



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**IN THE EMPLOYMENT AND LABOUR COURT**

**AT ELDORET**

**ELRC NO 393 OF 2018**

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

**VERSUS**

**NEW YAKO SUPERMARKET .....RESPONDENT**

**J U D G E M E N T**

1. The Claimant union in their memorandum of claim filed on 19<sup>th</sup> December, 2018 averred among others that it approached the employees of the respondent on various dates in September,2017 and voluntarily recruited 49 members out of 60 translating to about 82% of the respondent's employees.
2. The Claimant consequently wrote to the respondent forwarding check-off forms and a standard recognition agreement for the purpose of effecting trade Union deductions and signing of the recognition agreement but the respondent refused. The respondent consequently reported a trade dispute on 19<sup>th</sup> April,2018 and a conciliator was appointed. The conciliator made her findings but the respondent remained adamant.
3. According to the Claimant, the respondent has since refused to deduct and remit union dues despite the fact that it was served with check off forms pursuant to section 48 of the Labour Relations Act.
4. The respondent on its part pleaded that it made known its denial of membership of the alleged workers to the Claimant upon receipt of check -off forms and standard recognition agreement. There was therefore no legal basis for the deductions to be affected after the employees denied being members of the Claimant. The respondent further stated that the disputed membership to the Claimant was deliberated upon by the conciliator
5. According to the respondent, the claim before the Court lacked merit for the reason that the membership forming the substation of the claim is disputed, the dispute between the respondents and its employees was resolved by the Labour office and their dues fully paid. Further some of the alleged members were no longer in the employment of the respondent hence the deductions were not legally tenable.
6. The factual basis of this claim and response thereto are contained in the affidavit of Mike Oranga sworn in support of the Motion dated 18<sup>th</sup> December, 2018 filed together with the claim and the replying affidavit of one Barrack Maganda filed on 5<sup>th</sup> February,2019 in response.
7. Mr. Oranga deponed on the main that:
  - a. **THAT** I am the Assistant Secretary General of the Claimant/Applicant Union and authorized to swear this affidavit.
  - b. **THAT** in September, 2017 the Claimant/Applicant recruited 49 out of 60 unionable employees of the Respondent translating to about 82%.
  - c. **THAT** the Respondent after being served with the check-off forms resorted to threatening and intimidating the employees whose names appear in the Claimant/Applicant's check off forms, which forced the Claimant /Applicant to complaint to the Respondent vide a letter dated 13/12/2017.
  - d. **THAT** the trade dispute was accepted and the Cabinet Secretary endeavored to effect settlement by conciliation. Consequently Ms. Joycelyn Mmatsi and Boas Musandu of Eldoret Labour Office were appointed to act as a conciliator.

e. **THAT** the conciliator concened 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.

f. **THAT** the Claimant /Applicant wrote to the concilators requesting them to release their findings and recommendations to move the dispute to the next level since the time given to them as conciliators had lapsed.

8. Mr. Maganda in reply deponed that:-

a. **THAT** the New Yako Supermarket Limited acquired its business from the former, Yako Supermarket in November, 2016.

b. **THAT** after the take-over the Respondent retained most of the former Yako Supermarket's employees for better running of the business.

c. **THAT** the Respondent experienced low business performance after the take-over hence could not meet its targets including sustaining the wage bill.

d. **THAT** the above informed the Respondent's decision to lay off some of its employees.

e. **THAT** the above predicament was duly communicated to the relevant authorities in compliance with the law.

f. **THAT** to the best of my knowledge and information I wish to state that the application before court is spent as the orders it seeks are not legally tenable for the reason that some of the employees whose employment it seeks to safeguard are either no longer in the employment of the Respondent or have denied the authenticity of the alleged agreement between them and the Union.

g. **THAT** the members who have left employment did so on grounds of 2 either.

h. **THAT** further to the above, for those who left employment on grounds of low business, due notice of the Respondent's intention to terminate their services was accordingly communicated to the relevant authorities.

i. **THAT** all the employees who left employment on either of the above grounds were duly paid all their terminal dues as required by law and do not have any claim against the Respondent.

j. **THAT** after termination the Claimant wrote to the Respondent concerning the amicable lay off of the employees and a meeting to that effect was scheduled.

k. **THAT** it was subsequently resolved that the employees whose services had been terminated be paid their terminal dues which were worked out and agreed upon.

l. **THAT** the agreed sum was thereafter paid by the Respondent to the Labour Office for onward transmission to the said employees.

m. **THAT** the Respondent has never signed any recognition agreement with the claimant as alleged or at all.

9. The dispute between the parties herein seem to revolve around recognition agreement and deduction of union dues.

10. Under Section 54(1) of the Labour Relations Act, an employer including an employer in the public sector shall recognize a trade union for purposes of collective bargaining if that union represents the simple majority of unionisable employees.

11. Whereas the Claimant contended that it had recruited 49 out of 60 of the respondent's employees translating to 82% of the respondent's employees, the respondent contends that the names contained in the check-off list forwarded by the Claimant was not accurate and some of the employees mentioned in the list have either renounced their membership or left employment on account of termination for misconduct or were declared redundant.

12. This is the position which has been maintained by the respondent all throughout including before the conciliator.

13. Article 41 read together with section 46 of the Employment Act, and 48 of the Labour Relations gives an employee the unfettered right to join or not join a trade union and no employee shall be victimized for exercising this right in whichever way such employee shall deem fit.

14. Further section 54 makes it mandatory to recognize, once the simple majority is attained where such majority is disputed the matter is usually resolved by balloting at the shop-floor and under supervision by the Labour Officer either assigned by the Court or the conciliator to ascertain the actual number of unionisable employees recruited by the union. This did not happen at the conciliation stage.

15. Considering that recognition is an ever changing phenomenon and further in view of the fact that this claim was filed over one year ago the Court does not think it safe to grant the orders sought particularly based on the allegations that those employees alleged to be claimant's members may have left employment either through disciplinary termination or through redundancy.

16. The Court will however direct that the respondent upon reasonable notice do permit the Claimant to access its premises for purposes of recruitment of unionisable members and eventual signing of a recognition agreement.

17. Each party to bear their own costs of the suit.

It is so ordered.

**Dated at Eldoret this 13th day of February 2020**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 13th day of February, 2020**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**