



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO 525 OF 2019

KENYA ELECTRICAL TRADERS & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

KENYA ELECTRICITY TRANSMISSION COMPANY LTD.....RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under section 19 of the Labour Relations Act to represent unionisable employees in the Electrical Energy, Generation, transmission and Distribution, Electrical and Electronic Equipment Assembly and Manufacturing and Allied Industries. The Respondent is a limited liability company dealing with electricity energy transmission in Kenya.

2. The Claimant brought this suit on 9.8.2019 alleging that it had recruited as members 468 out of 700 unionisable employees of the Respondent but the latter had refused to accord it recognition under section 54 of the Act. The Claimant further averred that despite serving the Respondent with check off forms (Form S) duly signed by the recruited members, the Respondent refused to deduct union dues and instead resorted to harassing the members of staff in order to force them to revoke their membership to the union. Consequently the Claimant seeks the following reliefs:

(a) Determination that the Respondent's actions infringe on Claimant's Union's constitutional right to fair Labour Relations and fair labour practices.

(b) Order that the Respondent commence deduction and remittance of union dues from their unionisable employees who have acknowledged membership with the union

(c) Order restraining and restricting the Respondent, its servants, agents and/or employees from victimizing, intimidating, coercing, harassing, terminating, dismissing, or disciplining on account of their union membership the unionisable employees and Claimant's members.

(d) Order directing the Respondent to enter into and sign the Recognition Agreement in accordance with section 54 of the Labour Relations Act, 2007.

3. The Respondents filed defence on 18.10.2019 denying the allegations in the claim and averred that on 16.4.2019, it wrote an Internal Memo to the staff members whose names appeared in the check off forms served by the Claimant, to verify their membership to the union and whether they had consented to have union dues deducted from their salaries. It further averred that the staff members concerned responded to the Memo in writing denying the alleged membership to the union and indicating that they did not consent to any union dues being deducted from their salary.

4. In view of the said response from the staff members, the Respondent lodged a complaint with the Director of Criminal investigations (DCI) to verify the authenticity of the signatures on the check forms. In the meanwhile, the Respondent contended that it could not accord recognition to the Claimant because the alleged members from its staff had disputed membership and denied ever signing the check off forms. It therefore, prayed for the suit to be dismissed with costs because it is founded on fraud and forged signatures.

5. The Claimant filed Reply to the Defence on 24.10.2019 denying the alleged fraud and averred that the allegation of fraud in the defence lacks particulars. The Claimant contended that an alleged fraudulent conduct must be distinctly alleged and distinctly proved.

The Claimant further averred that the burden of proof lies with the Respondent to establish the alleged forgery.

6. It further averred that the DCI has no role in trade dispute before the court and contended that involving the DCI is the highest form of

intimidation of its unionisable employees. Finally the Claimant maintained that it did not forge any signatures as alleged and reiterated that it has recruited a simple majority of the Respondent's unionisable staff and it should be accorded recognition under section 54(1) of the Act.

7. The suit was disposed of by written submission on the basis of the pleadings and the written statements filed by the witness.

CLAIMANT'S CASE

8. Mr. Kosgey Kolil filed witness statement dated 9.8.2019. He stated that he is the Deputy General Secretary of the Claimant with authority to make the statement. He further stated that the Respondent's employees sought to join the Claimant union and between January to April 2019, the union recruited 468 out of 700 unionisable employees of the Respondent, equalling to 67%.

9. Mr. Kolil further contended that under section 54(1) of the Labour Relations Act, a trade union is only required to recruit a simple majority of the unionisable staff in order for it to be accorded recognition by the employer. He further contended that on 16.4.2019 the Claimant served the Respondent with signed check off forms duly signed by the recruited members, and a Draft Recognition Agreement but the Respondent refused to sign the Agreement or indicate any divergent views.

