



Banking Insurance and Finance Union v SMEP Microfinance Bank Limited (Cause 890 of 2019) [2024] KEELRC 2370 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2370 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 890 OF 2019
NJ ABUODHA, J
SEPTEMBER 27, 2024**

BETWEEN
BANKING INSURANCE AND FINANCE UNION CLAIMANT
AND
SMEP MICROFINANCE BANK LIMITED RESPONDENT

JUDGMENT

1. The Claimant a registered trade union filed its Memorandum of Claim dated 31st December, 2019 and pleaded *inter alia* as follows: -
 - a. The Claimant averred that it was a registered trade union and had mandate to represent unionisable employees in banks, insurance companies, sacco, Microfinance banks and financial institutions. That the Respondent is a microfinance bank hence the Claimant had a right to represent the Respondent's employees.
 - b. The Claimant averred that it had initially reported a dispute at the ministry of Labour and social services for failure by the Respondent to grant it access to recruit unionisable employees to the union. That after several conciliation meetings the Respondent agreed to grant the Claimant access to recruit and educate unionisable employees from all its branches.
 - c. The Claimant averred that on 2nd October, 2019 it received a letter from the Respondent where the Respondent was requesting it to review the list of the Union members listed in the check offs, alleging that some were managers, supervisors and shareholders of the Respondent and were therefore not eligible to be in the union.
 - d. The Claimant averred that on 4th October, 2019 it served upon the Respondent with a letter of even date taking issue with these claims from the Respondent that some employees who were recruited to the membership of the union were not eligible to be in the union.



- e. The Claimant averred that on 7th October,2019 it served upon the Respondent check offs which indicated that the Claimant had recruited 158 unionisable employees in to the membership of the Claimant Union.
 - f. The Claimant averred that on 9th October,2019 the Respondent served it with a letter of even date requesting for a meeting to discuss the issue of members who should be excluded from the union membership on 8th November,2019.
 - g. The Claimant averred that on 8th November,2019 the parties met and mutually agreed to exclude thirty eight (38) employees who the Respondent had stated were managers. That the Respondent failed to demonstrate how an additional 12 of its employees had exited employment immediately after signing the check offs to join the union.
 - h. The Claimant averred that on 4th November,2019 the Respondent served it with a letter dated 1st November, 2019 stating and defining the roles of the employees it considered should be excluded from union membership. That on 11th November,2019 it wrote to the Respondent as follow up on the meeting held on 8th November,2019 where the Respondent had promised to send a list of names and roles to the union of the members who it claimed were in management and their specific roles.
 - i. The Claimant averred that on 12th November,2019 the Respondent sent it a letter via email promising to respond to the Unions letter requesting for information on the names and specific roles of the employees the Respondent had claimed were not eligible to join the union and had requested it to remove them from the list of members.
 - j. The Claimant averred that on 13th November,2019 it served the Respondent with one check off form which indicated it had recruited one more employee to the union bringing the total number of employees recruited to the union to 159.
 - k. The Claimant averred that on 14th November,2019 the Respondent sent it a letter attaching a list of the employees who enrolled to join the union and their designation in addition to listing those who had since left employment.
 - l. The Claimant averred that on 19th November,2019 it wrote to the Respondent acknowledging receiving the letter dated 14th November,2019 and proposing that parties sign the Recognition Agreement on the 25th November,2019.
 - m. The Claimant averred that the Respondent did not respond to their letter to sign the recognition agreement on the stated date but chose instead to ignore it.
 - n. The Claimant averred that on 27th November,2019 the Respondent through its Human Resource Manager sent a letter to all employees who are members of the Claimant union requesting them to confirm that the Respondent deducts and remits union dues to the Claimant Union.
 - o. The Claimant averred that on 4th December,2019 the Respondent served it with a cheque of Kshs 23,124 which did not indicate whether it was for union dues and it also did not have an attached list of members who had been deducted.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. Declaration that the union is entitled to union dues from the one hundred and twenty two (122) members of the union.



