



**Kenya Union of Commercial Food & Allied Workers v Lake Treasure Ltd  
(Cause E073 of 2023) [2024] KEELRC 1641 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1641 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E073 OF 2023  
CN BAARI, J  
JUNE 27, 2024**

**BETWEEN  
KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS CLAIMANT  
AND  
LAKE TREASURE LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant's claim is dated 26<sup>th</sup> September, 2023. It seeks the following reliefs: -
  - i. An order that the Respondent recognizes it and sign the draft Recognition Agreement within 30 days of the date of Judgment.
  - ii. An order that the Respondent engages and negotiates a Collective Bargaining Agreement with the Claimant within 60 days of the date of signing Recognition Agreement
  - iii. Cost of the suit be provided to the Claimant in quantified amount as the Claimant acts by self
2. The Respondent entered appearance and subsequently filed a response to the claim dated 16<sup>th</sup> October, 2023, together with its witness statement and documents in support of the response.
3. The matter was certified ready for hearing on 12<sup>th</sup> February, 2024 and a hearing date set for 4<sup>th</sup> March, 2024. Both the Claimant's and the Respondent's cases were heard on 4<sup>th</sup> March, 2024 with the Claimant's branch Secretary Benjamin Tagara testifying for the Claimant and one Surendra Shetty testifying for the Respondent.
4. Submissions were filed for both parties.



### **The Claimant's Case**

5. The Claimant's case is that between January and July 2023, they embarked on fresh recruitment of the Respondent's unionisable employees, after the determination and rendering of judgment in Kisumu ELRC Cause No. E080 of 2021, which sought orders similar to the ones sought herein.
6. It is their contention that in March 2023, 94 unionisable employees of the Respondent joined the Claimant's union and acknowledged their membership by signing the check off forms. It is their further case that On 31<sup>st</sup> March 2023, it served the signed check off forms containing names of the 94 employees to the Respondent and requested them to commence deduction and remittance of union dues.
7. The Claimant states that later on 11<sup>th</sup> April 2023, it forwarded another set of check off forms containing names of 62 employees who had acknowledged their membership with the union and further requested for deduction and remittance of union dues.
8. It is the Claimant's further case that on 13<sup>th</sup> April 2023, it wrote to the Respondent and proposed a meeting on 24<sup>th</sup> April, 2023, for purposes of deliberating on a recognition agreement between itself and the Respondent.
9. The Claimant states that meetings slated for various dates between them and the Respondents between April and May, 2023, did not materialize for reason that the Respondent declined to meet them.
10. The Claimant further states that to date, it has recruited a total of 166 out of 200 unionisable employees of the Respondent, all of whom have signed check off forms and which forms have been forwarded to the Respondent.
11. It is the Claimant's position that 127 employees of the Respondent reaffirmed their position of joining the union. It states further that 19 persons listed were trainees and were thus not eligible to be recruited to the membership of the union. It states further that some names listed are management staff who are equally not eligible for recruitment.
12. It is its case that minus the repeated names, the number of employees recruited stands at 183 out of a possible 199, which means that it has achieved the simple majority and which qualifies it for recognition.
13. On cross examination, the CW told court that even casual employees were recruited as the law does not exclude casuals from belonging to a union.
14. The Claimant prays that court awards it the remedies listed in its statement of claim.

### **The Respondents' Case**

15. The Respondent's case is that on or about 31<sup>st</sup> March 2023, they received a letter from the Claimant with a check-off list of 94 members attached as new recruits, and requesting them to deduct the 2% of the employees' wages as union fees and a further Kshs 50 payable to COTU which deductions were to start in April, 2023.
16. It is the Respondent's case that the Claimant thereafter proceeded to send a letter addressed to them through its advocates, requesting for a meeting on the signing of a recognition agreement, and further proposed 24<sup>th</sup> April 2023 as the meeting date.



17. The Respondent avers that it notified the 94 members of the notice to deduct their union dues with effect from April and realized that most of the members in the list were irregular workers who are only available for work when there is raw fish for processing thereby making deductions difficult.
18. The Respondent further states that some of the said members then wrote letters protesting the deductions claiming that they were not aware of the listing or were never in conduct with the union to declare membership.
19. The Respondent avers that upon receipt of the letters, they duly informed the Claimant and proceeded to only deduct and remit the dues for the remaining members,
20. The Respondent further avers that from the foregoing, the Claimant resorted to fraud and/or coercion in a bid to attain the 50%+1 majority required by law by repeating the names of members listed to achieve the number, registering one person twice and issuing different union numbers, appending signatures on names without the knowledge of the alleged members, coercing employees to join without giving them information about the union and forging signatures.
21. The Respondent confirms that they have been remitting union deductions for 108 members in May,2023, 96 members in June, 95 members in July, approximately 100 members for the month of August which numbers do not meet the legal threshold of 50% +1.
22. The Respondent avers that the above numbers do not meet the threshold required by law since they have about 231 unionizable employees in their payroll. The Respondent further states that it has never received a list of the alleged 56 or 166 union members.
23. That it is not true that the Respondent has failed /refused to recognize the Claimant, but the Claimant ought to follow the due process in recruiting members, and also legally meet the threshold required by Section 54 (1) of the *Labour Relations Act*, 2007.
24. On cross-examination, RW told court that the Respondent has between 130 and 150 employees. It is his further evidence that the Respondent also has casual employees, and that it is difficult to deduct union dues once an employee leaves their employ.
25. It is RW evidence that the Respondent has never defaulted in deducting and remitting union dues. He states further that the Respondent received the notice of withdrawal from union on 24<sup>th</sup> July, 2023.
26. RW confirmed that union members that are permanently employed by the Respondent are 58 in number and which constitutes 73% of its workforce, and which percentage he confirmed meets the simple majority.
27. It is his testimony that the Respondent received check-off forms and that it is on the basis of the forms that it deducts union dues.
28. RW further told court 17 members left their service, but avers that they did not have prove that the persons left their service. It is his testimony that employees wrote to demand that union dues should not be deducted from their salaries.

### **The Claimant's submissions**

29. It is submitted for the Claimant that there is no discrimination whatsoever on categories of employees who are eligible to enjoy the Right of Freedom of Association, whether permanent/regular or Casual/Irregular employees. That all are workers and are employees with the same Fundamental Right of Freedom of Association.



30. It is further submitted that any employee who leaves employment and whose name is in the check off forms, left after giving the Claimant the required threshold as employment is fluid and is never static and changes given several reasons, including natural wastage.
31. The Claimant invites the court to find that the Respondent's reluctance to sign Recognition Agreement after the Claimant clearly demonstrated that she had acquired the requisite threshold, was simply being difficult.
32. It is the Claimant's submission that workers have a Fundamental Right to associate with a Trade Union of their choice and to participate in the programmes and activities of such a Trade Union. It submits that this is a right which finds strong endorsement in ILO conventions, and which qualify as a Universal Right and the Respondent's employees should not be denied such a right, unreasonably and unfairly.
33. The Claimant submits that it is through signing the Recognition Agreement that a forum shall be created for employees to engage their employer in Collective Bargaining, and to agree on terms and conditions of service, setting out a grievance procedure and how to address such grievances.

### **The Respondent's Submissions**

34. It is submitted that the Claimant, despite attaining a certain percentage of membership, failed to meet the requisite threshold of a simple majority (i.e, 50% plus 1) necessary for recognition by the Respondent.
35. It is the Respondent's submission that once the issue of recognition agreement is settled, then the negotiation of the collective bargaining agreement may commence, hence this matter is prematurely presented before the court.

### **Analysis and Determination**

36. Upon careful consideration of the pleadings, the oral testimonies and the written submissions, the singular issue for determination is whether the Claimant has met the threshold for recognition by the Respondent
37. The right of employees to join a trade union is a basic right protected under the Constitution, the Labour Relations Act and the core instruments of the ILO on freedom of association. This right cannot be curtailed unless by constitutional means.
38. Section 2 of the Labour Relations Act defines a recognition agreement as an agreement in writing between a trade union and an employer regulating the recognition of the trade union as the representative of the interest of unionisable employees employed by the employer.
39. Recognition confers legitimacy and determines the scope of a trade union's activities in the work place.
40. The Claimant's assertion is that it has recruited a total of 166 out of 200 unionisable employees of the Respondent, all of whom have signed check off forms, and which forms have been remitted to the Respondent.
41. The Respondent confirmed receipt of check-off forms and further confirmed deducting and remitting union dues for 108 members in May, 2023, 96 members in June, 95 members in July and approximately 100 members for the month of August. It is their position that these numbers do not meet the legal threshold of 50% +1.



42. Section 54 of the *Labour Relations Act* requires that an employer recognizes a trade union for purposes of collective bargaining, and which recognition is given only when the trade union represents a simple majority of unionisable employees in the bargaining unit.
43. Other than recruiting a simple majority, a trade union is also required to show that it is the relevant trade union to represent employees in the particular industry.
44. That the Claimant is the relevant trade union in the Respondent's sector is not disputed. The question is whether the Claimant has met the simple majority requirement for recognition.
45. RW told court on cross-examination that union members that are permanently employed by the Respondent are 58 in number and which constitutes 73% of its workforce, and which percentage he further confirmed meets the simple majority threshold.
46. The Respondent further admitted receipt of check-off forms from the Claimant, but avers that some of the members/employees wrote letters protesting the deductions claiming that they were not aware of the listing or were never in conduct with the union to declare membership.
47. The Respondent avers that upon receipt of the letters, they duly informed the Claimant and proceeded to only deduct and remit the dues for the remaining members.
48. The material time for determining whether a union represents a simple majority of the employer's work force for purposes of recognition, is the time the union transmits Form S to an employer. (See *Kenya Union of Commercial Food & Allied Workers Union v Eldomatt Supermarkets Limited* (2014) eKLR)
49. By the Respondent's own admission, the Claimant submitted Form S/Check-off forms on 31<sup>st</sup> March, 2023 and sought to meet the Respondent on 24<sup>th</sup> April, 2023 for purposes of signing a recognition agreement, but which meeting the Respondent declined.
50. The evidence tendered by the Respondent to support the position that the Claimant's members withdrew from the union were made long after the check-off forms were forwarded to the Respondent, and are therefore not credible prove of such withdrawal.
51. On the Respondent's assertion that some of the employees recruited are casual labourers, it is settled that the right of an employee to join, participate in or leave a trade union cannot be negated by the nature of employment contract. All employees without distinction are entitled to enjoy the right to unionize. (See *Kenya Power & Lighting company Limited v Kenya Electrical Trades & Allied workers union* (2017) eKLR).
52. In the final analysis, I find that the Claimant has met the threshold for recognition, and I grant orders as follows: -
  - i. A declaration that the Claimant union has met the provision of Section 54 of the *Labour Relations Act* on recognition, and ought to be recognized by the Respondent.
  - ii. That the Respondent is ordered to forthwith sign a recognition agreement with the Claimant union for purposes of collective bargaining.
  - iii. Parties shall bear their own costs in the interest of social partnership.
53. Judgment of the Court.

**DATED, SIGNED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**



**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Nyumba present for the Claimant

Mr. Paul Ogedi present for the Respondent

Anjeline & Debra - CAs