10. He further stated that the Claimants attempt to engage the respondent in dialogue was frustrated by the Respondent. He contended that the Respondent is highly likely to victimize, coerce, harass and/or discipline employees who appear on the check off forms considering the fact that it had refused to sign the Recognition Agreement or effect the check of forms. He contended that the Respondents belligerent behaviours is aimed at denying its unionisable staff their right to representation by trade union.

11. He prayed for the reliefs sought by the Claimant because they are justified and reasonable.

RESPONDENT'S CASE

12. Ms. Regina Kemboi, Respondent's Acting General Manager, Human Resources and Administration filed written witness statement dated 18.10.2019. She confirmed that in April 2019 the Respondent received from the Claimant notices demanding union dues in respect of check off forms allegedly signed by its staff members. She further stated that in order to ascertain the truth in the said check off forms, and in accordance with the Respondent's practice and procedure, she served the employees listed in the check off forms with an internal memo dated 16.4.2019 via email. According to her 167 employees responded in writing denying ever joining the union or signing the notice to have their salaries deducted.

13. She further stated that she honestly believed that the alleged list of recruited members of the union was premised on fraud and forged signatures. She further stated that the Respondent made a complaint to the DCI to conduct investigations to ascertain the authenticity of the said signatures on the said check off forms and the same is still on going.

14. She contended, that the Respondent cannot therefore deduct employee's salaries or sign Recognition Agreement or engage the Claimant in meetings until the investigations are concluded. Finally, she denied that the Claimant has recruited a simple majority of the Respondent's employees and further denied that the Respondent will harass, victimize, coerce and discipline its employees for joining the union. Therefore she prayed for the suit to be dismissed with costs.

CLAIMANT'S SUBMISSIONS

15. The Claimant reiterated that it recruited 468 out of 800 unionisable staff of the Respondent but since May 2019, the Respondent has persisted in refusing to sign a Recognition Agreement and to deduct union dues from salaries of its employees who have been recruited as members of the union.

16. The Claimant submitted that it has met the legal threshold for recognition set out under section 54(1) of the Labour Relations Act, which is, recruitment of a simple majority of unionisable staff of the employer. It contended that having recruited 468 out of 800 unionisable staff of the Respondent, it had exceeded the required simple majority to achieve 58.5% by April 2019.

17. It further submitted that the right to association and to form union membership is anchored on Article 36 and 41(2) (a) of the Constitution and as such the Respondent ought to deduct union dues from the salary of the recruited members and remit the same as per the check-off forms signed by the said members. It contended that the Respondent was served with duly signed check-off forms (form s) and under section 48(3) of the Act, it is obligated to deduct union dues and remit because the signed check-off forms constitutes lawful instructions by the concerned employees to it to deduct their salaries under section 19 (i)(f) & (g) of the Employment Act.

18. It maintained that even without meeting the legal threshold for recognition, under section 48(2) of the Labour Relations Act, an employer is obligated to deduct and remit union dues where more than 5 members have been recruited by a trade union. It relied on **Kenya Union of Hair and Beauty Salon Workers v Styled Industries Ltd and Another[2020]eKLR** where the court held that an employer should deduct union dues from employees who have signed the check-off forms once the same have been served upon the employer.

19. The Claimant further submitted that the Respondent should be ordered to pay the union dues from its own funds for deliberately failing to deduct the same from the employees as per the check-off forms served on it. For emphasis, it relied on **Kenya Long Distance Truck Drivers and Allied Workers Union v Masters Fabricators Ltd[2020]eKRL** in which Radido J held that the check-off made reference to an order form the Cabinet Secretary issued on 1.10.2007 and as such the employer should comply by effecting the same in its payroll and in default pay the union dues from its own funds.

20. As regards whether to compel the Respondent to accord the union recognition, the Claimant relied on **Kenya National Union of Nurses**

v County Public Service Board Homa Bay [2018]eKLR where the court held that the union must demonstrate that it represented a simple majority of the unionizable staff. The Claimant further relied on **Banking Insurance Finance Union(K) v. Kenya Revenue Authority [2018]eKLR** where the Court of Appeal held that the proof of membership to a union is submission of check-off forms duly signed by the concerned employees. The Claimant therefore prayed for the Respondent to be compelled to sign Recognition Agreement.

21. As regards the alleged harassment and victimization of the recruited members of the union by the Respondent the Claimant submitted that demand by the Respondent vide internal memo dated 16.4.2019 that the employees who signed check-off forms should give a written consent to have their salaries subjected to union dues deductions amounted to bad faith, intimidation, interference with union matters. For emphasis it relied on **Civicon Limited v. Amalgamated Union of Kenya Metal Workers [2016] eKLR** where the Court of Appeal deemed letters of withdrawal from the union dated almost even date as a deliberate effort by the employer to reduce numbers of eligible members in order to frustrate recognition process.

22. The Claimant contended further that the Respondent has no scintilla of any right to verify, interrogate and confirm from its employees whether they want to belong to a trade union. In the Claimant's view the employer is only supposed to deduct and remit union dues once served with check-off forms. It contended that the purported inquiry and investigation of whether the employees have joined a trade union is offensive and creates bad working environment and it is against fair labour practices.

23. For emphasis it relied on **Kenya Union of Hair and Beauty Workers v Black and Beauty Products Ltd{2020}eKLR supra** where the court held that inquiry and further investigation with employees joining a trade union constituted interference with union matters. The Claimant further relied on **Bakery, Confectionary, Food Manufacturing and Allied Workers Union (K) v. Brava Food Industries [2020]eKLR**.

24. As regards the alleged fraud by the Respondent, the Claimant submitted that the burden to plead particulars and prove the same lies with the party alleging. Accordingly, the Claimant's contended that the Respondent has failed to particularise the alleged fraud and to tender evidence to prove the same. For emphasis, it relied on **Vijay Morjaria v Nansingh Madhusingh Darbar & Another[2000]eKLR**. The Claimant further relied on **Wilberforce Asiepi Ongoru & 2 Others v. Margaret Ondeso Opio & 3 Others [2000]eKLR** where the court held that fraud is a serious accusation and without evidence from a Document Examiner it is not proved. Therefore, the Claimant prays for the reliefs sought in its claim.

RESPONDENT'S SUBMISSIONS

25. The Respondent submitted that the Claimant has not proved that it recruited a simple majority of its unionisable staff as required by section 54(1) of the Labour Relations Act. It contended that according to the check-off forms received the Claimant recruited as members only 235 out of 800 unionisable staff of which 167 employees denied ever joining the Claimant union or ever signing the check-off forms for deduction of union dues from their salary.

26. It contended that the Claimant submitted to it 13 check-off forms of which 12 forms had 18 members each while one form had 19 members. It further contended that after 167 members denied the alleged membership the remaining membership from its staff was 68 representing 8.5% of the unionisable staff. It also submitted that, even if the total 235 members contained in the said check-off forms were to be considered the same does not constitute as simple majority of the unionisable staff of 800 but only 29.37%. For emphasis, it relied on **Kenya Chemical & Allied Workers Union v. Base Titanium Ltd [2016]eKLR and Kenya Union of Commercial Food and Allied Workers v. Naivas Ltd[2015]eKLR** where recognition was declined for lack of a simple majority.

27. The Respondent further submitted that the Claimant did not serve any order from the Cabinet Secretary together with the check-off forms as required under section 48(3) of the Labour Relations Act. For emphasis it relied on **Kenya Long Distance Truck Drivers and Allied Workers Union v. Master Fabricators Limited [2016]eKLR** where recognition and deduction of main dues was declined because the union did not prove that it served the order by the Cabinet Secretary under section 48(5) of the Act.

28. In view of the foregoing matters, the Respondent submitted that the Claimant is not entitled to recognition because it has not met the threshold under section 54(1) of the Act. It further submitted that the claim for deduction of union dues cannot be granted because it is grounded on fraud and lack of authority from the 167 employees who have since denied membership and authority to have their salary deducted.

29. It relied on section 19(i) (f) & (g) of the Employment Act to urge that it had the right to seek written authority from its employees before deducting union dues from their salaries. Therefore it contended that it has no written authority from the concerned employees to deduct union dues from their salary.

30. As regards the alleged victimization and harassment of the employees recruited into union membership, the Respondent submitted that the Claimant has not adduced any evidence to prove that the 68 employees who did not dispute membership to the union have been subject to any harassment or victimization. It therefore deemed the said allegation as an effort to taint its image and reputation and urged the court to decline the prayer for injunction. In conclusion, the Respondent prayed for the suit to be dismissed with costs.

31. In a rejoinder, the Claimant submitted that there is no statutory requirement for the union to serve the prescribed forms together with the ministerial order put on the Forms S (signed check-off forms) under section 48(2) & (3) and 50 of the Labour Relations Act. It contended that the forms submitted the Claimant's bundle submitted page 75-82) made reference to the ministerial order which was effective from 1.4.2019. Consequently, it submitted that under the law the Respondent ought to have commenced the deduction and remittance of union dues from May 2019 but so far no dues have been deducted and remitted.

32. In response to the foregoing, the Respondent denied that the ministerial order allegedly issued on 1.4.2019 was part of the documents in page 75-82 of the Claimant's bundle of documents. It further contended that only 3 out of 13 check-off forms referred to the said order compounding suspicion whether the order existed. It contended that the burden is on the Claimant to prove that there is an order issued by the

Minister directing it to deduct and remit union dues. It maintained that it can only deduct union due from its employees if the union recruits a simple majority of its unionisable staff and if it is served with a ministerial order directing it to deduct union dues.

ISSUES FOR DETERMINATION

33. Having carefully perused and considered the pleadings, evidence and written submissions by both parties, it is common ground that on 8th and 17th April 2019 the Claimant served the Respondent with a total of 13 check-off forms signed by persons alleged to be Respondents unionisable staff. The issues for determination are:

(a) Whether the Claimant has met the legal threshold for recognition by the Respondent under section 54(1) of the Labour Relations Act.

(b) Whether the Claimant has met the legal threshold for Respondent to deduct union due from its unionisable staff under section 48 of the Act.

(c) Whether the reliefs sought by the Claimant should be granted.

LEGAL THRESHOLD FOR RECOGNITION

34. The legal threshold for an employer to grant recognition is set out under section 54(1) of the Labour Relations Act as follows:

“An employer, including an employer in the Public Sector shall recognise a trade union for purposes of collective bargaining if that union represents the simple majority of unionisable employees.”

35. The Claimant alleged that it recruited 468 out of 800 unionisable staff of the Respondent while the Claimant contends that it was served with only 13 check-off forms allegedly signed by 235 employees. The Respondent further contended that after serving an internal memo to the said 235 employees, 167 denied membership with the union and the authority to have union dues deducted from their salaries.

36. I have carefully perused the bundle of documents filed by the Claimant on 9.8.2019 together with the Memorandum of Claim. The Claimant’s letter dated 8.4.2019 forwarded to the Respondent nine (9) check-off forms duly signed. The letter stated as follows in part:

“RE: THE LABOUR RELATIONS ACT – COLLECTION OF UNION DUES

Reference is hereby made to the attached list of staff totalling to approximately 161 (one hundred and sixty one) who have acknowledged and reaffirmed to be members of the union.

Kindly deduct . . .”

37. Again the Claimant forwarded four (4) check-off forms to the Respondent by the letter dated 17.4.2019 which stated as follows:-

“Reference is made to the attached list of staffs totalling to approximately 73 (seventy three) who have acknowledged and reaffirmed to be members of the union.

Kindly deduct . . .”

38. Apart from the said two letters, the Claimant did not write again to the Respondent to submit more check-off forms duly signed by any other recruited union members from the Respondent’s staff. It follows that the total members recruited were the ones contained in the 13 check-off forms, 12 of which had 18 signatories while one had 19 equalling to 235 signatures.