- b. Declaration that the union has attained simple majority in accordance with section 54(1) of the *Labour Relations Act* therefore entitled to be recognized by the Respondent.
 - c. An order directing the Respondent to deduct and remit outstanding union dues to the Claimant's registered account stated in the check off forms as from the 19th October 2019.
 - d. An order directing the Respondent to enter in to recognition agreement with the Claimant union within 30 days from the date of judgment.
 - e. Costs of the claim.
3. The Respondent in reply filed its statement of Response dated 3rd November, 2022 and averred that at the time of filing the claim the Claimant union had not met the threshold as contemplated in section 54(1) of *Labour Relations Act*.
 4. The Respondent averred that it had 257 employees out of which 170 were unionisable. That at the time of filing this claim the union had furnished it with a Form S indicating that it had recruited 158 employees of the Respondent.
 5. The Respondent averred that upon scrutiny of the said list the following emerged;-
 - a. 38 employees of those in the list were in management of the Respondent and therefore where not unionisable.
 - b. 28 employees of those in the list had formally withdrawn their union membership vide letters and emails addressed to the Respondent.
 - c. 1 of the employees had been promoted to management level while another 1 employee had the status not confirmed owing to a long leave of absence.
 - d. 15 employees resigned from the Respondent's employment while 1 was summarily dismissed on account of gross misconduct.
 6. The Respondent averred that as at the time of filing this claim 78 of the Respondent's unionisable staff were active members of the Union and had their union dues duly deducted and remitted to Claimant.
 7. The Respondent averred that the Claimant had not attained the simple majority to be accorded recognition by the Respondent. That since only 78 employees were unionisable and the other 83 of them could not be its members due to the reasons above, the Claimant could not be given the recognition agreement by the Respondent.
 8. The Respondent averred that the best the Claimant would have done would have to continue with recruitment exercise until it attained simple majority before it demanded recognition.
 9. The Respondent prayed for the claim to be disallowed and be dismissed with costs.
 10. The Court in agreement with parties agreed to dispense this matter by way of written submissions.

Claimants' Submissions

11. The Claimant filed written submissions dated 8th May, 2024 and on the issue of whether the Claimant union at the time of filing this suit on 31st December, 2019 had recruited a simple majority of the total unionisable employees of the Respondent, the Claimant submitted that Section 54 of the *Labour Relations Act*, addresses the issue of Recognition of a trade union by employer. The Claimant



- submitted that for a union to qualify for recognition, it must prove that it has recruited a simple majority of the total unionisable employees of the Respondent.
12. The Claimant submitted that the material time for determining whether the Claimant union represented a simple majority should have been as close as possible to the time the union served the form S or check offs to the Respondent which were also sent together with a draft model of the recognition agreement to show that the Claimant union had recruited a simple majority of the unionisable employees of the Respondent.
 13. It was the Claimant's submission that the Claimant union was able to recruit a simple majority of the total unionisable employees by 17th of September 2019 when it recruited one hundred and fifty four (154) out of a possible one hundred and seventy five (175) unionisable employees of the Respondent which translated to Eighty eight percent(88%) which was above the legal threshold for the granting a recognition agreement.
 14. The Claimant relied on the case of *KUCFAW v Eldomat Supermarket Limited* [2014] while submitting that the material time for determining whether a union has a simple majority should be as close as possible to the time a union transmits to an employer form S.
 15. The Claimant submitted that by 14th November 2019, it had served the Respondent with all the check offs forms for the deduction and remittance of union dues in accordance with Section 48 of the *Labour Relations Act*.
 16. It was the Claimant's submission that instead of complying with the deduction of union dues and signing of the recognition agreement as legally expected of it, the Respondent proposed for a meeting with the Claimant union to discuss the union eligibility of some of the employees who had been recruited into the membership of the union.
 17. The Claimant submitted that it excluded the thirty eight (38) employees who had signed up to be union members and who the Respondent claimed were managers in compliance with the Industrial Relations Charter. The Claimant therefore submitted that the Respondent was deliberately trying to mislead the union on the actual number of the employees who it had claimed were managers, by giving a name of one George Barasa Wamalwalisted as number 239 on the list as one of the employees who had joined the union, yet there was no evidence of him ever signing the check offs submitted by the union.
 18. It was the Claimant's submission that the Respondent had a deliberate attempt to diminish the number of employees recruited to the union in order to defeat the recognition process.
 19. The Claimant further submitted that the Respondent in its memorandum of response, conceded that the Claimant union had indeed recruited one hundred and fifty eight (158) unionisable employees, but failed to state that it had been agreed by parties to exclude thirty seven (37) members who the Respondent insisted were in management resulting to the total number of unionisable employees recruited into the membership of the union as 122 unionisable employees out of a possible 175 unionisable employees.
 20. The Claimant submitted that according to paragraph 6.2 of the Respondent's memorandum of response the Respondent averred that 28 members formally resigned from the union and their resignations were acknowledged by the management.
 21. It was the Claimant's submission that at the time of filing the memorandum of claim dated 31st of December 2019, the Claimant union was not aware and had not been served with any notices of resignations or withdrawals by its members from the union and that the Respondent only attached



