



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 62 OF 2020

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

VERSUS

MITRA ENTERPRISES LIMITED.....1ST RESPONDENT

MALIWA WORKFORCE SERVICE.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged this claim through a Notice of Motion application and a Memorandum of claim, both dated 12th August, 2020. The Respondent filed their response on 31st August, 2020. On 15th February, 2021, the Claimant filed an amended memorandum of claim followed by the Respondent's amended response on 22nd March, 2021.

2. The Claimant seeks a declaration that the 1st Respondent's failure to recognize it and deduct Union dues is unfair and unlawful. The Claimant also prays that the 1st Respondent is directed to sign a recognition agreement and commences deduction and remission of Union dues.

3. Parties sought to canvass the claim through written submissions. Both parties filed their written submissions.

The Claimant's Case

4. The Claimant's case is that it recruited 26 Unionisable employees out of a total possible 45 employees of the 1st Respondent to its membership.

5. The Claimant's case is that on various dates between 22nd February, 9th May and 20th June, 2021, it forwarded check off forms to the 1st Respondent duly signed by twenty-six (26) of the 1st Respondent's Unionisable employees for deduction and remittance of Union dues. The Claimant's further case is that the check off forms strictly conformed to the provisions of *Section 48 of the Labour Relations Act, 2007* and the Kenya Gazette Notice No. 11153 of 8th August, 2013 and No. 6912 of 2nd September, 2016.

6. The Claimant states that the number herein meets the simple majority threshold required under the Labour Relations Act, and pursuant to this threshold, the Claimant wrote to the 1st Respondent on issues concerning recognition. The Claimant states that the 1st Respondent declined to engage with them.

7. The Claimant further states that the 1st Respondent likewise declined to discuss their concerns on deduction and remission of Union dues, resulting in the Claimant reporting a trade dispute to the minister.

8. It is the Claimant's case that the Minister accepted the dispute and appointed C. Miwani of Kakamega labour office to act as a conciliator in the dispute. The Claimant states that the 1st Respondent failed and/or neglected to attend the conciliation upon invitation by the Conciliator, resulting in the conciliator issuing a certificate of unresolved dispute.

9. It is the Claimant's case that the 1st Respondent started victimizing and intimidating employees who had joined its membership and who were also forced to sign contracts of employment with the 2nd Respondent. The Claimant's states that the employees who refused to sign the

said contracts were sent away and told to only return when they were ready so to do.

The Respondent's Case

10. The Respondent's denies that the Claimant has recruited 51% of its employees to its membership. It is the Respondent's further case that the Claimant has not demonstrated that it had recruited a simple majority from its employ, as some of the names given in its list of membership are not their employees.

11. The Respondent states that some of the signatures appended to Claimant's list of membership purported to be from the 1st Respondent, are questionable. The 1st Respondent further states that the identity card numbers given therein are impossible to verify.

12. It is the 1st Respondent's case that although it did receive the recognition agreement from the Claimant, it could not sign it for reason that the Claimant did not demonstrate that it had recruited a simple majority of membership from its employment.

13. The 1st Respondent denies having been informed of the conciliation meeting which resulted in the issuance of the certificate of unresolved dispute.

14. The 1st Respondent avers that the Claimant has no *locus standi* to bring this suit for reason that it cannot establish that it has recruited a simple majority of membership from the Unionisable employees of the 1st Respondent.

15. The 1st Respondent denies victimizing and intimidating its employees on account of their membership to the Claimant's trade Union. The Respondent further denies forcing employees who had joined the Claimant's Union to sign employment contracts with the 2nd Respondent and asserts that the 2nd Respondent is a stranger to them.

Submissions

The Claimant's Submissions

16. It is submitted for the Claimant that once an employer is properly served with check off forms and a notice in compliance with Form S, as per the third Schedule to the Labour Relations Act, 2007, the employer is legally and duty bound to deduct and remit Union dues to a trade Union unless the employee withdraws or resigns from the membership of the trade Union.

17. The Claimant submits that none of the 1st Respondent's employees who had signed the check off forms, has left the Union or written to the 1st Respondent or the Claimant denying having signed the check off forms. The Claimant submits that the 1st Respondent cannot question the authenticity of their members signature, as they have themselves not disputed their authenticity.

18. It is submitted for the Claimant, that the 1st Respondent has not denied receipt of the check off forms and have therefore been denying the Claimant its lawful income since the year 2019, when it recruited its members from the employ of the 1st Respondent.

19. The Claimant submitted that remittance of Union dues is autonomous from recognition agreement per Section 48 of the Labour Relations Act, which law does not make recognition a pre-condition for deduction of Union dues.

20. The Claimant submits that Articles 36 and 41(1)(5) of the Constitution guarantees rights to form, join and participate in the activities of a trade Union and further confers them with the right to engage in collective bargaining, possible only upon recognition.

The Respondent's Submissions

21. The Respondent submitted that the Claimant has not met the requirements of *Section 54 (1) of the Labour Relations Act*, to warrant recognition for purposes of collective bargaining. It is their submission that the Claimant has not recruited a simple majority of membership from its employment.

22. It is submitted for the Respondent that the total number of its employees is 64, 5 of whom are not Unionisable, which leaves a total of 59 employees. It is the 1st Respondent's submission that their Unionisable work force is 59 employees and not 45 as submitted by the Claimant and for this reason, it is submitted that the Claimant is not entitled to seek recognition from the 1st Respondent and therefore Union dues cannot be paid to the Claimant.

