknowledged the check off forms by a letter dated 28th June 2019 before the recruitment of 16 employees in July and August that year, but only indicated that there were amendments to be done to the agreement. According to the respondent, by that response, the appellant acknowledged that the simple majority threshold had been reached, hence their consideration of the agreement.

23. It was submitted that the appellant only took issue with double entry of two names, two members who had withdrawn, making a total of three deductions from the total number that had been recruited. However, there was no evidence of dismissal of one member or transfer of employees to the managerial positions as alleged. According to the respondent, the purported withdrawal of some employees was after the matter had been filed in court with the intention of reducing the simple majority, which had been reached, and to continue frustrating and employing unfair labour practices.

24. The respondent submitted, that the learned Judge effectively analysed and considered the facts and evidence produced by all the parties and did not err in holding that the respondent had, as at the time of the conciliation and filing the suit, met the statutory threshold to compel the appellant to recognise the respondent and execute the recognition agreement. It was therefore justifiable for the learned Judge to direct the appellant to sign the recognition agreement and order deduction and remittance of the dues. We were urged to dismiss the appeal with costs.

25. We have considered the submissions made to us by the parties herein as well as the material placed before us. In a first appeal such as this, we are enjoined to consider the submissions made before us as well as the record of the proceedings before the trial court. In so doing, we are under a duty to analyse and re-assess the evidence on record and reach our own conclusions on the issues for determination in the appeal. Generally, where oral evidence is taken, caution must be exercised in carrying out that mandate since, unlike the trial court, the appellate court has no benefit of seeing or hearing the witnesses testify and, therefore, allowance must be given for that handicap. This position was restated in Selle v Associated Motor Boat Co. [1968] EA 123 where this Court held that:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make

due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

26. The Court sitting as the first appellate court must appreciate that, as held in Alfarus Muli v Lucy M Lavuta & Another [1997] eKLR, it will interfere with the findings of the first trial court:

> " only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding. Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence."

27. In this appeal, the main issue for determination is whether, based on the evidence adduced before the trial court, the respondent met the threshold set out in section 54 of the Act. That section provides that:

> 1. An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
>
> 2. A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective terminate or revoke a recognition agreement.
>
> 6. If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.
>
> 6. If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Employment and Labour Relations Court under a certificate of urgency.
>
> 7. When determining a dispute under this section, the Employment and Labour Relations Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Cabinet Secretary.

28. 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 at which 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. That was the position adopted by this Court in Cello Thermoware Limited v Kenya Union of Commercial, Food and Allied Workers [(Supra) where it was held that:

> "26. 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. To discern whether, the respondent had registered a simple majority of the appellant's unionisable members by the time the dispute was lodged, will require firstly, the total number of unionisable employees, that were registered by the time the dispute was lodged with the Ministry, and secondly, the number of members that were registered with the respondent to be ascertained."

29. According to the respondent, its recruitment of the appellant's workers started in March 2019 and, by 4th May 2019, it had recruited 324 employees who had consented to be members of respondent trade union, and the relevant check-off forms were delivered to the appellant on 7th May 2019 duly signed by those employees. Along with the said check-off forms, the respondent delivered to the appellant a draft recognition agreement for execution by the appellant. Later, between 17th May 2019 and 13th August 2019, the respondent recruited a further 85 employees of the appellant, bringing the total number of the employees recruited from the appellant's employment to 409 out of the total unionisable number of 600. This, according to the respondent, accounted for 68.1% of the total unionisable employees of the appellant, way above the simple majority required under section 54 of the Act for the appellant to recognise the respondent for purposes of collective bargaining.

30. In response, the appellant took the view that the recruitment by the respondent exhibited inconsistencies such as double entries of a single unionisable employee, entries of persons who were no longer in the appellant's employment or strangers to the appellant, and the inclusion of supervisors who otherwise were part of the management. By a letter dated 24th May 2019, the appellant gave the particulars of these alleged inconsistencies stating that there were two double entries, one summary dismissal, recruitment of deputies in operation area who are at the supervisory level, and two withdrawals. However, it would appear that, by 28th June, 2019, these were no longer live issues since, by a letter of the same date, while referring to discussions that had taken place between the parties, the appellant expressed itself as follows:

> "From the discussion held at FKE Mombasa, there were amendments to be done on the draft recognition agreement and this being the first time we are dealing with union we had to engage our lawyers to review the document and they are yet to get back to us. Further, our directors have been out of the office attending to urgent family matters and once they are back they will address the same. Notwithstanding this, be rest assured that we are making every effort to get the draft with amendments shared with you."

