



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.1095 OF 2016**

**KUDHEIHA WORKERS.....CLAIMANT**

**VERSUS**

**B.O.M. EASTLEIGH HIGH SCHOOL.....RESPONDENT**

**JUDGEMENT**

Issue in dispute – refusal to sign recognition agreement

Claim

The claimant is a registered trade union. The respondent was empowered by the Minister for Education vide Legal Notice 262 of 26<sup>th</sup> August, 1993 to perform managerial functions for public school and where nonteaching staff fall under the board of management (BOM). The Minister also directed BOM to enter into recognition agreement with the claimant for purposes of nonteaching staff representation vide Legal Notice 263 and then on 3<sup>rd</sup> September, 1993 the Minister revoked Legal Notice No.262 vide Legal Notice No.39. The non-teaching staff of the respondent joined the claimant membership.

The claim is that on 16<sup>th</sup> July, 2012 the claimant sent a letter to the respondent authorising the deduction and remittance of union dues. On 12<sup>th</sup> September, 2014 the claimant forwarded a recognition agreement to the respondent to sign pursuant to section 54 of the Labour Relations Act (LRA) and on 25<sup>th</sup> September, 2014 the claimant members in the employment of the respondent wrote to the Minister confirming membership with the claimant.

The respondent has refused and or neglected to sign the Recognition agreement.

This was reported to the Minister on 27<sup>th</sup> November, 2014.

On 8<sup>th</sup> December, 2014 the Minister invoked section 65(1) of the LRA and appointed a Conciliator and who requested parties to submit proposals but the dispute was unresolved and Certificate of Unresolved Dispute as issued and dated 27<sup>th</sup> November, 2015.

The respondent is in violation of the law and has failed and refused to recognise the claimant.

The claimant is seeking for an order that the respondent be compelled to sign the recognition agreement since the claimant has attained simple majority and this will allow the claimant to initiate collective bargaining for mutual benefit.

Defence

There is no defence on the record.

By consent, both parties agreed to address the claim and issue in dispute by way of written submissions.

The claimant submitted that the respondent's nonteaching staff are its members and have attained a simple majority and the claimant has attained the threshold for recognition pursuant to article 41 of the Constitution which allow employees to join a trade union of own choice. On 16<sup>th</sup> July, 2012 and 12<sup>th</sup> September, 2014 the claimant sent the check off and draft recognition agreement to the respondent but have failed to deduct and remit union dues or sign the recognition agreement.

The respondent has not raised any issue(s) or sought clarification with regard to the recognition agreement. There are no objections noted despite several reminders. The defence that the respondent is willing to negotiate a CBA can only be done upon recognition of the claimant.

The claimant also submitted that the respondent has been deducting and remitting union dues and on this basis the claim should be allowed with costs.

The respondent submitted that by letter dated 15<sup>th</sup> April, 2013 the claimant forwarded a draft recognition agreement and in reply sought for patience as the BOM wanted to discuss the matter. The respondent was not opposed to the recognition agreement but wanted to understand it.

Recognition of the claimant must be by recruiting a simple majority of unionisable employees pursuant to section 54(1) of the Trade Union Act [Labour Relations Act] as held in the case of **Kenya Petroleum Oil Workers Union versus Kenol Mahavir Service Station & another [2017] eKLR**. The claimant had not submitted its constitution to establish the sector it represents and this led to the respondent's request to deliberate the matter at the board level. It is not sufficient for a trade union to refer and cite it has attained simple majority, evidence must be submitted as held in **Kenya Shoe & Leather Workers Union versus Crown Industries Limited & another [2017] eKLR**.

The respondent also submitted that prior to the deduction and remittance of union dues the respondent had raised several other non-monetary functions the claimant ought to have addressed with its members in their employment. There are potential public policy issues with regard to deductions from an employee's wages as the claimant lacks the visibility and confidence in respect to its intentions and has refused to engage and negotiate a CBA. The claim should be dismissed.

### **Determination**

As noted above, the claim was addressed by way of written submissions as the sole issue for determination is the recognition of the claimant by the respondent. Also, there is no defence on the records.

The above noted, recognition of a trade union by an employer is regulated in law and under section 54 (1) of the LRA as follows;

#### **54. Recognition of trade union by employer**

*(1) 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.*

The trade union seeking recognition by an employer must recruit and attain a simple majority of members from the unionisable employees. The trade union must also operate in the given sector of the employer.

In the case of **Kenya Hotels and Allied Workers Union v Tourism Promotion Services (Management) Limited t/a Serena Lodges and Hotels; Kenya Union of Domestic, Hotels, Educational Institutions and Hotel Hospital Workers & another (Interested Parties) [2020] eKLR** the court held that;

*... the court declined to grant the prayer for recognition on ground that the claimant did not prove that she had recruited simple majority of the employees within the members of the employers' association. The court stated that: -*

***“For the Claimant to qualify for recognition by the 2<sup>nd</sup> Respondent, it must prove that it has achieved a simple majority of either 50% of the 2<sup>nd</sup> Respondent's member organizations or of the employees of the 2<sup>nd</sup> Respondent's members. The court cannot hand the claimant recognition without it proving that it has achieved a simple majority as this would contravene both Article 41 of the Constitution and section 54 of the Act”***

In the case of **Kenya Union of Entertainment and Music Industry Employees versus Bomas of Kenya Limited [2018] eKLR** and in the case of **Kenya National Union of Nurses versus County Public Service Board Homabay [2018] eKLR**

the courts held that for a trade union to be recognised by the employer it must meet the threshold of section 54(1) of the LRA.

In this case, the claimant sent check off forms to the respondent on 16<sup>th</sup> July, 2012. The list has 19 listed persons. There is no contradiction as to whether these names and list comprise the total number of nonteaching staff of the respondent for the claimant to claim recognition.

There must be recruitment of a simple majority of the total unionisable employees for recognition to follow.

As submitted by the respondent in the case of **Kenya Shoe and Leather Workers Union versus Crown Industries Limited & Another [2017] eKLR** a trade union claiming to have achieved a simple majority must submit evidence in this regard. The court held that;

*Attainment of a simple majority for purposes of recognition is a matter of evidence...It follows therefore that a trade union pursuing recognition must lay before the Court documentary evidence that it has recruited a simple majority of the unionisable employees in the employment of the employer from which it seeks recognition.*

It should also not apply automatically that a trade union is fit and proper to cover the employee's interests and hence seek automatic recognition by the employer. The trade union must demonstrate that it covers such industry and sector and hence imperative to forward its constitution to the employer at the time of seeking recognition. In the case of **Kenya Petroleum Oil Workers Union v Kenol Mahavir Service Station and Another [2017] eKLR** the court held that;

*Section 54 provides for the threshold for recognition of a trade union being recruitment of a simple majority of members and taking into account the sector in which the employer operates. In the present case it is unfortunate that the Claimant has not supplied a copy of its constitution to the court for the court to determine the sectors that it is authorised to cover.*

In this case, save to share a draft recognition agreement, the claimant failed to share its union constitution with the respondent.

**Accordingly, the court finds no matter sufficient to compel the respondent to recognise the claimant. The parties shall return to the shop floor and address. Where simple majority threshold is achieved, the claimant is at liberty to move the court under the provisions of section 54 of the Labour Relations Act, 2007. The instant suit is dismissed. Each party shall bear own costs.**

Delivered in open court at Nairobi this 11<sup>th</sup> day of February, 2021.

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....