Kenya Building Construction Timber and Furniture Industries Employees' Union v Zhong Wu E-Commerce (Kenya) Co Ltd (Cause 59 of 2020) [2025] KEELRC 872 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 872 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 59 OF 2020

MN NDUMA, J

MARCH 13, 2025

BETWEEN

KENYA BUILDING CONSTRUCTION TIMBER AND FURNITURE INDUSTRIES EMPLOYEES' UNION .... CLAIMANT

AND

ZHONG WU E-COMMERCE (KENYA) CO LTD .... RESPONDENT

JUDGMENT

1. The suit by the Claimant, seek to have the Respondent to recognize the Claimant union as the sole union representing the employees of the Respondent in terms of section 52 of the Labour Relation Act, 2007. The issue in dispute is whether the Claimant union has recruited a simple majority of all unionisable employees in the employment of the Respondent.
2. The Claimant alleges that it had recruited 18 employees out of the 25 unionisable employees which constitutes 54 + 1% of the Respondents workforce.
3. The Claimant notified the Respondent of aforesaid fact by a letter dated 23/11/2018 seeking the Respondent to commence deducting union dues for each member at 2 ½% of each of the employees' consolidated wages, plus Kshs. 150 COTU affiliation fees.
4. Attached to the memorandum of claim is Form 's' in terms of section 48 of Labour Relation Act, with the alleged 18 employees with a forwarding letter dated 23/11/2018.
5. The Claimant wrote another notice to authorize deduction to the Respondent dated 26/4/2019 attaching form 's' with a list of 25 employees.
6. The Claimant has also attached a sample Recognition Agreement to be signed by the Respondent.

7. The union also attached a letter dated 6/12/2016 written by the union to the Managing Director of the Respondent reporting five grievances including:

    1. Intimidation of workers
    2. Arbitrary termination
    3. Provision of unclean drinking water
    4. Union membership
    5. Recognition Agreement

    in which the union requested a meeting with the Respondent on 17/12/2018 at the company office to discuss the aforesaid matters. The Claimant also reported a dispute on 30/1/2019 to the Cabinet Secretary for Labour with regard to a dispute of refusal to recognize the union requesting the Ministry to intervene.

8. On 27/2/2019 the Chief Industrial Relations Officer, Grace Mwenesa acknowledged the dispute and requested parties to submit their proposal in writing to a conciliator named Mr. Wakheya situated at Athi River Labour Office.

Conciliation meeting

9. Parties were invited to conciliation meeting on 29/4/2019 and on 2/5/2019 when both parties attended. The union was advised by the conciliator to bring the check off form duly signed by members and the employer to bring in employment record of all permanent employees.

10. The conciliator was unable to resolve the dispute and referred the matter to next level of arbitration in terms of section 69 of LRA.

Defence

11. The Respondent filed a Statement of Defence to the Memorandum of Claim dated 22/7/2020 and a witness statement of Tony Wenyon and bundle of documents dated 10/5/2021 and one by Zeng Fai dated 6/2/2025. The Respondent states that by the time the Claimant presented the list of recruited members, most of them had left the employment of the Respondent and the remaining ones could not meet the simple majority.

12. That for this reason, the Respondent was unable to sign the recognition agreement and/or commence CBA negotiations with the Claimant.

13. The Respondent states that it cannot deduct union dues from employees who have left its employment.

14. That by the time a dispute was reported to the Ministry of Labour in February 2020, there was COVID-19 pandemic until June 2021, and the dispute could not be resolved at the time.

15. That the Respondent has attached resignation and termination letters of some of the recruited employees in the bundle of documents to demonstrate that they were no longer in the employment of the Respondent.

16. The court granted the Claimant leave to file a fresh list of recruited employees on 9/6/2021 but the Claimant did not file any nor is there evidence that the Claimant has conducted fresh recruitment after the said court order.

17. The Respondent submits that out of the 18 employees recruited in 2018, 10 have left the employment and thereafter out of a total of 25 employees recruited by April 2019, 11 employees were no longer in the Respondent's employment. That the suit lacks merit and it be dismissed.

DETERMINATION

18. The issue for determination is whether the Claimant has proved that it had recruited a simple majority of all unionisable employees of the Respondent to enter into a recognition agreement with it and commence deduction of union dues.

19. The court finds that the Respondent has by its own admission in the witness statement, statement of defence and submissions made the following admissions:-

> Out of 18 employees who had been recruited in 2018 10 employees had since left employment and thereafter out of a total number of 25 employees recruited by April 2019 15 employees were no longer in the Respondent's employment."

20. The Respondent was not candid enough to disclose the total number of unionisable employees in its employment between 2018 and April 2019. The Claimant had deposed that the Respondent had 27 unionisable employees.

21. Even in the final submissions filed by the Respondent and dated 25/11/2024, the Respondent did not still disclose the total number of unionisable employees in its employment. The court believes the Claimant that the Respondent had 27 unionisable employees as at April 2019.

22. Therefore, going by the admission by the Respondent as at April 2019, only 11 employees out of the 25 recruited by the Respondent were no longer in the employment of the Respondent.

23. It follows that 14 employees out of the 27 unionisable employees recruited were still in the employment of the Respondent. The Respondent does not allege that there were other unionisable employees not recruited by the Claimant as at April 2019. The court finds therefore as at April 2019, 14 employees who were members of the Claimant union constitutes a simple majority of unionisable employees of the Respondent.

24. The court finds therefore that the Claimant has proved on a balance of probability that it had satisfied the requirements of section 54 of the LRA and the Respondent is mandated by section 54(1) of the Act which provide.

> An employer including an employer in the public sector, shall recognize a trade union for purpose of collective bargaining if that trade union represents the simple majority of unionisable employees."

25. The decision by the court is supported by the Court of Appeal decision in Civil Appeal No. 47 of 2015, Civicon Limited versus Amalgamated Union of Kenya at Mombasa where the court held:-

> The determination of the question of existence of unionisable employees is therefore one of evidence as more employees are engaged by an employer, some leave employment while others, through natural attrition cease being employees. For this reason and for purposes of recognition, the number of unionisable employees is not expected to remain constant. Because of this the process requires full cooperation, honest disclosure and utmost good faith especially on the part of the employer to state a true and accurate reflection of the details and particulars of its workforce, especially those who are unionisable and those who are not.

No difficulty is posed by any change that increases the number of unionisable employees. However, any changes that reduces that unit below the simple majority will affect the recognition agreement. There are clear inherent risks where this happens. An employer can deliberately provide inaccurate data of its staff regarding their job titles, and description with the potential objective of blurring the actual staffing situation in the organization in order to bring the number of unionisable employees below the simple majority and ultimately terminate, (or deny a trade union) recognition agreement.'

26. In the present case the employer was not candid in rebuttal of the Claimant's case by not disclosing the full complement of its unionisable employees at any one given time.

27. Consequently, the suit by the Claimant has merit and the court grants the following orders in favour of the Claimant as against the Respondent:-

    a. A declaration is issued that the Claimant union has met the condition to be granted recognition by the Respondent.

    b. The Respondent is compelled to sign a Recognition Agreement in favour of the Claimant union within 30 days of the judgment.

    c. The Respondent is ordered to commence deduction of union dues from the members who have signed form 's' in favour of the Claimant and remit the same to the Claimant union.

    d. Each party to bear the costs of the suit.

DATED AT NAIROBI THIS 13TH DAY OF MARCH 2025.

MATHEWS NDUMA

JUDGE

Appearance:

Ms. Chege for Claimant union

Mr. Ochieng for Respondent

Mr. Kemboi – Court Assistant