31. By then, it is clear that the only issue pending resolution were the terms of the recognition agreement as opposed to the threshold for recognition. We agree with the learned Judge for finding that:

> "The evidence is that the claimant wrote the letter dated 21.06.2019 reminding the respondent about the parties' agreement at the meeting with FKE that the recognition agreement be concluded. The respondent's letter of 28.06.2019 in reply to that claimant's letter does not deny that parties agreed to conclude a recognition agreement but only that the respondent needed to consult its lawyers on the contents of the agreement. The Court finds that at the meeting of 30.05.2019 the parties thrashed out the issue of recruited employees and agreed to sign the recognition agreement subject to such agreeable amendments or concurrence by the respondent's directors and advocates. The Court finds that to be the effect when the letter by the claimant dated 21.06.2019 is read together with the respondent's letters dated 24.05.2019 and 28.06.2019. The Court finds that the claimant established the simple majority recruitment and parties agreed to conclude the recognition

agreement at the meeting of 30,05.2019 - so that the respondent's dispute and case that the claimant had not attained the simple majority recruitment envisaged in section 54(1) of the Act is found to be a pure afterthought."

32. However, the appellant declined to make any positive step towards the resolution of the dispute. Instead, it took issue with the perceived impartiality of the appointed conciliator; the alleged competition between the respondent and other trade unions for recognition by the appellant; and the insufficiency of material details to enable the respondent to file a replying memorandum. It declined to participate in the conciliation under the pretext that the respondent had reported a trade dispute to the Cabinet Secretary (or Minister as was the designation). The conduct of the appellant of changing goalposts, as it were, was in our view, that of a party who was not genuinely interested in resolving the issue between it and the respondent. Instead, the appellant was intent at erecting roadblocks on the respondent's path towards recognition.

33. In our view, the respondent having presented the check-off list of the employees it had recruited, it was upon the appellant to point out with precision which names ought not to have been in the list of the recruits. By vaguely referring to some employees as supervisors without disclosing their particulars before the Court, the appellant failed to satisfy the court that the number was less than the simple majority required for recognition. In any case, the trial court found that, even taking into account the number mentioned by the appellant, the respondent still met the threshold. In the learned Judge's own words:

> "The Court has considered the letter by the respondent dated 24.05.2019 in which the respondent pointed out numbering errors at page 4, double entry of two employees, one employee who had been dismissed, recruitment of 13 employees in supervisory and therefore managerial positions and withdrawals by two employees. The matters were to be addressed at the recognition meeting with FKE. The Court finds that in view of that respondent's letter, nothing is established to show that the claimant had not hit the simple majority threshold."

34. We have no reason to differ with the learned Judge on this finding.

35. It was the appellant who was in custody of the records of its employees and their status at any given point in time, and it was upon it to show that what the respondent was alleging was not correct. This is what is contemplated by sections 109 and 112 of the *Evidence Act* which provide that:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

36. The two provisions were the subject of this Court's decision in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which it was held that:

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the

burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

37. Since it was the appellant who alleged that some of the names of the persons recruited by the respondent were those of employees who had resigned, withdrawn from the respondent or elevated to supervisory status, facts which were especially within the knowledge of the appellant, the burden of proving those facts shifted to the appellant, but it failed to discharge that burden. As the learned Judge rightly noted, some of the alleged resignations or withdrawals from the respondent took place after the suit had been filed, yet what was in contention was whether at the time the dispute was referred to the Cabinet Secretary, the respondent had met the statutory threshold of the unionised employees of the appellant it had recruited.

38. We have gone through the impugned judgement and form the view that the appellant has unjustifiably faulted the learned Judge for failing to consider all the evidence on record. To the contrary, we find that the learned Judge evaluated the evidence presented by the parties, analysed it and came to the right decision. This Court in Benjamin Mbugua Gitau vs. Republic [2011] eKLR cited the case of Odongo and another v Bonge Supreme Court Uganda Civil Appeal No. 10 of 1987 (UR), in which Odoki, JSC (as he then was) said:

> " While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

39. Having found that the respondent had met the statutory threshold, the learned Judge had no option but to direct the parties to execute a recognition agreement.

40. We find no merit in this appeal, which we hereby dismiss with costs to the respondent.

41. Orders Accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR