



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 51 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

KUDHEIHA WORKERS.....CLAIMANT

VERSUS

UNITED STATES INTERNATIONAL UNIVERSITY-AFRICA (USIU)....RESPONDENT

JUDGMENT

1. The Claimant herein is a trade union registered under the Labour Relations Act to represent employees in the sectors as set out in the union's constitution. The Respondent is a private university established pursuant to the provisions of The University Act and its employees are eligible to join the membership of the Claimant.

2. The Claimant alleges that the parties, prior to an about-turn by the Respondent, enjoyed cordial and harmonious industrial relations. That after allowing the Claimant to meet with the Respondents employees on two different occasions, the Respondent in compliance with the provisions of Sections 48(1), (2), and (3) of the Labour Relations Acts 2007 deducted and remitted trade union dues to the Claimants union from August 2017 and has continued to do so. That upon recruiting a simple majority of 74.1% of the Respondent's employees, the Claimant sent to the Respondent a recognition agreement for signature. That on 3rd October 2017 and 6th November 2017 the Respondent forwarded some letters purporting that some 14 members of the Claimant had revoked their membership. That the said letters were not signed and cannot therefore be authenticated. The Claimant avers that it reported a dispute to the Minister for Labour which the Minister accepted and appointed a Conciliator.

3. The Claimant further alleges that on several occasions the Respondent failed to table its staffing levels to the Conciliator as requested by the Union. That despite the failure to table the aforementioned evidence, the Conciliator still returned a finding that the Claimant had not attained the simple majority required to allow the parties enter into a recognition agreement. That releasing of the report by the conciliator was premature as the union was waiting for the Respondent to table documentary evidence on its staff numbers and levels to enable the conciliator to prepare a comprehensive report. That efforts to have the conciliator review his report were in vain thereby necessitating filing of the instant suit.

4. The Claimant further avers that it is aware that the Respondent has contracted two entities, Suny Ahadi and Kenet to run its payrolls and that the employees of the two entities are not employees of the Respondent. In a nutshell, the Claimant avers that it had recruited a simple majority of the Respondent's employees and therefore qualified for recognition.

5. In the Memorandum of Claim dated 29th January 2017, the Claimant prays for orders that:

i. The Respondents be compelled to sign the Standard Recognition Agreement within 30 days from the date hereof and joint negotiations to commence within the next 30 days so that a Collective Bargaining Agreement is concluded and registered within the next 30 days proceeding.

ii. The Respondents be restrained from victimizing, coercing and or otherwise in any way from instilling fear and despondency amongst union members and other employee's on account of issues now before court or otherwise related as that amounts to unfair labour practice as there are direct consequences in default.

iii. The Respondent be compelled to respect the Claimant's role in Collective Bargaining with them as lawfully provided by the Kenyan Constitution Article 41(5), the Labour Relations Act No. 14 of 2007 Section 54(1) and 57(1) and indeed ILO conventions 154, 144 and 98 and 87, other enabling provisions governing collective bargaining and industrial relations engagements.

iv. *The Respondents be compelled to deduct and remit trade union dues based on the number of union members on the served check-off forms.*

v. *Cost of this application be in the cause.*

6. In response to the claim which was filed together with an application by way of notice of motion, the Respondent filed a Replying Affidavit sworn on 16th July 2019 by Yusuf Saleh where he avers that the Claimant's list of unionisable University employees as presented by the Claimant is inaccurate, since 12 of the employees listed are not unionisable. Further that among the 169 employees who signed the Check Off forms, 23 were not within the level of representation thereby reducing the Claimant's alleged numbers to 146 as at September, 2017.

7. The Respondent further claims that it had a unionisable population of 359 employees as at September, 2017 and not 228 as alleged by the Claimant. Therefore the 146 members recruited by the Claimant fell short of the required simple majority.

8. The Respondent admits receiving a Recognition Agreement from the Claimant but avers that it was not executed since the Claimant had not attained a simple majority as per the applicable law to compel the Respondent to sign the Recognition Agreement. The Respondent confirms that the parties herein had undergone conciliation where the Conciliator's finding was that the Claimant had not attained a simple majority to warrant the signing of a Recognition Agreement.

9. The Respondent avers that it has never threatened or intimidated its employees to leave the membership of the Claimant and that the correct position is that some of the employees voluntarily sent emails and letters to the Respondent's Human Resource Office notifying it of their withdrawal from membership of the Claimant. That the Respondent, in line with the legal provisions, has consistently remitted union dues to the Claimant for all its employees who are still members of the Claimant.

10. The Respondent therefore reiterates that the Claimant should intensify its efforts to recruit more of the Respondent's employees as well as maintain those already in the Union to enable it meet the required threshold since the Respondent has always been and is still ready to cooperate with the Claimant in that respect.

11. That the instant suit is therefore premature given that the Union is yet to meet the required threshold to move the Court. Further that had the Union met the threshold, there would be no need to move this Court as the Respondent would have no problem or hesitation in recognizing the Claimant and signing the Recognition Agreement. That as such, the Court's intervention would not be necessary. That indeed once the Claimant meets the requirements, the Respondent will readily, happily and willingly sign the subject Agreement. That in this regard, the Claimant is requested to enhance its efforts towards meeting the same rather than approaching the Court at this stage. That in the circumstances, the application as filed and presented before this Court is frivolous, vexatious, devoid of the requisite materials and amounts to a gross abuse of Court process for failing to establish any cause of action against the Respondent. The Respondent therefore, implores this Court to so find and to accordingly dismiss the claim with costs.

Evidence

12. The claim was at the request of the parties disposed of by way of written submissions.

Claimant's Submissions

13. The Claimant reiterates that at the time Claimant recruited 169 employees, the Respondent's unionisable employees were 228 and it had therefore attained a simple majority to warrant Respondent affording it Claimant recognition.

14. The Claimant submits that recognition should be determined based on the number of unionisable members against number of the unionized employees then and not against every other employee within the establishment. It further submits that the level of union representation is based on the organogram which gives the organizational structure. Counsel relies on the case of **Civicon Limited v Amalgamated Union Of Kenya Metal Workers [2016] eKLR** where the court of appeal held that:

"Unionisable employees must not be confused with the total work force engaged by the employer. Only members of staff who are eligible for membership (unionisable members) are targeted....It must be borne in mind that the trial court is only concerned with the numbers as at the time the claim is made. If verification has to be done it must relate to the number of employees stated in claim against that asserted by the employer."

15. It is the Claimant's submission **that** the numbers to be relied on should be as it were in **September 2017** when the Claimant sought recognition. Further that once the union met the required threshold, in September, 2017, the Respondent had no choice but to accord the union recognition forthwith. That delay in affording the union recognition and continuous victimization of union members was done in order to cow them to abandon union membership which amounts to unfair labour practice.

16. The Claimant further submits that the Respondent has given two conflicting numbers of unionisable employees, being **359** in their affidavit of **16th July 2019** and **414** in their report to the conciliator.

17. It is also the Claimant's submission that on receipt of the check off forms the Respondent was obligated to make deductions and remit union dues on the actual membership within 30 days of service of the check off forms (Form-S) as provided by section **48(3)** of the Labour Relations Act, 2007 and Section 19 of the Employment act 2007. That individual's right of association as given by the Constitution of Kenya 2010 Article 36(1) is paramount and the Respondent cannot decide who to belong to the union by failing to remit members union dues. That it is the right of every worker to belong to an association of choice as prescribed by the statute laws and the Constitution 2010 under Article

36 (1) which states:

Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

18. That withholding of union dues and failure to deduct and remit the same is unlawful, unconstitutional and is against the rules of natural justice.

Respondent's Submissions

19. On the requisite threshold that must be met to warrant the signing of a Standard Recognition Agreement the Respondent's counsel submits that the Claimant is required to attain a simple majority (being 50%+1) of the Respondent's employees. That contrary to the Claimant's averment as above the Claimant is yet to meet the threshold since:-

a. The Claimant's list of unionisable Respondent's employees is inaccurate since 12 of the employees listed are not unionisable.

b. Among the 169 employees who signed the Check-Off forms 23 of them were not within its level of representation; since the unionisable members fall within the bracket of grades S5 to S9.

c. The Respondent at the time of the recruitment had 359 unionisable employees as at September, 2017 and not 228 as alleged by the Claimant. The Claimant, therefore, recruited 146 employees out of the Respondent's 359 unionisable employees. This makes it only 41% of the total of the Respondent's unionisable members, which is far from simple majority members threshold required.

d. The exact number of the Respondent's unionisable members is as produced in the Replying Affidavit and the said number does not include Kenet and Suny-Ahadi staff (who are outsourced employees and, therefore, not unionisable employees of the Respondent as Claimed by the Claimant.)