- the purported withdrawals in their memorandum of response dated the 3rd of Nov 2022 from where the Claimant union had the benefit of seeing them for the first time.
22. The Claimant submitted that the Respondent did not forward any notices of union resignations or withdrawals in compliance with section 48(8) of the *Labour Relations Act*. To this extent, the Claimant relied on the case of *Kenya Plantation And Agricultural Workers Union v Expressions Flora Limited* [2013] eKLR and submitted that the purported withdrawal or revocation letters from the union were not valid, since they were never served upon the Claimant union.
 23. It was the Claimant's submission that on 14th of November 2019 the Respondent through its CEO provided a list of employees who joined the union and their positions, as well as a list of unionisable employees who joined but left the company. Claimant contended that the union should have been notified of any withdrawals from membership by unionisable employees, rather than only including this information in a latter's response.
 24. The Claimant submitted that close scrutiny of the purported letters of withdrawal from the union reveal that the resignation letters from the union appears to have been motivated by the letters the Respondent's Human Resource Manager wrote to the union members to confirm the deductions of union dues from their monthly salary.
 25. The Claimant submitted that it was not proper for the Respondent to have sought the confirmation for the deduction and remittance of union dues from the union members, this approach served to intimidate the employees who were union members, since the Respondent had a reputation of being against union membership, when previously it had refused to grant the Claimant union access to recruit unionisable employees.
 26. It was the Claimant's submission that service upon the Respondent of the notice in form S or check offs should automatically trigger the deduction of trade union dues and it was not in order for the respondent to have sought the concurrence of the employees who had already signed the said check offs and who were members of the union.
 27. The Claimant relied in the case of *Kenya Plantation and Agricultural Workers Union v Expressions Flora Limited* Cause Number 11 Of 2012 (2013) and submitted that once the prescribed statutory notice was served the Respondent was obliged to effect the deductions and to remit the same.
 28. The Claimant further submitted that the Respondent provided a list on the 14th of November 2019 on the status of the employees who had joined the union, where apart from proposing the exclusion of the 37 it alleged were managers it also provided a list of 12 union members it alleges had exited employment, but at the time this suit was filed on 31st of December 2019, the Claimant had not received any letters of termination or resignation from employment for the twelve (12) union members the Respondent had said had since exited employment immediately after signing the check off forms from the Respondent employment, despite requesting for them.
 29. The Claimant submitted that recognition should be determined based on the number of unionisable employees recruited into the membership of the union at the time, when the Claimant union filed the suit in court.
 30. The Claimant submitted that as of November 14, 2019, they had recruited 159 unionisable employees, but after excluding managers, supervisors, and senior officers, there were 122 unionisable employees in the union out of a possible 175 which represented approximately 69.71% of the total unionisable employees, exceeding the threshold for recognition of a simple majority requirement.



31. The Claimant relied on the case of *Cello Thermoware Limited - v- Kenya Union of Commercial Food and Allied Workers* (Civil Appeal 120 of 2019) and submitted that to determine if the Respondent had a majority of the appellant's union members at the time of the dispute, first figure out the total number of union members registered at that time and then determine how many of those members were registered with the Respondent.
32. The Claimant also relied on the case of *Civicon Limited v Amalgamated Union Of Kenya Metal Workers* [2016] eKLR while submitting that unionisable employees must not be confused with the total work force engaged by the employer as court is only concerned with the numbers as at the time the claim is made.
33. On the issue of whether the Claimant union has attained the threshold for the granting of the recognition agreement by the Respondent, the Claimant submitted that as is evidenced by several letters to the Respondent dated 19th of September 2019, 4th October 2019 and 26th November 2019, the union had tried on several occasions but in vain to have the Respondent execute the recognition agreement, despite having recruited 122 unionisable employees out of a possible 175 unionisable employees into the membership of the union which is approximately 69.7% of the total unionisable employees of the Respondent and which was above the threshold of 50%+1 simple majority required for the union to be recognized according to Section 54 of the *Labour Relations Act*.
34. On the issue of whether the Claimant/ union was entitled to the reliefs sought, the Claimant submitted that the Respondent violated the *ILO conventions*, Constitution and *Labour Relations Act* by failing to enter into a recognition agreement with the Claimant union and its deliberate efforts to interfere with the rights of its employees to join and participate in the activities of a trade union.
35. It was the Claimant's submission that the actions of the Respondent amounted to an unfair labour practices and against good labour relations expected of an employer and a trade union.
36. The Claimant submitted that having proven its case on a balance of probabilities it was entitled to the reliefs sought in the suit herein.

Respondent's Submissions

37. The Respondents filed their written submissions dated 21st June, 2024 and on the issue of whether the Claimant Union had attained a simple majority of unionisable employees of the Respondent at the time of filing this suit, it was the Respondent's submission that Section 54 of the *Labour Relations Act* provides for the recognition of trade union by an employer and the main requirement is that the trade union must be representative of a simple majority of the unionisable employees.
38. The Respondent submitted that the Claimant Union at the time of filing the suit had recruited 78 out of 170 unionisable employees pointing out those that were under management thus not unionisable, those that had resigned and those no longer under its employment and attached the requisite documentation.
39. The Respondent submitted that regarding the withdrawals, the Claimant union did not at any point in the proceedings challenge the authenticity of the resignation letters and that court finds the notices of withdrawal as genuine and that arising therefrom the Claimant lost members.
40. The Respondent submitted that at the time of filing the Respondent further noted that the Claimant union had included names of 38 members of staff who were in management and therefore ununionisable and 1 member of staff promoted to management which fact was not challenged by the Claimant union.



41. The Respondent submitted further that 15 resigned from the Respondent's employment and 1 summarily dismissed which members should also be rightfully excluded from the list being relied upon by the Claimant Union.
42. It was the Respondent's submission that the Claimant did not have a simple majority of the total unionisable employees at the time of instituting the claim as supported by the Memorandum of Response and Replying Affidavit.
43. On the issue of whether the Claimant union had met the threshold for recognition by the Respondent, the Respondent submitted that out of the 154 members the Claimant claims to be its members only 78 were unionized by the Claimant being approximately 46% of the unionizable employees.
44. The Respondent submitted that the changes to employee demographics at the work place between the time of the recruitment exercise by the Trade Union and the date of the request for recognition may impact on the statutory threshold while equally relying on the case of *KUCFAW v Jade Collection Limited* [2017] eKLR.
45. On the issue of whether the Claimant Union is entitled to the reliefs sought in its Memorandum of Claim, the Respondent submitted that the Claimant Union is indeed aware of the resignation by the Respondent's employees from its membership and could not expect deductions of union dues from employees who have since withdrawn membership.
46. The Respondent relied on among others the case of *Tailors & Textile Workers Union v Global Apparels EPZ Limited* and submitted that any deduction of union dues from employees who for one reason or another are not members of a Union and/ or ceased from membership of the union amounts to unfair labour practice and in its violation of article 41 of the *Constitution* of Kenya, 2010 and Section 19 of the *Employment Act*, 2007 on deduction of wages.
47. The Respondent submitted that in the circumstances and having demonstrated the changes in demographics in union membership, the Claimant union is only entitled to remission of union dues for 78 members only and not 159 as pleaded.
48. The Respondent submitted union membership is quite fluid and members keep fluctuating from time to time.
49. It was the Respondent's submission that membership of a union is and should be a continuous exercise and the Claimant union recognition should be done in accordance with the provisions of the *Labour Relations Act*, 2007.
50. The Respondent submitted that the Court finds the Claim devoid of merit and to be dismissed with costs save for an award for remission of union dues for 78 union members.

Determination

51. I have reviewed and considered the pleadings and submissions by the parties and not the issues for determination to be whether the Claimant had attained the simple majority as per section 54 of the *Labour Relations Act* to be recognized by the Respondent.
52. Section 54 of the *Labour Relations Act* provides as follows:

“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.”



53. The Respondent averred that it had 257 employees out of which 170 were unionisable. That the Claimant had recruited 158 employees in its union. The Claimant on the other hand alleged that the Unionisable members were 175 where it had recruited 159 employees to its union.
54. Out of the 158 employees the Respondent averred that a total of 83 employees were not the union members for the reason that 38 were in management level, one promoted to management level, one his status not known for long leave absence, 28 employees formally withdrawn, 15 employees had withdrawn and 1 summarily dismissed. The Respondent therefore alleged that the only unionisable employees who remained to be members of the union were only 78 which did not meet the simple majority of 50+%.
55. On the other hand the Claimant union only agreed to the removal of 38 employees who were in management level and alleged that the remainder of the employees totalling to 122 were unionisable out 175 and this constituted 69.71% of unionisable employees in the respondent's employment hence it had attained the simple majority.
56. The Claimant union alleged that the Respondent never served it with any resignation or withdrawal of employees at the time of filing the suit and that they came to be aware of such resignations after the Respondent replied to their application. The court notes that this was against the provisions of Section 48(8) of the *Labour Relations Act* which provides that;
- “(8) An employer shall forward a copy of any notice of resignation he receives to the trade union.”
57. The Claimant had submitted its Form S showing the number of employees it had recruited and the sudden withdrawals would seemed to have been triggered by the Respondent's letter dated 27th November, 2019 to the employees to confirm the union's deductions yet they had already signed the said check off forms. Further, the Respondent ought to have notified the Union after its members exited. In the case of *Kenya Quarry and Mine Workers Union v Transfleet Limited* [2021] eKLR the court held that ;
- “This action was mischievous as it was aimed at remedying the non-compliance with sections 48 (6) and (8) of the *Labour Relations Act* because there was no notice in writing and the Applicant was never served with the resignation notices.”
58. Whereas the Respondent made a remittance of Kshs 23,124/- without attaching the list of those it remitted for and whereas the Claimant union maintained that the unionisable members were 122.
59. Whereas this court notes that it is now almost five years since this matter was filed and the situation on the ground may have changed, it would only be proper for a Labour officer to conduct a head count on the unionisable employees at the employ of the Respondent in order for the Court to determine the issue of simple majority for the purposes of recognition of the Union by the Respondent. The court notes that it would be unfair to order the Respondent to remit dues for employees who have since left its employ hence necessitating this directive.
60. The respondent has however conceded that it has in its employment 78 unionisable employees on whose behalf it is remitting union dues to the claimant union. If my advise would be sought, I would encourage the parties for the sake of industrial relations to cooperate in the recruitment by the claimant of unionisable employees and ultimately sign a recognition agreement



61. In the case of *Kenya Plantation & Agricultural Workers Union v Beauty Line Limited* (Employment and Labour Relations Cause E007 of 2023) [2023] KEELRC 2231 (KLR) (28 September 2023) (Ruling) Lady Justice Wasilwa having found herself in the same situation ordered as follows;-

In view of the omission from both parties, the only solution would be to direct that the Labour Officer to write a report on the unionisable employees after doing a head count vis a vis the number of employees and present the same before this court for consideration"

62. In conclusion I order that the Labour officer to conduct a head count of unionisable employees currently in the respondent's employment and submit a report to the Court within 60 days of this order to enable the court make final orders in respect of the dispute.

63. The matter to be mentioned on 25th November, 2024 for further directions.

64. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

Presiding Judge-Appeals Division