39. In views of the foregoing, it is clear that 235 out of 800 staff equals to 29.3565% of the Respondent’s unionisable workforce. Consequently, I find and hold that even without factoring the disputed membership, the Claimant did not recruit a simple majority of Respondents unionisable staff which the legal threshold required for recognition under section 54(1) of the Labour Relations Act. In **Kenya Union of Commercial Food and Allied Workers v. Naivas Limited [2015]eKLR** Wasilwa J held that:

“Having said that, the court inevitably finds that the Claimant has not recruited sufficient members to satisfy the requirements under section 54(1) of the Labour Relations Act of 2007 of attaining 50 +1 [sic] members out of a total of unionisable workforce of 3,287.”

LEGAL THRESHOLD FOR DEDUCTION OF UNION DUES

40. The legal threshold for an employer to deduct union dues from employees salary is set out under section 48 of the Labour Relations Act which states that:

(1) In this Part “trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.

(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.

(4) ...”

41. The Respondent contended that the Claimant did not serve it with any ministerial order and that only three (3) of the 13 check-off forms indicated the effective date of the alleged ministerial order being 1.4.2019. The Claimant has maintained that it had no obligation to serve the Respondent with the ministerial order together with the check-off forms.

I have carefully considered the rival interpretations of section 48(2) & (3) by the two parties and my view is that an order directed to a person is not made to be kept by the maker or the party requesting for the order. Consequently, it is erroneous for the Claimant herein to argue that the ministerial order issued against the Respondent ought not to be served on it. I do not ascribe to the view that the order by the Cabinet Secretary need not be served on the employer at whom it is directed. In my view the order ought to be served on the employer or at least the employer should be referred to the Gazette Notice in which the order was published.

43. The present case is distinguishable from the **Kenya Union of Hair and Beauty Workers v Black and Beauty Products Limited**[2020]eKLR because in the latter case the union indicated the Gazette Notice number by which the Minister for Labour had authorised the deduction of union dues, in the letter forwarding the check-off forms. In fact, the court in the said precedent never dealt with the issue of service of the Ministerial Order, but the issue of manner of recruitment and the amount of the union dues payable to the union by its recruited members.

44. The court further finds that Radido J in the **Kenya Long Distance Truck Drivers and Allied Workers Union v Masters Fabricators Limited**, *supra* did not hold that service of the ministerial order granted under section 48 of the Act ought not to be served on the employer against whom it is made. My considered view is that where the existence of such an order is disputed or doubted by the employer, the trade union ought to serve it. In the case of **Kenya Long Distance Truck Drivers and Allied Workers Union v Masters Fabricators Ltd** [2016]eKLR, the employer disputed the existence of the Minister's Order and denied its service on it and the court found that service was necessary.

45. Likewise, it is my view that in any legal proceeding, where the employer disputes the obligation to deduct union dues from its employees and remit to the trade union, there is burden of proof on the part of the trade union to prove existence of an order from the Labour Cabinet Secretary issued against the employer under section 48(2) of the Labour Relations Act. The said burden is discharged if the union proves that the employer has been served with the order, or is aware of the existence of the order or if the union produces the order as an exhibit in court.

46. In this case, the Ministerial Order was not produced as an exhibit and the claimant has not adduced any evidence to prove that the respondent was served or is aware of existence of the order. In fact, the claimant has adamantly maintained that there is no legal obligation to serve the respondent with the order together with the Check off forms. Consequently, I find that either there no order issued against the respondent by the Labour Cabinet Secretary under section 48(2) of the Act or the claimant has deliberately withheld the ministerial order from both the respondent and this court.

