



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 431 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

BAKERY, CONFECTIONERY, FOOD MANUFACTURING

**AND ALLIED WORKERS' UNION (K)
VERSUS**

CLAIMANT

BRAVA FOOD INDUSTRIES LIMITED

RESPONDENT

JUDGMENT

The Claimant filed a Memorandum of Claim on 2nd July 2019 alleging that the Respondent has failed to respond to its communication to discuss its recognition. It avers that between September and November 2018, it recruited a total of 21 out of 31 of the Respondents unionisable employees and on 18th April 2019 it forwarded the check-off forms to the Respondent. It further avers that it convened a meeting with the Respondent on 2nd May 2019 for the execution of the Recognition Agreement but the respondent refused to respond to any correspondence or calls to discuss recognition.

It avers that it has recruited a simple majority of the unionisable employees required under Section 54 of the Labour Relations Act and that the Respondent's refusal to afford it recognition is a violation of Article 36 as read with Article 41 of the Constitution. It seeks the following reliefs in its claim herein:

- 1. A declaratory order to issue directing the Respondent to forthwith execute the Recognition Agreement in the form and model presented to it by the Claimant within 14 days of delivery of the Judgment herein;*
- 2. An order to issue directing the Respondent to forthwith commence deduction of union dues in respect of employees who have acknowledges union membership;*
- 3. An order to issue directing the Respondent to settle amounts due from the date when such union dues became due for payment from its own accounts;*
- 4. An order directing that the company commences negotiation to put a Collective Agreement in place within ninety (90) days of delivery of the Judgment herein*
- 5. Costs be provided for; and*
- 6. Any other or further relief deemed fair and fit to grant under the circumstances.*

The Respondent filed a Response to the Memorandum of Claim on 9th October 2016. It avers that the Claimant has not disclosed that it previously sued it in ELRC Cause No. 1111 of 2018, which was dismissed. It denies receiving any document for the purpose of recognition or a notice of the meeting that was to be convened on 2nd May 2019.

The Claimants filed a reply to the response in which it avers that the Respondent is notorious for refusing to acknowledge service and that the non-disclosure of the previous suit has no bearing to the suit.

Parties' Submissions

The Claimant submitted that it has proved that it recruited 21 out of 31 employees and that Section 54 of the Labour Relations Act provides that an employer is to recognise a union for the purpose of collective bargaining if the union represents a simple majority of its employees.

It relied on the case of **Kenya Chemical & Allied Workers Union v Jumbo Foam Industries Limited [2014] eKLR** where the Court held that all the Claimant needs is to only demonstrate that they represent a simple majority.

It submitted that the respondent has caused the union dues to accrue to the extent that should the union require the accrued dues from the employees, such action would be punitive to them. It relied on the case of **Banking Insurance and Finance Union (K) v Maisha Bora Sacco [2016] eKLR**.

The Respondent submitted that Order 5 Rule 3 of the Civil Procedure Rules is clear on persons to be served with a corporation's documents. It maintains that it has never been properly served with the recognition documents. It avers that the claimant failed to consider other alternative forms of service granted in the rules. It relied on the case of **Kanga Mwaduma Mwambire & Another v National Bank of Kenya Ltd [2006] eKLR**.

It submitted that it has no issue with the employees joining the union but due to improper service it was not made aware of the claimants need to be recognised.

The Claimant filed Supplementary submissions in which it reiterates its averments.

Determination

The issues for determination are whether the Claimant has met the simple majority threshold for recognition and whether the Respondent is under obligation to deduct and remit union dues.

From the record, it is evident that Cause 1111 of 2018 was dismissed by Ongaya J. for reason that the Claimant had failed to establish the threshold for recognition and that the Respondent exhibited documents proving that it had outsourced its employees.

In the instant suit, the Respondent has not refuted the allegations that the Claimant has recruited a simple majority. The list of the Respondent's employees as at October 2017 produced by the Claimant indicates that the Respondent has 52 employees. From the check off forms submitted by the Claimant, it has recruited 21 employees. It avers that the respondent has 31 unionisable employees. That 21 of the 52 employees are in management and thus not unionisable. The Respondent has not opposed this and has not produced any evidence on the number of its employees at the time the claimant sought recognition.

The Respondents main concern is that the documents relating to recognition were not served upon it. In its submissions, it avers that it has no problem with the employees joining the Union. In the absence of any other evidence on the number of its unionisable employees as at the date of seeking recognition, it is my finding that the Claimant has met a simple majority threshold as set under Section 54 of the Employment Act for the purposes of recognition.

With respect to deduction of union dues, the Respondent avers that it did not receive any documents. The Claimant forwarded the check off forms vide the letter dated 18th April 2019. In the emails annexed to the Claimant's documents, it is evident that the Respondent held a meeting with some of its employees who had joined the Union. The minutes of these meetings sent via email by Ursula Kevogo, indicate that the Respondent proposed to the staff to consider having their issues sorted internally and also consider withdrawal from the union by the following week. In the email dated 27th April 2019, she states that 2 of the employees, Felix and Brian, who represented the employees who had joined the union stated that they were not willing to withdraw from the Union. This proves that the respondent was aware of the employees who had joined the union and was trying to persuade them to withdraw from union membership.

Section 48(3) of the Labour Relations Act provides as follows in respect of union membership and dues –

(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.

I find that the Respondent has not proved that there was any sufficient reason, why it failed to comply with the notice requiring deduction of dues. In the Court of Appeal decision in **Banking Insurance Finance Union (K) v Kenya Revenue Authority (2018) eKLR** the court discussed the issue of proof of membership by a union and concluded that all that a union needed to do is submit the check off forms signed by the employees as proof of the said employees joining membership of the union.

I therefore find that the claim has merit and make the following orders –

- 1. That the respondent do commence deducting and remitting union dues for the employees who have signed the check off forms with effect from June 2020.**
- 2. That the respondent do sign recognition agreement within 30 days from date of judgment.**
- 3. That the respondent do pay claimant's costs for this suit.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MAY 2020

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