



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

AT ELDORET

COURT NAME: ELDORET LAW COURT

CAUSE NUMBER: ELRCC/41/2020

CITATION: KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS VS DHAVAL WHOLESALERS LIMITED

RULING

1. Concurrently with the statement of claim dated 1st October, 2020, the Claimant filed a Notice of Motion seeking orders among others that the Court issues orders restraining the respondent from victimizing, intimidating, disciplining or terminating, the service of Claimant's members whose names appear on the check-off forms on account of their union membership.

2. The application was supported by the affidavit of Rogers Ombati who deponed on the main that

- i. THAT I am an officer of the Claimant/Applicant Union in charge of membership recruitment in the North Rift region and did coordinate and supervise the recruitment of the Respondents employees to join the Claimant/Applicant Union.
- ii. THAT the Claimant /Applicant recruited 15 Unionisable employees of the Respondent out of a possible 17 and that the said employees acknowledged that membership by signing the Claimant/Applicant's check-off sheets as proof of their members.
- iii. THAT vide a letter dated 22nd February, 2019 he Claimant/Applicant check-off forms to the Respondent for the purpose of deduction and remittance of union dues.
- iv. THAT on 18th February, 2019 the Claimant/Applicant addressed the Respondent over the Trade union membership and sent a draft copy of the model or Draft Recognition Agreement for their study and ensuring signatures but the Respondent declined to allow the meeting for the purpose of signing the Recognition Agreement.
- v. THAT the Claimant/Applicant made every effort to have the issue resolved at the party's own level but Respondent frustrated every effort forcing the Claimant/Applicant to report a trade dispute to the state Department of Labour under Section 62 of the Labour Relations Act on 23.10.2019.
- vi. THAT the trade dispute was accepted and the ministry of Labour endeavored to effect settlement conciliator.
- vii. THAT the conciliators convened several meetings in an attempt to amicably resolve the dispute but the Respondents remained adamant and refused to recognize the union and deduct union dues.
- viii. THAT the conciliator was left with no option but to issue a certificate of Unresolved dispute under section 69 of the Labour Relations Act, 2007.
- ix. THAT the Claimant/Applicant has exhausted all the laid down machinery/procedures in seeking for the Recognition Agreement, deduction and remittance of union dues with the Respondent but all in vain.

3. The respondent filed a replying affidavit through one Tireru Gasrani who deponed in the main that: -

- i. THAT I am the director of DHAVAL WHOLESALERS LIMITED hence competent to swear this affidavit.
- ii. THAT I have the authority of the directors of DHAVAL WHOLESALERS LIMITED to swear this affidavit on their behalf.
- iii. THAT from the list attached of 15 members these are employees from different organizations leaving on 7 members as

employees of Dhaval Wholesalers Ltd.

- iv. THAT employees have denied being members of the Claimant's Union and have opposed being subjected to deduction of salary.
- v. THAT the stalemate between the company and the Union arose out of the unverifiable list of its purported members and we could not agree as the Union demanded recognition without achieving the threshold for recognition.
- vi. THAT the application is pre-mature and unmerited hence should be dismissed.

4. In his submission in support of the application Mr. Kavuvi for the applicant submitted that section 54(1) of the Labour Relations Act is phrased in mandatory terms that once a trade union attains simple majority which is 51% of all unionisable employees the employer is legally compelled and duty bound to recognize the union.

5. According to the Claimant it recruited 88% of all unionisable employees of the respondent which is far above the mandatory threshold of simple majority required by law. The respondent only disputed the number of possible unionisable employees employed by the respondent but did not provide the actual number of employees in their employment hence the Claimant maintained that the number of possible unionisable employees in respondent's employment was seventeen.

6. Further, in the replying affidavit the respondent provided names of employees who are from different organizations. It was imperative for the Court to take cognizance of the fact that only five employees out of fifteen recruited were disputed. Even after reducing the number of Claimant's simple majority with ten unionisable employee in the respondent's employment.

7. Mr. Kavuvi further submitted that none of the employees in the respondent's employment and who are members of the Claimant have withdrawn their union membership. Withdrawal from a trade union membership was governed by law and has a procedure set out under Section 48(6,7 and 8) of the Labour Relations Act and an employer cannot withdraw from the union on behalf of employees or allege employee's withdrawal from a trade union without the notices required under Section 48(6) and (7).

8. Mr. Martin for the respondent on the other hand submitted that for the Claimant to be recognized as a Union it must prove that it had recruited a simple majority of Unionisable employees. The Claimant claimed to have recruited fifteen of respondent's employees. The respondent refuted this claim and stated that of these fifteen members the Claimant claim to have recruited five are not employees of the respondent leaving ten on the list and of the ten only seven are in the employment of the respondent hence the Claimant had not met the legal threshold for simple majority of unionisable employees.

9. Under article 40(2) of the Constitution, every worker has the right among others to form, join or participate in the activities and programmes of a trade Union. This is a right which is personal to the worker and can only be exercised by the worker himself. The respondent alleged that some its unionisable employees have refuted the allegation by the Claimant Union that they signed the check-off forms evincing their intentions to join the Claimant Union. The respondent however did not produce before the Court any evidence or material in support of this allegation. As stated above, the right to join or not join a trade Union is exercisable by the employee personally hence where there is an allegation that a worker has refuted an allegation that it joined a union such worker ought to communicate such decisions in the form that any adjudicating authority can peruse and persuade itself that indeed such worker refuted such allegation. In the case before me, no such evidence was presented.

10. On the issue of recognition, this Court has severally observed that recognition is mandatory once the Union concerned has shown that it has recruited simple majority of Unionisable employees in an organization.

11. The respondent contended that out of the fifteen unionisable employees allegedly recruited by the Claimant Union, five were not its employees. The respondent however apart from the allegation, did not produce any evidence to support the allegation that indeed the five were employed elsewhere. In any event if as conceded the respondent had seventeen Unionisable employees and it is true that five were not in respondent employment, ten employees still work out to 58% which is above the required minimum threshold.

12. To this extent, the respondent is bound by section 54(1) to recognize the Claimant Union.

13. In conclusion the court hereby orders the respondent to recognize the applicant Union for purposes of collective bargaining and further that the respondent remits to the Claimant Union arrears of Union dues from March ,2019 to date and further that the respondents do continue to so deduct Union dues from the Claimant's members as per the check-off forms and remit the same to the Claimant Union's designated account.

14. The determination of this application renders the main claim redundant and the same is hereby deemed to finally decide the main claim.

15. It is so ordered.

DATED AT ELDORET THIS 12TH DAY OF MAY 2021

DELIVERED AT ELDORET THIS 12TH DAY OF MAY, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA