



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 89 OF 2019

KENYA SHIPPING CLEARING FREIGHT LOGISTICS AND

WAREHOUSES WORKERS UNION.....CLAIMANT

VERSUS

MULTIPLE ICD (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 10th December, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 27.11.2019 in person. The claimant alleged failure by the respondent to sign a recognition agreement with the claimant trade union. The claimant prayed for:

- 1) The respondent to accord formal recognition agreement to the claimant union forthwith.
- 2) The Honourable Court to set aside the conciliator's report and hear the case on merits.
- 3) The respondent to pay costs of the suit.

The claimant filed the memorandum of claim together with an application by way of a notice of motion seeking the same orders.

The respondent filed on 19.04.2021 the replying affidavit of Daniel Muasa, the respondent's Human Resource and Administration Manager and through Kishore Nanji Advocate.

On 03.11.2021 by consent order the application was dispensed with and further, the suit was to be determined upon pleadings and documents on record. Final submissions were filed for the parties.

The only issue for determination is whether the claimant has satisfied the statutory provisions to conclude a recognition agreement with the claimant.

Subsection 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. Subsection 54 (6) of the Act provides that a dispute as to the right of a trade union to be recognised for purposes of collective bargaining or cancellation of recognition agreement may be referred by the trade union for conciliation per Part VIII of the Act. Subsection 54(7) of the Act provides that if the dispute is not resolved by way of conciliation then the trade union may refer the dispute to the Court under a certificate of urgency. Subsection 54(8) of the Act states that when determining a dispute under the section, the Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.

The Court finds that in the instant case, the claimant reported a dispute and a conciliator was appointed. The Court further finds that in the instant case, the parties appear not to be in dispute that the union is the sector union. The only dispute is whether the claimant has recruited a simple majority of the respondent's unionisable employees.

The evidence is that the claimant has recruited some unionisable respondent's employees and the respondent has commenced some deduction and remission of the dues. The conciliator's report is dated 21.08.2019. The report shows that parties met on 2nd and 18th July 2019 and discussed the dispute but failed to resolve it. The claimant's case before the conciliator was that the claimant had recruited 209 out of 300

respondent's unionisable employees and the claimant therefore demanded signing of recognition agreement with the respondent. The respondent admitted to the conciliator that it had received from the claimant check off forms on 04.01.2019 and had 116 names and not 209 as alleged for the claimant. Further, the respondent had 284 unionisable employees and not 300 as alleged for the claimant. The respondent further urged before the conciliator that the claimant's check off list had the following anomalies:

- a) Those who had left employment as at recruitment – 7.
- b) Those who had left employment after recruitment – 22.
- c) Those in management and therefore not unionisable – 16.
- d) Those who had resigned from union – 10.
- e) Those whose names were repeated – 27.
- f) Those who had not signed – 11.
- g) Those not being respondent's employees (unknown) – 9.
- h) Total of those who should not be on the claimant's check off list – 102.

The respondent submitted to the conciliator that since those on the claimant's check off forms were 209, the valid number of recruited unionisable employees was 106. The simple majority of 284 being 143, the claimant had not yet met the threshold for concluding a recognition agreement with the respondent. The conciliator found as follows:

- a) The claimant had submitted it had recruited 209 out of 300 unionisable respondent's employees.
- b) But the respondent had produced a list of its unionisable employees totalling 284 and not 300 as alleged for the claimant.
- c) Seven lists of irregularly included 106 employees were tabled by the respondent as enumerated earlier in this judgment. The list was not disputed by the union.
- d) Further, **“As the management states, if the said irregular names are deducted from the list the union claims to have recruited (209 – 102) the result will be 106. Since the employer's records show that the unionisable employees are 281, out of that number 106 will form 37.3%”**. the conciliator then recommended, **“After due consideration of both parties' submission couple with my findings, I do recommend that the union put more effort to attain the threshold required for a formal recognition agreement. I further recommend that the employer deduct union dues from pay of those whose membership is not in dispute and remit the same to the union's account.”**

The claimant's case is that the conciliator found that the union had 106 validly recruited unionisable respondent's employees while the print out of employees' deducted union dues showed 124 unionisable employees. The 16 management staff were not established and while stating the unionisable employees were 284, the respondent had not stated the full work force.

The Court has considered the material on record. The Court finds that there is no reason to deviate from the material before the conciliator showing that the respondent's unionisable staff were 284 – and in any event 284 being more advantageous to the claimant towards meeting the threshold of simple majority. Second, by the claimant's own evidence as at conciliation the recruited unionisable employees and therefore for whom union dues were being paid were 124 and as per the printout for union dues for March 2019 being exhibit JT IV on the claim bundle. The conciliation meeting was held on 2nd and 18th July 2019 and taking the recruited unionisable staff as at 124 and the sum of respondent's unionisable staff at 284, then the recruited employees amounted to $124/284 \times 100$ making 43.66% and thus falling short of the statutory simple majority for the parties to conclude a recognition agreement. The Court therefore finds that the conciliator's final recommendation that the claimant had to put in more effort to recruit more staff to meet the threshold for a formal recognition agreement with the respondent is found to have been well grounded.

The parties being in a forming industrial relationship, each will bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the claimant for orders:

- 1) The suit is struck out.
- 2) Each party to bear own costs of the suit.
- 3) The respondent to continue deducting and remitting union dues for duly recruited unionisable employees and the claimant at liberty to continue recruiting unionisable respondent's employees towards a simple majority necessary for recognition agreement for purposes of collective bargaining.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 10TH DECEMBER, 2021.

BYRAM ONGAYA

JUDGE