



**Kenya Union of Commercial, Food and Allied Workers v Amritlals Wholesalers Limited
(Cause 4 of 2019) [2023] KEELRC 3017 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3017 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 4 OF 2019
MA ONYANGO, J
NOVEMBER 24, 2023**

BETWEEN
**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**
AND
AMRITLALS WHOLESALERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the *Labour Relations Act* to represent employees engaged in retail and wholesale sector.
2. The Respondent is a limited liability company incorporated under the *Companies Act* and operating a wholesale business in Eldoret city.
3. The Claimant is the appropriate trade union for the representation of employees of the Respondent.
4. The claim herein arose after the Claimant recruited employees of the respondent into its membership. The Claimant alleges that the Respondent refused to sign recognition agreement and to deduct and remit union dues.
5. The Claimant reported a dispute to the Minister for Labour and a conciliator was appointed. After hearing the parties the Conciliator prepared a report dated 12th July 2018 and a certificate of unresolved trade giving way to the filing of the instant suit.
6. Vide a Memorandum of Claim dated 25th January 2019 and filed in court on 7th February 2019 the Claimant seeks the following orders against the Respondent-
 - i. That the Honorable Court award in favor of the Claimant and order the Respondent to sign the Recognition Agreement,



- ii. That this Honorable Court be pleased to order the Respondent to commence Collective Bargaining Agreement within sixty (60) days,
 - iii. That this Honorable Court be pleased to order the Respondent to deduct and remit union dues from the employees who have acknowledged their membership through signing the check off forms
 - iv. That the Respondent to pay costs of the suit
7. The Claimant avers in the Memorandum of Claim that between May and September 2017 it approached the employees of the Respondent and recruited 68 employees out of a possible 83 total workforce translating to 56.3 % of the Respondent's employees.
 8. The Claimant contends that on 12th September 2017, it forwarded a standard draft Recognition agreement to the Respondent for purposes of signing and proposed a signing ceremony to be held on 15th September 2017.
 9. The Claimant states that around 26th and 27th January 2018, it recruited some more members and consequently forwarded the check off forms to the Respondent on 4th April 2018.
 10. According to the Claimant, the Respondent refused to deduct and remit union dues as provided under Section 48 of the *Labour Relations Act* as a result of which the Claimant reported the existence of a trade dispute to the Cabinet Secretary Ministry of Labour and Social Protection whereupon a conciliator was appointed.
 11. It is the Claimant's case that the conciliator convened several meetings on the issue of the recognition agreement and the Respondent's alleged refusal to deduct and remit union dues. That the matter was referred for adjudication by this court after the parties failed to agree.
 12. Contemporaneously with the Memorandum of Claim the Claimant filed an application seeking the following orders-
 - a. That the Hon. Court certify this application as urgent.
 - b. That service of this application/claim on the Respondent be dispensed with and that the Applicant be heard ex-parte in the first instance.
 - c. That pending hearing and determination of this claim this Hon. Court be pleased to issue orders restraining the Respondent from victimizing, intimidating, coercing, harassing, termination, dismissing or discipline the Claimant's members whose names appear on the check off forms on account of Trade Union membership.
 - d. That this Hon. Court issue order to the Respondent to continue deducting and remitting union dues pending hearing and determination of the main suit.
 - e. That this Hon. Court issue orders to the Respondent to recognize the Claimant for the purposes of the Collective Bargaining Agreement.
 - f. That this Hon. Court set this matter for hearing and determination on priority basis.
 - g. That costs of this application be provided.
 13. The Respondent entered appearance and filed a Memorandum of Response dated 18th February 2019 in which it denies the averments at paragraphs 3 to 15 of the Memorandum of Claim and avers that it has not contravened any provisions of *the Constitution* or any other law. It contends that the claim



is frivolous and has been brought in bad faith. That the employees have a right to join or not join a union and the Respondent has a right to conduct business in a conducive environment in the absence of coercion and intimidation.

14. The Respondent also filed a replying affidavit sworn by Kamal Amritlal Shah a director of the Respondent on 18th February 2019. The affiant states that at no time did the Respondent victimize, intimidate, coerce, harass, terminate, dismiss or discipline any of its employees on account of being a member of the Claimant union. That on the contrary the Claimant through its officials have acted in unacceptable manner by incitement and trickery in a bid to recruit the Respondent's employees to be members.
15. Mr. Shah further deposed that there were allegations of forgery of the Respondent's employees' signatures being investigated and a letter had been written to the County Labour Office indicating the same. That when the Respondent received communication from the Claimant that it had recruited some employees into its membership the Respondent it begun a process of verification of the signatures.
16. Mr. Shah deposes that upon concluding the process it found several anomalies which led to the conclusion that the process of recruiting members by the Claimant was not genuine. That the Respondent found that:
 - i. List contained names of persons not employees of the respondent.
 - ii. Signatures of some employees were found to have been forged.
 - iii. Case of persons appearing more than once on the list.
 - iv. The list had employees who intimidated that they had been tricked into appending their names on to the list without knowing what they were getting into.
17. Mr. Shah stated in the affidavit that two employees swore affidavits which were filed in court as annexures KAS 2(a) and (b). That there were also Mr. Shah further states that some of the alleged members have since left employment with knowledge of the Claimant's officials. A list of the employees alleged to have left service is annexed as KAS 3.
18. According to Mr. Shah the present suit was filed while this dispute was still pending for investigation before the County Labour Officer.
19. This court considered the application in its ruling delivered on 17th October 2019 referred the dispute back to the Labour Office for ascertainment of the number of members the Claimant had recruited for purposes of recognition. In the ruling the court stated that should the parties not agree a determination will be made by the court.
20. In the ruling delivered on 17th October, 2019 the court granted an order restraining the Respondent from intimidating, harassing, terminating, disciplining or dissuading employees from joining membership of the union and observed that such an order simply rested the constitutional rights of the employees and was harmless to the Respondent.
21. A report was filed in court by the Conciliator which indicated that the Conciliator went to the Respondent's premises and did a headcount in bid to establish who among the Respondent's employees was a member of the Claimant.



22. On 4th July 2023, this court directed the parties to dispose of the claim by way of written submissions. From the record, I have only found submissions for the Claimant on the labour report filed on 8th September 2023.
23. In the submissions the Claimant states that the Conciliator called the parties for a meeting on 28th September 2020 where proposals were made and modalities to be used agreed on. It was further stated that the Conciliator went ahead with the exercise to ascertain the number of the Claimant's members without adhering to the rules that were made at the joint meeting such as joint verification of the payroll and muster roll. The Claimant submitted that it raised questions on the credibility of the exercise since the Conciliator ignored all the modalities that were to be used during the exercise. It was submitted that from the court's ruling, it was ascertained that the Claimant had 27 members, thus the Respondent should have commenced to deduct and remit union dues of those 27 members whose membership had been confirmed. That the ascertainment of membership should have been limited to those whose membership were in question and not the entire population of employees. The Claimant thus rejected the report.

Determination

24. From the pleadings and the submissions on record, the only issue for this court's determination is whether the Claimant has recruited a simple majority of employees of the Respondent to be entitled to recognition. The only other pending issue which was the deduction and remittance of union dues was determined in the ruling delivered on 17th October, 2019.
25. According to the report filed by the county Labour Officer dated 22nd October 2020, a headcount was conducted at the Respondent's two premises at Kisumu Road and Oloo Street. Five employees confirmed membership while 74 stated they were not members of the union.
26. The report states that the Union representative left the premises at Kisumu Road just before voting ended and did not attend voting at Oloo Street. The report further states that 92 employees were listed in the register.
27. In view that the Claimant has rejected the report, it falls on this court to determine the suit as stated in the court's ruling of 17th October 2019.
28. Article 41(2)(c) of *the Constitution* of Kenya gives every worker the right to form, join or participate in the activities and programmes of a trade union while under Article 41(4) & (5) every trade union has a right to -
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.(5) Every trade union has the right to engage in collective bargaining.
29. The Claimant has maintained that as at the time it was seeking recognition by the Respondent, it had recruited 68 out of the 83 total employees of the Respondent. This is confirmed by the Claimant's list of documents annexed to the Memorandum of Claim particularly the Check off forms dated 12th September 2017, 29th September 2017 and 4th April 2018.



30. Section 48(2) and (3) of the [Labour Relations Act](#) provide;
- (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 signed by the employees in respect of whom the employer is required to make a deduction.
31. Section 48 of the [Labour Relations Act](#) does not mandate an employer to verify the names in a check-off list. Any such verification would amount to intimidation of employees. Once an employer has been served with Form S (check-off form) the employer’s role is to comply by deducting union dues from wages of employees who have signed the said form and remit the same to the union.
32. Deduction of union dues is authorized under section 19(1)(f) of the [Employment Act](#) which provides that an employer may deduct from the wages of an employee any amount the deduction of which is authorized by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award. Section 19(1) (g) also permits deductions of any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages. A check off form is authorization in writing for deduction of union dues.
33. The authorization by the Minister for Labour as provided in section 48 is in Form S of the Second Schedule to the [Labour Relations Act](#) and commonly referred to as the “check off form”. The particulars are usually contained in the letter forwarding the check off forms to an employer. Should any employee change their mind about union membership, they are free to leave in the manner stated in the section.
34. In the instant case, it was incumbent upon the Respondent to deduct union dues from employees who had signed the check off forms and remit the same to the Claimant. The Respondent had no business investigating signatures in the form. Any such investigation would cause fear of retaliation in employees and prevent them from expressing their interest in joining union membership.
35. On the issue of recognition of the Claimant by the Respondent, section 54(1) of the [Labour Relations Act](#) provides;
1. “An employer, including an employee in the public sector, shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionizable employees.”



Section 54 (2) provides;

2. “A group of employers, or an employers’ organization, including an organisation of employers in the public sector, shall recognize a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionizable employees employed by the group of employers or the employers who are members of the employer’s organization within a sector.

36. From the above provision of the law, it is clear that recognition for purposes of collective bargaining is a mandatory requirement and all a union needs to satisfy is that it has recruited a simple majority of unionisable employees in the organization into its union.

37. This court in the case of Kenya Building, Construction, Timber and Furniture Industries Employees Union v Kings Developers Limited [2020] eKLR observed as follows;

“Recognition is thus not a privilege to be dished out by the respondent but a right to be exercised by the rights holder. Section 49 and 54 of the *Labour Relations Act* are couched in mandatory terms, that once a union has recruited a minimum of 5 employees the employer is obliged to set up a check off system for deduction and remittance of union dues. Further, that once a union has acquired a simple majority the employer is obligated to recognize the union and thereafter, to collectively bargain with the union.”

38. In this case, the Respondent has not disputed the Claimant’s claim that it recruited 68 members out of a possible 83 unionisable employees at the time the Claimant was seeking recognition on 12th September, 2017. The allegation that the said employees were coerced into signing the check off forms has not been proved by the Respondent. The two affidavits sworn by the Respondent’s employees do confirm that the Claimant recruited employees of the Respondent.

39. The discharge voucher filed with the Replying Affidavit of Mr. Shah are all dated 2018 after the date on which the Claimant sought recognition. They are further proof that at the time the Claimant sought recognition they were members of the Claimant.

40. Membership of any trade union is always a shifting target. New members are always joining while others are always leaving for various reasons. The date on which a union seeks recognition is always therefore the determinate date as to whether or not it was entitled to recognition on the date it sought the same.

41. From the evidence on record it is my finding that the Claimant had acquired a simple majority of membership among the employees of the Respondent on the date it approached the Respondent for recognition. The Claimant had therefore attained the required threshold for recognition and the Respondent was obligated to recognize the Claimant for purposes of Collective Bargaining Agreement as stipulated by Section 54(2) of the *Labour Relations Act*, 2007.

42. In the end, I find that the claim herein is merited and I enter judgement in favour of the Claimant in the following terms:

- a. The Respondent is hereby ordered to sign a recognition agreement with the Claimant within 30 days from today.
- b. The Respondent is hereby ordered to deduct and remit union dues from employees who have acknowledged their membership through signing the check off forms.
- c. Parties to thereafter commence collective bargaining in the manner provided in the law.



d. Respondent to pay the Claimant costs of the Claim which I assess at Kshs. 80,000 to include reasonable costs and necessary disbursements and expenses related to the suit. This assessment is based on the fact that the Claimant was not represented by an advocate and the costs of the suit cannot therefore be subjected to taxation.

DATED, DELIVERED AND SIGNED AT ELDORET

THIS 24TH DAY OF NOVEMBER 2023.

M. ONYANGO

JUDGE

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ELD ELRC NO 4 OF 2019 JUDGMENT