20. The Respondent further submits that being the employer, it is the only party with privy to the information regarding the number of its employees. That the Claimant cannot, therefore, purport to have the correct number of the Respondent's employees when, in fact, it is not privy to such information. That even assuming that the Respondent was to accept the Claimant's allegation that it recruited 169 members, which is in any event not accurate given the foregoing, the Claimant would still not meet the threshold of 50%+1 since 169 out of 359 employees would still be well below 50%.

21. The Respondent cites Section 54(1) of the Labour Relations Act, 2007 which stipulates that:-

An employer, including an employer in the Public sector, shall recognise a trade union for purposes of Collective Bargaining if that trade union represents a simple majority of unionisable employees.

22. The Respondent further relied on the decision in the case of **Kenya Hotels and Allied Workers Union v Attorney General & 6 others [2015] eKLR** where the majority decision held that:-

"...For the Claimant to qualify for recognition by the 2nd Respondent, it must prove that it has achieved a simple majority of either 50% of the 2nd Respondent's member organisations or of the employees of the 2nd 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."

23. The Respondent therefore submits that it is not obligated to sign the Recognition Agreement at this stage since the Claimant is yet to meet the required threshold.

24. On whether the Respondent has been engaging in unfair labour practices against its employees the Respondent submits that it has never threatened or intimidated its employees to leave the Claimant and that contrary to the Claimant's assertions, the correct position is that some of the employees voluntarily sent emails and letters to the Respondent's Human Resource notifying the Respondent of their withdrawal from membership of the Claimant. The Respondent further submits that it is a law abiding corporate body that recognizes the rights enshrined under the Bill of Rights, the rights of its employees to join and/or leave trade Unions and, therefore, did not in any way coerce its employees into joining or leaving the Claimant as averred.

25. On the issue of remittance of union dues, the Respondent submits that it has honestly and consistently been remitting union dues to the Claimant for all its employees who are still members of the Claimant. That the amount remitted to the Claimant has, however, dropped with time as a result of the Claimant's members opting out of its membership. That the Claimant cannot, therefore, claim bad faith on the part of the Respondent as there is no evidence of such. The Respondent relies on Section 48(6) of the Labour Relations Act which states that:-

An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.

26. The Respondent also relied on the case of **Tailors and Textiles Workers Union v Global Apparels EPZ Limited; Fidelis Omwamba Onsongo & 6 others (Proposed Interested Parties) [2019] eKLR**, where it was held as follows:-

"It is thus clear that an employer cannot deduct union dues from a member who has resigned from the union. The union members

write these resignations to their employer and the employer has the extra duty to notify the union by forwarding a copy of the notice of resignation to the trade union.”

27. The Respondent submits that cannot be compelled to remit union dues for employees who are no longer the Claimant’s members. Accordingly, counsel submits that the instant Claim raises no cause of action against the Respondent, does not rise to the required threshold to warrant the grant of the prayers sought therein, is unmerited and is, in essence, an abuse of the Court’s process and should be dismissed with costs to the Respondent.

Determination

28. I have considered the pleadings and submissions filed by the parties. The issues in dispute in this suit are

- a. Whether the Claimant has met the requisite threshold to warrant the signing of a Standard Recognition Agreement with the Respondent;
- b. Whether the Respondent has been engaging in unfair labour practices against its employees by instilling fear and despondency on its employees who are members of the Claimant;
- c. Whether the Respondent ought to remit union dues in respect of the twenty three (23) employees whose membership it disputes.

Whether the Claimant has met the requisite threshold to warrant the signing of a Standard Recognition Agreement with the Respondent;

29. Section 54 of the Act provides for recognition of trade unions as follows –

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.

30. It is therefore clear that for a union to qualify for recognition it must prove that it has recruited a simple majority of the employees of the Respondent.

31. In the instant case, the Claimant pleaded that it had recruited more than 50% +1 majority of the Respondent’s employees. It produced the check off forms signed by 169 members. The Respondent did not deny that the names of the employees in the check off forms were those of its employees. The Respondent, however, disputed the total number of unionisable staff and claim that they had a total of 359 unionisable employees and not 228 as claimed by the Claimant. The Claimant asserts that the figure of 228 is based on the records from the Respondent’s organogram and the Respondent’s labour report. On the other hand the Respondent attached a copy of its payroll as at September 2017. Notably the said payroll summary has 359 names. The Claimant refutes this figure and claims that the staff working at the cafeteria do not form part of the Respondent’s Staff as they are outsourced.

32. It is trite that the information as to the number of staff in any organization is privy to the employer. The Onanogram attached by the Claimant does not indicate the number of the Respondents’ employees. It only gives the organizational structure of the Respondent. It is however imperative to note the issue of duplication of the names in the attached payroll. A studious examination of the payroll summary confirms the allegation that 8 names have been duplicated as pointed out in Paragraph 6 (D) of the Claimant’s response to Replying Affidavit. This therefore reduces the number of the Respondent’s unionisable employees to 351.

33. It is not in dispute that only members who fall under Grades No S5-S9 are eligible to join the Claimant. The Respondent claims that 23 of the 169 members were not unionisable as they do not fall under Grades No S5-S9. It lists the 23 names of the 23 employees at paragraph 7 of its Replying Affidavit. The Respondent has not provided the Grades for the 23 employees. A close look at the payroll summary vis-à-vis the 23 does not provide an answer as to the applicable Grades for the 23 members. While most of the named 23 members are not included in the payroll list, the ones in the list fall within grades S5-S9 which contradicts the Respondent’s assertion that the 23 members fall outside Grades 5-9. For instance the Grade for Josephat M. Mosweta (number 292 in the payroll list) is Grade 5 while Wilson Komba Ochingwa (number 1 on the payroll list) falls under grade 5 contrary to the allegation by the Respondent that they do not fall within grades S5 to S9.

34. Having failed to provide the applicable grades for the 23 members the court must conclude that all the 169 members recruited by the Claimant fall under grades S5-S9. This, however, has no major consequence as having recruited 169 out of 351 unionisable employees the Claimant is yet to meet the simple majority requirement by at least seven members and as such its prayer for recognition fails.

Whether the Respondent has been engaging in unfair labour practices against its employees by instilling fear and despondency to its employees who are members of the Claimant;

35. Section 11 of the Labour Relations Act provides that –

In any proceedings under this Act—

- a. a party that alleges that a right or protection conferred by this part has been infringed shall prove the facts of the conduct; and
- b. the party who is alleged to have engaged in that conduct shall prove that their conduct did not infringe any provision of

this Part.

36. It is the Claimant's allegation that the Respondent instilled fear its employees thereby forcing them to resign from membership of the Claimant. The Claimant did not table any evidence to prove this allegation and accordingly this prayer fails.

Whether the Respondent ought to remit union dues in respect of the 23 employees whose membership it disputes

37. Section 19(1)(f) and (g) of the Employment Act, 2007 obliges an employer to deduct from the employees' wages:

(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;

(g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

38. The employee is free to require the employer to make deductions from his wages as provided in the aforesaid Section. Further, Section 48 of the Labour Relations Act provides that employers are under an obligation to set up a check off system for deduction and remittance of such union dues from the wages of employees who have signed the check off form, provided the same has been signed by the employee. Section 48(6) of the Labour Relations Act states that:-

An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.

39. It is not in dispute that 169 employees signed check off forms. The Respondent has attached evidence that it has been remitting union dues to the Claimant for its employees who are still members of the Claimant. The Respondent, however, failed to remit union dues for 23 employees as the Respondent claimed that they did not fall under grades S5-S9 hence could not join the Claimant as its members. The Court has already returned a finding that there was no evidence to this effect and as such the Respondent ought to have remitted union dues for all 169 members who signed the check off forms.

40. The upshot is that the Respondent is directed to immediately deduct and remit union dues of all employees currently in its employment who have signed check off forms less those who have resigned from the union.

Conclusion

41. In conclusion, the Court makes the following orders –

i. The Respondent is directed to immediately deduct and remit union dues of all employees currently in its employment who have signed check off forms.

ii. The prayer for recognition has not been proved.

iii. The prayer for a declaration that the Respondent has been engaging in unfair labour practices against its employees by instilling fear and despondency to its employees who are members of the Claimant has not been proved.

iv. Other than (1) above, the claim is accordingly dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JULY 2021

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE