



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 54 OF 2019

KENYA UNION OF DOMESTIC,

HOTELS, EDUCATIONAL INSTITUTIONS

AND HOSPITAL WORKERS.....CLAIMANT

- VERSUS -

MOMBASA GOLF CLUB.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 11th March, 2022)

JUDGMENT

The claimant filed the memorandum of claim on 26.08.2019 through Mr. Hezron Onwonga, the Industrial Relations Officer. The claimant prayed for judgment against the respondent for:

- 1) The finding that the claimant has met the threshold as required by section 54 of the Labour Relations Act, 2007 and the respondent to sign the recognition agreement and conclude collective bargaining agreement within 90 days from the date of the judgment.
- 2) The respondent to pay the costs of the suit.
- 3) The Court to issue any orders it deems just and fit.

The claimant's case is that it is the sector union for the respondent's enterprise. Further it has recruited 13 out of 15 of the respondent's unionisable employees and served the respondent completed Form S for the respondent to deduct union dues. The respondent deducted union dues and remitted them for some period then it stopped. Further, a draft recognition agreement was forwarded but the respondent declined to sign. A trade dispute was reported to the Cabinet Secretary and a conciliator appointed on 20.02.2018. The parties were invited but the respondent failed to attend and the conciliator issued a certificate of unresolved dispute per section 67(1) (a) of the Labour Relations Act, 2007. It is urged that by refusing to sign the recognition and collective agreements, the respondent has violated Article 41 of the Constitution of Kenya, 2010 and section 54 of the Labour Relations Act, 2007 – the claimant being the sector union and having recruited 51% (simple majority) of the respondent's unionisable staff.

The respondent filed the memorandum of response on 15.11.2019 through Muturi Gakuo & Kibara Advocates. The respondent admitted that it had started deduction of the union dues but stopped upon realising that the claimant had not met the threshold under the Labour Relations Act, 2007. The respondent stated that it has 22 employees and only 10 being 45% had been recruited so that the statutory simple majority had not been attained by the claimant. Further, the respondent's Board had made a decision that in view of low percentage of its employees who had joined the claimant union, the union members should pay the union dues directly to the claimant. The respondent relied on section 52 of the Labour Relations Act, 2007 that nothing limited an employee from remitting union dues directly to the union.

By consent of the parties, it was ordered on 03.11.2021 that the suit be determined on the basis of the pleadings, documents on record and submissions to be filed. Final submissions were filed for the parties. The Court has considered all the material on record and finds as follows.

First, there is no dispute that the claimant is the sector trade union with respect to the respondent's enterprise as envisaged in section 54(8) of the Labour Relations Act, 2007.

Second, the claimant has exhibited Form S showing that it had recruited 13 members. There is no dispute that the employees were duly recruited and the respondent commenced deduction of union dues but which was stopped upon Board decision that the simple majority threshold in section 54(1) of the Labour Relations Act, 2007 had not been attained. The Court finds the Board's position was lacking in legal

backing because as per section 48 (3) of the Act, once the claimant recruited the employees and Form S was served upon the respondent, the respondent was required to commence deduction and remission of the union dues for the recruited employees within 30 days of such service. The Court holds that the deduction and remission of union dues under section 48(3) of the Act is not chained or depended upon the trade union meeting simple majority recruitment of unionisable staff per section 54(1) and which threshold is prescribed for recognition purposes and, not for purposes of commencing and continuing deduction of union dues. Further, while section 52 permits a member of a union to remit union dues directly to the union, the section does not justify the position taken by the respondent to stop deduction for the recruited members to directly remit dues to the union because, section 48(3) of the Act is in mandatory terms – that an employer served with Form S is required to commence deduction within 30 days from such service.

The evidence is that the claimant recruited 13 members but only 11 of them signed Form S. The respondent alleges that it has 22 unionisable employees but no evidence has been provided, even by way of affidavit or documents. The claimant asserts that at the material time the respondent has 15 unionisable members. The verifying affidavit of Albert Njeru annexed on the memorandum of claim verifies the correctness of the claimant's case as pleaded. The Court finds that on a balance of probability, the respondent at the material time had only 15 members of staff out of whom 13 were recruited but only 11 actually signed the Form S as exhibited. Thus 11 out of the 15 unionisable employees makes 73% being way above the simple majority threshold. The Court returns that the claimant has therefore met the threshold of simple majority in section 54(1) of the Act for recognition of the claimant by the respondent for purposes of collective bargaining. The claimant's suit will therefore succeed and considering all circumstances of the case and to foster harmonious industrial relationship between parties henceforth, the respondent will pay only partial costs of the suit fixed at **Kshs. 25, 000.00** only.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent by itself or by its board members and responsible officers to conclude and sign a recognition agreement with the claimant union by 01.05.2022.
- 2) The respondent by itself or by its board members and responsible officers to conclude and sign a collective bargaining agreement (CBA) with the claimant union by 01.08.2022.
- 3) The respondent, effective end of March 2022, to recommence and continue deduction and remission of union dues with respect to its unionisable members duly recruited by the claimant union per Form S and fully comply with section 48 (3) of the Labour Relations Act, 2007.
- 4) The respondent to pay the claimant the partial costs of the suit fixed at **Kshs. 25, 000.00** only by 01.05.2022 failing interest to run thereon at Court rates from the date of this judgment until full payment.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 11TH MARCH, 2022.

BYRAM ONGAYA

JUDGE