REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 253 OF 2018

KENYAN PLANTATION & AGRICULTURAL

WORKERS UNION……..…….....CLAIMANT

VERSUS

KENYA HORTICULTURE EXPORTERS LIMITED - MWEA SITE…RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for failure to sign a Recognition Agreement. The Claimant averred that it had recruited 96 Unionisable employees out of the 100 unionisable employees working for the Respondent and sent check-off lists in accordance with the law. The Claimant averred that however, the Respondent had failed to act on the check-off forms and has not signed the Recognition Agreement with the Claimant Union. The Claimant averred that the Respondent has been remitting dues to the Claimant even though it has refused to sign a Recognition Agreement which would allow negotiations for a Collective Bargaining Agreement. The Claimant averred that it had done all which is legally possible to secure a recognition Agreement with the Respondent and the Respondent's failure to recognize the Union is in breach of Section 54 of the Labour Relations Act, Article 41 of the Constitution and the International Labour Organization Conventions Number 87 and 98 on the Right and Freedom of Association and Collective Bargaining. The Claimant prays for an order against the Respondent compelling it to comply with the mandatory provisions of Sections 48 and 54 of the Labour Relations Act with regard to recognition of trade unions; an order directing the Respondent to sign a formal recognition agreement with the Claimant union and to pave way for talks on a Collective Bargaining Agreement with the Claimant; the Respondent be compelled to begin CBA negotiations with the Claimant in good faith, and the collective bargaining process be concluded within 30 days; and finally, costs of the suit.

2. The Respondent filed a defence and in it denied every allegation in the memorandum of claim and averred that the number of unionisable employees is over 500 as opposed to the Claimant's allegations that the number of unionisable employees is 100. The Respondent averred that the Claimant has not recruited 96 unionisable employees of the Respondent and that there is no basis or foundation necessitating the signing of a Recognition Agreement with the Claimant as contemplated under Section 54 of the Labour Relations Act. The Respondent averred that the entire claim is frivolous, vexatious, an abuse of the court process, incurably defective for having failed to comply with the law. The Respondent averred that it reserved the right to apply for the entire suit to be struck out with costs and the Respondent be allowed to proceed with the redundancy process procedurally.

3. The Claimant called the branch secretary Mr. Francis Chepkech who relied on his statement and list of documents. He stated that he had recruited over 200 staff since the year 2015 to 2016 and submitted the forms to the Secretary General Francis Atwoli. He further stated that the Union had met the threshold but when it sought for recognition the employer declined to sign a Recognition Agreement. He confirmed that staff numbers fluctuate and only 100 or so remained. He stated that that there are legal requirements such as loans, overtime and medical which can only be accessed through the CBA. He testified that the Union receives dues from the members. He said that the Union came to court because the employer refused to cooperate.

4. The Respondent's witness Mr. Kenneth Kimaru who is the Respondent's Group HR and Admin. Manager adopted his statement and testified that it is not true that the Claimant has unionized 96 employees. He stated as at the time of filing suit there were no union members. He testified that the Respondent employed seasonal workers for periods between 3-6 months and as such many desert, leave employment or resign. He stated that others resigned from union membership and by the time the union filed the suit, it had no members. He stated that they have never had 100 employees as they employ between 450 and above employees. He stated that the list by the Claimant has a lot of duplication and the truth is that the Union has never met the threshold. He testified that the Respondent does not have a problem signing a recognition agreement if the Claimant meets the threshold of 51% of unionisable workers. He confirmed that the Respondent remitted dues to the Claimant in the year 2017.

5. The Claimant submitted that it represents unionisable workers within the agricultural sector in which the Respondent operates and that it has recruited a simple majority of the Respondent's unionisable employees as per the provisions of Section 54 of the Labour Relations Act. It cited the case of **Bakery, Confectionery, Food Manufacturing and Allied Workers Union (K) *v* Mombasa Maize Millers Ltd & 3 Others [2016] eKLR**. The Claimant submitted it organized and recruited the unionisable employees of the Respondent between the year 2015 and 2017 through check-off forms and gave notice to the employer as required under SectionCl 48 of the Labour Relations Act. The Claimant submitted that the employer remitted union dues to the Claimant as the recruitment was ongoing and having achieved the simple majority by recruiting 96 employees out of the possible 100 into its membership, it forwarded a copy of the Recognition Agreement for signing in compliance with Section 54 of the Labour Relations Act. However, the Respondent refused to sign claiming that the Claimant had not recruited the minimum level. The Claimant submitted that despite the constant fluctuation in numbers of employees of the Respondent, the Claimant union has maintained membership akin to a simple majority of the unionisable employees of the Respondent. The Claimant submitted that the Respondent's witness confirmed that the Respondent was still remitting union dues to date. This admission was in direct contravention of the Respondent's claim that the Claimant had no members with the Respondent. The Claimant submitted that the memorandum of claim was filed on 4th August 2018 while the list of employees provided by the Respondent were infact casual employees employed in the peak season of September 2018 thus the list supplied covers a period that is not relevant to the suit. The Claimant placed

reliance on the case of **Kenya Union of Commercial Food & Allied Workers Union *v* Jade Collection Ltd [2017] eKLR** and submitted that the Respondent failed to supply a list of its employees during the relevant period of 2015 to 4th August 2018, so as to counter the Claimant's averments. The Claimant submitted that the letters produced by the Respondent by employees purporting to resign from the Union were never presented nor copied to the Claimant union. It was submitted that this is a clear example of the Respondent employer using unfair labour practices and interfering with the membership of the Claimant union. The Claimant submitted that the letters comprising the mass resignation of unionisable employees are curiously dated the month of December 2016 the period within which recognition talks were ongoing. The Claimant submitted that recognition is a precondition for concluding a collective bargaining agreement and that the interests of the Claimant's members who have voluntarily acknowledged membership with the Union are bound to be greatly prejudiced if the Respondent continues to refuse to sign the Recognition Agreement with the Claimant.

6. The Respondent submitted that as per Section 54(1) of the Labour Relations Act for a union to be recognized for purposes of a collective bargaining, it must represent a simple majority of unionisable members and it must provide evidence in relation to the same. The Respondent cited the case of **Kenya Chemical & Allied Workers Union *v* Strategic Industries Limited [2016] eKLR** in support of this argument. The Respondent submitted that the check-off forms on which the Claimant seeks to place reliance to show it had recruited a simple majority do not represent the actual position and thus the allegation of having recruited simple majority does not hold. The Respondent submitted that the Claimant did not produce any evidence to support its allegation that the total number of the Respondent's employees was 100 which is contrary to the well-established doctrine of "he who alleges must prove" as per Section 107 and 108 of the Evidence Act. The Respondent submitted that it had presented a register of employees which shows that as at September 2018 the total number of employees was 558 and not 100 as alleged by the Claimant. The Respondent submitted that it had produced uncontroverted evidence showing that some of the employees previously recruited by the Claimant, as per the check-off forms referred to by the Claimant, tendered their resignations from the Claimant between the years 2016 and 2018. The Respondent submitted that the majority including the 96 employees whom the Claimant purported to recruit resigned from the Claimant in the year 2016 way before this suit was instituted. The Respondent submitted that the Claimant did not plead in specificity the particular time or point that it had recruited a simple majority of the Respondent's unionisable employees. The Respondent also presented some evidence showing a massive repetition of the employees in the check off forms presented by the Claimant. The Respondent submitted that therefore, the union had never at any particular time whether at the time of seeking recognition or at the time of filing suit or during hearing met the minimum threshold as required by law. The Respondent submitted that thus, there was no basis upon which the Respondent could have recognized the Claimant. The Respondent submitted that any order for recognition as sought by the Claimant will therefore fly in the face of Section 54(1) of the Labour Relations Act as the union does not represent a simple majority of the Respondent's unionisable employees and did not meet the required threshold as at the time of filing the suit. The Respondent submitted that the Claimant failed to refer the dispute to a conciliator as provided for under Section 54(6) of the Labour Relations Act and prayed that the suit be found to be incompetent for being premature. The Respondent cited the case of **Kenya Union of Entertainment and Music Industry Employees *v* Bomas of Kenya Limited [2018] eKLR**. The Respondent submitted that for the reason of the resignations, separation and repetition in the check-off forms, even in the absence of a register of the Respondent's employees, it cannot be held that the Claimant has a simple majority as at the time of filing the suit as all the recruited members in the check-off forms relied on by the Claimant had either resigned from the Claimant or left the Respondent's employment. The Respondent cited the case of **Kenya Chemical & Allied Workers Union *v* Base Titanium Ltd [2016] eKLR** where it was held *" Consequently, I agree with respondent's evidence and submissions that the 25 members who resigned from the union before 13.5.2015 when the suit was filed must be excluded in my determination as to whether or not the claimant represents a simple majority of the respondent's unionisable work force."* The Respondent submitted that there was no plea, allegation or proof that the members of the Claimant were forced to resign as alleged by the Claimant. The Respondent submitted that the Claimant did not lead evidence at the hearing on forceful resignation of its members. The Respondent submitted that even in its submissions, the Claimant did not allege or show that its members were forced to resign. The Respondent submitted that the Claimant cannot therefore rely on the unpleaded and unproven allegation of forceful resignation of members to impugn the resignation notices adduced by the Respondent. The Respondent cited the case of **Mombasa Maize Millers Ltd *v* Bakery, Confectionery, Food Manufacturing and Allied Workers Union & Another [2018] eKLR** and submitted that the Claimant failed to prove that it recruited a simple majority of the Respondent's employees. The Respondent submitted in closing that the suit as filed is incompetent and premature and it should be dismissed with costs.

7. The issue that falls for determination is whether there is satisfaction of the threshold for recognition. Section 54(1) of the Labour Relations Act makes provision on recognition of trade unions for purposes of negotiation as follows: -

> *54(1). 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.*

The Claimant in its suit alleged it had recruited 96 unionisable employees out of the 100 that the Respondent had employed. On the other hand, the Respondent asserted that it had more than 400 employees and produced a staff register which as at September 2018 confirmed that the Respondent had employed a total of 529 employees. The Respondent in addition produced evidence of employees who had deserted employment, others who had resigned from the Respondent and the ones who had resigned from the union. From the foregoing, it is clear that the Union had not recruited a simple majority, the threshold for recognition which is of 50% + 1. It is not enough for a trade union to say it represents the simple majority of an employer's unionisable employees, it must lead evidence to that effect. The evidence adduced before the court shows that the Claimant had only recruited a possible 80 employees of the total number when you factor in the repeated names and errors. As such, the Claimant union has not raised the requirement for recognition as prescribed under the Labour Relations Act. The suit is unfit for the grant of any relief as sought by the Claimant. In the premises it is dismissed albeit with no order as to costs.

8. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 30th day of March 2020

Nzioki wa Makau

JUDGE