23. The 1st Respondent submitted that the Claimant's action of demanding that it signs a recognition agreement with them is premature and an abuse of process as the Claimant has not demonstrated that it has recruited 51% of the Respondent's employees to its membership.

24. It is the Respondent's submission that some of the names on the Claimant's check off list are not employees of the 1st Respondent. They submit that some have either resigned or left work or are unknown to the 1st Respondent.

Determination

25. The Issues for determination in this matter are:

- i. Whether the Claimant has satisfied the requirements of *section 54(1) of the Labour Relations Act, 2007*, by recruiting a simple majority of the respondents Unionisable employees to qualify for recognition
- ii. Whether the Claimant has met the requirements for deduction and remission of Union dues
- iii. Whether the Claimant is entitled to the reliefs sought
- iv. Who bears the costs of the suit.

Whether the Claimant has satisfied the requirements of Section 54(1) of the Labour Relations Act, by recruiting a simple majority of the Respondents Unionisable employees to qualify for recognition

26. Section 54 (1) of the LRA provides as follows in regard to recognition agreements:

“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.”

27. The 1st Respondent submitted that the Claimant has not recruited a simple majority of membership from its Unionisable employees. The Respondent averred that it has a total work force of 64 employees out of which, 5 are not Unionisable, leaving a total of 59 Unionisable employees.

28. The 1st Respondent submitted that some of the employees named in the Claimant’s check off list had either resigned or otherwise left the service of the 1st Respondent and therefore are not employees of the 1st Respondent, resulting in the conclusion that the Claimant had not met the 51% threshold for recognition.

29. The 1st Respondent’s supplementary list of documents, shows that a total of Nine (9) employees left the service of the 1st Respondent for various reasons including termination, resignation, retirement amongst other reasons, between the month of April, 2019 and August, 2021.

30. Assuming that the Claimant had recruited 26 Unionisable employees of the 1st Respondent to its membership as at June, 2019, less the ten that have been proved to have left the service of the Respondent as at August, 2021, the remaining members out of 26 would be 16 out of a possible 45 Unionisable employees. This number is below the 51% threshold required under Section 54 of the Labour Relations Act. The Court of Appeal in the case of **Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union [2016] eKLR** held as follows in regard to recognition:

“To be recognized as the representative trade Union of the workers of a person or entity, Section 54 of the Labour Relations Act stipulates that the minimum number of workers willing to join the Union must be a simple majority or 51% of the work force.”

31. I find and hold that the Claimant has not met the simple majority threshold required under Section 54 of the Labour Relations Act, 2007, for purposes of recognition and collective bargaining.

Whether the Claimant has met the requirements for deduction and remission of Union dues

32. Deduction of Union dues is governed by Section 48 (2) and (3) of the Labour Relations Act, which states as follows:

“(2) A trade Union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the Union to—

(a) deduct trade Union dues from the wages of its members; and

(b) pay monies so deducted—

i. into a specified account of the trade Union; or

ii. in specified proportions into specified accounts of a trade Union and a federation of trade Unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade Union dues from an employee’s wages within thirty days of the trade Union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.”

33. The Claimant’s submission is that it has recruited 26 Unionisable employees of the Respondent to its membership. Arising from the separation discussed earlier, the Claimant is left with about 16 members in employment of the 1st Respondent.

34. The 1st Respondent submitted that for not having attained a simple majority of membership from its employment, the Claimant is not entitled to recognition and by extension deduction and remission of Union dues. A reading of Section 48(2), reveals that recognition and deduction and remission of Union dues have separate and distinct requirements. For deduction and remission of Union dues, all a trade

Union needs to do, is recruit at least more than 5 employees, which action obligates an employer to deduct and remit Union dues.

35. The Claimant has about 16 members working for the 1st Respondent. The 1st Respondent is bound to deduct Union dues from these members and remit to the account of the Claimant (Union) recognition notwithstanding. This position was affirmed in the case of **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (Kudheiha) v British Army Training Unit Kenya [2015] eKLR**, where Mbaru J held:

“The question of deduction of Union dues and that of recognition of the Union by an employer are separated in law. Under section 48 of the Labour Relations Act, an employer is bound to remit all Union dues deducted to the Union account irrespective of recognition as under this part, where there are more than 5 employees in the membership of a Union, the employer should make deductions and remit to the Union. The deduction and remittance of Union dues from employees who have acknowledged Union membership should be based on the Minister for Labour making an appropriate order through Kenya Gazette indicating the account to which such Union dues should be remitted. It does not require a recognition agreement between a Union and an employer. The duty on the Union is to submit to the employer the names and identity card numbers of the employees through the check-off forms.”

36. It is not disputed that the Minister for Labour made an order for deduction of Union dues vide gazette Numbers 11153 of 8th August, 2013 and No. 6912 of 2nd September, 2016.

37. I find and hold that the Claimant has recruited more than 5 members in the employ of the 1st Respondent. Consequently, I enter judgment for the Claimant compelling the 1st Respondent to henceforth deduct Union dues from the salaries of the current and future members of the Claimant’s Union and remit the same to the claimant’s account.

38. I decline the prayer to compel the 1st Respondent to pay the Union dues for the months when the dues were not deducted, as an employer does pay dues from its own account but from the employee’s salary.

39. The prayer to restrain the 1st Respondent from terminating or transferring Unionisable staff to the 2nd Respondent, has not been proved and the same fails and is dismissed.

40. Each party shall bear their own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9TH DAY OF DECEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Benjamin Tangara present for the Claimant

Mr. Wangoda Present for the Respondent

Christine Omollo- C/A