REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E099 OF 2021

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

HYPERMART LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 8th December 2020 seeking to be heard for Orders:

1. Spent.

2. THAT pending hearing and determination of this matter, this Hon. Court do and hereby restrains the Respondent from threatening, harassing, intimidating, coercing, victimizing and /or terminating the services of their employees on account of Trade Union Membership.

3. THAT pending hearing and determination of this matter, this Honourable Court do and hereby restrains the Respondent from any action intended to force their employees who have already acknowledged their Trade Union membership to withdraw such membership unwillingly and involuntarily.

4. THAT an Order do and is hereby issued directing the Respondent to deduct and to remit union dues from their employees who have already acknowledged their union membership by signing the requisite check off sheets availed to them on 14th February 2020.

5. Costs of the application be in the cause.

2. The Application is premised on the grounds that the Claimant/Applicant Union represents employees in shops and supermarkets and the Respondent herein is engaged in supermarket business and that the Respondent's unionisable employees registered their Union membership with the Applicant between November, 2019 and 9th February 2020 by completing and signing the requisite check off sheets which were then served on the Respondent on 14th February 2020 to effect deduction and remittance of union dues. That the Applicant further addressed the Respondent on 5th March 2020 and enclosed a copy of the Draft Recognition Agreement for their study and that it also proposed a joint meeting for 3rd March and 11th March 2020 for introduction and signing of Recognition Agreement respectively. That the Respondent however declined the proposal and instead warned the Applicant against meddling in its business, threatened it with prosecution for alleged forgery and further ordered it to recall its letter of 5th March 2020. The Applicant asserts that it then reported existence of a Trade Dispute to the Ministry of Labour for conciliation on 26th May 2020 and after the conciliator was appointed on 22nd June 2020, fully cooperated and attended all convened conciliation meetings. That however during the conciliation process, the Respondent terminated the services of 14 employees identified to have recruited their colleagues to join the Applicant Union and that the Respondent also sought to force the remaining members to withdraw their union membership. It further asserts that on 16th November 2020, the conciliator released a biased report which the Claimant/Applicant rejected hence this dispute before the Court. The Application is supported by an affidavit sworn by the Claimant/Applicant's Assistant Secretary General, Mike Oranga who is the in-charge of membership recruitment and the one who coordinated and supervised the recruitment of the Respondent's employees as members of the Union. He depones that the Application herein is brought with regard to the constitutional right of workers to enjoy their fundamental right of freedom of association and that it is in the interest of justice that the reliefs sought herein be granted.

3. The Respondent is opposed to the motion and filed a Replying Affidavit sworn on 12th March 2021 by its Head of Human Resources, Urbanus Kioko. He depones that out of the Respondent's workforce of 179 employees, the Claimant/Applicant has only managed to recruit to its membership 20 employees and which number is below the 50%+1 legal threshold required for recognition. He avers that the Respondent questions the authenticity of the check-off forms attached to the Claimant's application because the Respondent is in possession

of signed Statements made by some of its employees who do not wish to have their union dues deducted and remitted to the Claimant Union. The deponent asserts that the Conciliator's report also confirmed there were employees of the Respondent who had either denied being members of the Claimant union and/or withdrawn their membership from the Union. That the consequence of the Conciliator's finding was that the Claimant had not met the minimum threshold for recognition and that the Respondent was therefore well within its right not to sign the Claimant's recognition agreement. He further avers that that the Respondent cannot term the Conciliator's report as being biased without setting out cogently the basis or evidence for imputing such bias. He denies that some employees have been victimised on account of their membership in the Applicant union or that the Respondent has violated any of its employee's constitutional rights and asserts that the Claimant/Applicant has not produced any evidence in support of these allegations. He avers that the 14 employees referred to by the Claimant/Applicant were declared redundant for reasons well-articulated in the Respondent's defence before a different Court in **ELRC Cause E663 of 2020 KUCFAW *v* Hypermart Limited (Ramtons)**. He further avers that the Claimant has filed the instant Application and suit prematurely and which calls for dismissal of the Application with costs to the Respondent.

4. The Claimant/Applicant submits that it has met the simple majority threshold set under Section 54 of the Labour Relations Act, 2007 as it has in its membership, 114 out of the 158 unionisable employees of the Respondent and which constitutes 72.2%. That its actions leading to reporting of a trade dispute were pursuant to the provisions of Section 48 of the Labour Relations Act but the Respondent has declined to deduct and remit union dues from all its unionisable employees who signed the check off sheets. It further submits that there is no provision in law requiring an employer to summon union members to confirm in their presence whether they are members of a union as such kind of action amounts to intimidation and that the law only requires an employer to stop remitting union dues upon an employee withdrawing their union membership. That if indeed the signatures in the check-off sheets were forged, the said union members should have been the ones to approach the union with the issue and not make such confession to the Respondent without any notice to the union. It is the Claimant/Applicant's submission that Article 41 of the Constitution of Kenya and Sections 4 & 5 of the Labour Relations Act guarantee employees the right of Trade Union membership and to this end, no employer should be allowed to threaten and intimidate employees in the manner and magnitude with which the Respondent has acted. The Claimant/Applicant submits that a grant of prayers (ii) and (iii) in the Application is therefore necessary in the circumstances and further because the Claimant/Applicant has not received any letter of withdrawal from any union members, for which prayer (iv) becomes extremely necessary. That this Court should allow the application at this stage so as to protect the Respondent's employees against acts of intimidation and victimization and in meeting the requirements under Section 48 (3) of the Labour Relations Act, 2007.

5. The Respondent on the other hand cites the case of **Kenya Chemical & Allied Workers Union *v* Strategic Industries Limited [2016] eKLR** where Linnet Ndolo J. observed that a trade union pursuing recognition must lay before the Court documentary evidence that it has recruited a simple majority of the unionisable employees of the employer from which it seeks recognition and that in the absence of tangible evidence of recruitment of a simple majority, the Court has no basis to order recognition. The Respondent further submits that Section 54(1) of the Labour Relations Act, 2007 provides that an employer shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees. The Respondent submits that it has on its part pointed out irregularities in the lists provided by the Claimant and also adduced statements by its employees but which discrepancies the Claimant has failed to explain and only reiterated its right to recognition. That the Claimant has also failed to produce credible evidence to confirm it indeed validly secured the signatures of the employees without coercion or fraud and that consequently, the check-off forms are *prima facie* invalid and void. That the Court in the case of **Nairobi ELRC Cause No. 127 of 2013, Kenya National Private Security Workers Union *v* Watchdog Limited [2018] eKLR** stated that in terms of Sections 106, 107, 108 and 109 of the Evidence Act, Cap 80 of the Laws of Kenya, he who alleges must prove on a balance of probabilities the allegations for the Court to find in their favour. The Respondent submits that the Claimant/Applicant has further not established before this Court that it has recruited a simple majority of the unionisable employees considering that the evidence of the check-off forms has been rebutted. Further, that the Claimant/Applicant has failed to prove the alleged bias on the part of the Conciliator. It also cites the Court of Appeal case of **Nairobi Civil Application No. 12 of 1978, CMC Aviation Ltd *v* Kenya Airways Ltd (Cruisair Ltd) [1978] eKLR** where Madan JA (as he then was) held that pleadings contain the averments of the parties concerned and until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them and that proof is the foundation of evidence. The Respondent further relies on the case of **Nairobi HCCC 232 of 2012, Alfred Kioko Muteti *v* Timothy Miheso and Another [2015] eKLR** where the Court found that it is trite law that he who alleges must prove, which burden does not shift to the adverse party even if the case proceeds by way of formal proof and/or undefended. The Respondent further submits that the unionisable employees have the freedom to leave the Respondent union. It cites the case of **Bakery, Confectionery, Food Manufacturing and Allied Workers Union [K] *v* Mombasa Maize Millers Limited & Another [2017] eKLR** where Rika J. held that an employee has the right to join a trade union of their choice as well as leave the said union. That such freedom has been aptly set out in several decisions of the ELRC such as in **Scientific Research International Technical & Allied Workers Union *v* Kenya Agricultural Research Institute & Another [2013] eKLR**. The Respondent urged the dismissal of the motion with costs.

6. The matter before me is one of recognition of the trade union by the employer. A recognition in terms of Section 54(1) of the Labour Relations Act is where the Union has recruited a simple majority of the unionisable employees of the employer/enterprise. In this case, the employer asserts that the Union has not recruited 50%+1 to meet the threshold under Section 54(1) Labour Relations Act. The Conciliator who heard the parties made a determination that was to the effect that the Union has recruited 20 employees out of a total of 179 employees. This is below the requisite minimum for recognition and as such this does not meet the threshold for recognition in terms of Section 54(1) of the Labour Relations Act. The Claimant Union's motion is therefore devoid of merit and is accordingly dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2021

NZIOKI WA MAKAU

JUDGE