47. Without an order from the Labour Cabinet Secretary, an employer has no legal obligation to collect union dues on behalf of a trade union, nor does a court of law have any jurisdiction to order the employer to do so. Consequently, without any evidence of the existence of the said ministerial order directing the respondent to deduct union dues from its employee who have signed Check-off forms, I find and hold that the claimant has not met the legal threshold under section 48(3) of the Act for court to order the respondent to deduct union dues from its staff who have signed check off forms in favour of the claimant.

48. In addition to the foregoing, and as regards the authority from the recruited members to have union dues deducted from their salary vide the check of forms, the court takes seriously the objection raised by 167 of the 235 signatories to the check off forms. Even if in the claimant's view the Respondent had no scintilla of right to seek written consent from the said employees before deducting union dues from their salary, the fact remains that the 167 alleged signatories of the check off forms have in writing the alleged membership and objected to the proposed deduction of union dues, leaving only 68 eligible members.

49. The foregoing number of eligible members is more than the required minimum of five employees. However, as already held herein above, without any evidence of existence of an order from the Labour Cabinet Secretary, directing the respondent to collect union dues on behalf of the claimant and remit the same to specified Bank Accounts, the respondent has no obligation to do so under section 48(3) of the Labour Relations Act.

50. Whereas the court appreciates the employee's right to dispose of his salary as he desires under section 19(1) (g) of the Employment Act,

when it comes to deduction and remittance of union dues, that right is exercisable subject to section 48(2) and (3) of the Labour Relations Act. If the opposite was true, the legislature would not have taken all the trouble enacting the detailed procedure to govern collection of union dues by the employers on behalf trade unions under section 48 of the Act.

RELIEFS

51. The Claimant prayed for a determination that the Respondent's action infringe on Claimant's union's constitutional right to fair labour relations and fair labour practices. However, the said claim is not pleaded with precision so as to meet the competence threshold set out by the Court in **Anarita Karimi Njeru v Republic [1979]eKLR** , which is, for a claim to fit within the threshold of constitutional reference the Claimant must state with a degree of precision the provision of the Constitution which has been infringed, the right which has been violated and the manner in which it was violated. The claim does not meet the foregoing competence threshold and it is dismissed.

52. As regards the claim for union dues, it is clear from the analysis of the numbers of the recruited member above that only 68 employees of the respondent are eligible members of the claimant union. However, as held herein above, without evidence of existence of an order from the Labour Cabinet Secretary issued under section 48(2) of the said Act, the respondent has no obligation to act as the collection agent of union dues for the claimant and the court has no jurisdiction to compel the respondent to do so. Consequently, the claimant is at liberty to collect the union dues directly from the 68 union members under section 52 of the Act until it serves the respondent with the Order by the Cabinet Secretary if there is any. Once the claimant serves the order by the Cabinet Secretary, the respondent will be bound to commence deduction of union dues for the 68 eligible members thirty days after service.

53. As regards the prayer for restraining order, I agree with the Respondent that the Claimant did not adduce any evidence, say from any eye witness or employees of the Respondent or even a document showing that the Respondent has or is or about to harass victimise or intimidate the union members who have signed the check-off forms produced in court. In fact, going by the paragraph 10 of the Statement of Claim. It is clear that the Claimant is just being speculative. Consequently, the prayer for restraining order is declined for lack of evidence.

54. Finally, the prayer for recognition is declined because as already held herein above the Claimant did not establish any evidence that it represents a simple majority of the Respondent's unionisable work force.

CONCLUSION AND DETERMINATION

55. I have found that the Claimant has not met the legal threshold for grant of recognition by the respondent under section 54(1) of the Labour Relations Act, which is, representation of a simple majority of the unionisable staff of the Respondent. I have further found that, although the Claimant has 68 eligible members recruited from the Respondent's staff, and who have signed check off forms for the employer to deduct union dues from their salary, there is no obligation for the employer to do so in the absence of evidence of an order from the Labour Cabinet Secretary issued under section 48(2) of the Act. Consequently, I find no merits in the claimant's suit and proceed to dismiss it with no costs.

Dated and delivered in Nairobi this 18th day of February, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE