REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1361 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

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

VERSUS

SHEER LOGIC MANAGEMENT CONSULTANTS LIMITED.....RESPONDENT

JUDGMENT

The Claimant is a registered trade union while the Respondent is a labour agent dealing with outsourcing of labour to industries and companies.

The Claimant filed a Memorandum of Claim on 6th September 2018 in which it avers that on 16th September 2019, it approached the Respondent's unionisable employees and recruited 142 out of 180 of them which translates to 78%. That on 6th April 2017, pursuant to section 48 of the Labour Relations Act the Secretary General forwarded the signed check off forms to the Respondent for the deduction and remittance of union dues.

That in its letters dated 20th April 2017 and 31st May 2017, it informed the Respondent that its employees had enrolled into the membership of the Union and requested a meeting to sign the recognition agreement but the respondent either remit union dues or call a meeting for signing of the Recognition Agreement. It avers that on 6th September 2017, it reported the existence of a trade dispute to the Cabinet Secretary, Ministry of Labour and Social Protection. That a conciliator was appointed and issued a Referral Certificate to the parties for arbitration on 25th June 2018. It is it case that the Respondent has refused to deduct and remit union dues contrary to Articles 36 and 41 of the Constitution, Sections 48, 54 and 57 of the Labour Relations Act and ILO Convention No. 87.

It seeks orders against the Respondent as follows –

1. Deduct and remit Union dues from the members who acknowledged their membership through endorsing their names in the already forwarded check off forms.

2. Recognise the Claimant by signing the standard Recognition Agreement.

3. Costs of the suit to the Claimant.

Simultaneously with the claim, the Claimant filed a Notice of Motion seeking the following orders:

1. Spent.

2. Spent.

3. That pending hearing and determination of this claim this Court be pleased to issue orders restraining the Respondent from victimising, intimidating, coercing, harassing, terminating, dismissing or disciplining the Claimant's members whose members' names appear on the check off forms on account of Trade Union membership.

4. That this Court issue orders to the Respondent to continue deducting and remitting union dues pending hearing and determination of the main suit.

5. That this Court issue orders to the Respondent to recognise the Claimant for the purpose of a Collective Bargaining Agreement.

6. That this Court set this matter for hearing and determination on priority basis.

7. That costs of this application be provided for.

The grounds in support of the application are that –

1. Around 16th December 2016, the claimant recruited 142 out of 180 unionisable employees of which translates to 78% above the required 51% simple majority under Section 54 (1) of the Labour Relations Act.

2. The Respondent has unfairly, unjustifiably and unlawfully denied recognition.

3. The Respondent's behaviour is aimed at denying their unionisable employees the right of Trade Union representation.

The application is supported by the affidavit of Simon Kimeu the Claimant's Assistant National Organising Secretary sworn on 6th September 2018 in which he reiterates the grounds in the face of the application.

Respondent's Case

In response to the Memorandum of Claim and application, the Respondent filed a Memorandum of Reply on 11th April 2019 and a Replying Affidavit sworn by Reinhard Ranji, the Respondent's Human Resource Manager on 27th November 2018.

The Respondent denies that the Claimant recruited its employees into the union membership. It denies that the Claimant complied with the applicable provisions under the Labour Relations Act 2007 on the deduction of union dues.

It avers that the Claimant has not provided any proof that the alleged employees referred to in the check off forms voluntarily joined the Union. It further avers that the Claimant has not demonstrated that it has attained a simple majority of 50% plus one of its unionisable employees.

It avers that the Claimant has not demonstrated any alleged contravention of the Constitution, the Labour Relations Act and ILO Convention 87 which are unsubstantiated.

In his Replying Affidavit, Reinhard Ranji denies that the Claimant has attained a simple majority of its unionsiable employees who are currently 378. He avers that none of the alleged members of the Claimant has confirmed that they are union members.

When parties appeared before me on 28th November 2018, I directed that the motion and claim be heard together by way of written submissions and gave directions on the filing of submissions.

Claimant's Submissions

The claimant submitted that the requisite conditions for recognition are set out under Section 54 of the Labour Relations Act. It submitted that the Respondent does not state the union membership out of the total unionisable employees and the percentage that has been recruited.

It submitted that the list of 378 employees produced by the Respondent includes employees holding managerial positions. It was its submission that the Respondent employs 250 unionisable employees and 128 employees are in managerial positions. It relied on Section 48 of the Labour Relations Court Act and submitted that the Respondent can only stop deduction of union dues upon receiving written notification of an employee's resignation from the union.

It submitted that the relevance of the Claimant in the sector has not been disputed. It submitted that union dues being authorised and lawful deduction under Section 48 and 50 of the Labour Relations Act, the Respondent was duly bound to makes such deduction and remittance.

Respondent's Submissions

The Respondent submitted that the Claimant has not provided proof that it has a total of 180 unionisable employees and that the persons in the check off forms are indeed its members. It avers that the purported check off lists consist of many repetitions thus the number of 140 is manufactured.

It further averred that should the Claimant have recruited 140 of the Respondent's employees then this does not constitute a simple majority of its entire 378 unionisable employees. It is therefore its submission that the Claimant has not recruited a simple majority to be entitled to recognition under Section 54(1) of the Labour Relations Act.

It submitted that there is no proof that 114 of its employees are in management. It contended that the actual number of unionisable employees is as per the list of 378 employees. It submitted that should the Court be in doubt the actual number of unionisable employees, the safest approach would be to order for a ballot to be conducted among the respondent's unionisable employees to determine whether the majority of its employees have been recruited by the Union.

It relied on the case of **Bakery Confectionery, Food Manufacturing and Allied Workers Union (K) v Mombasa Maize Miller Limited & 2 Others [2016] eKLR** where the court held that the intention of the employees to join the union could only be known through balloting.

In respect of deduction of Union dues, it relied on Section 48 (5) of the Labour Relations Act and submitted that the Respondent did not serve it with an order for deduction of union dues. It further maintains that the number of 140 employees is based on erroneous and repetitive names thus there is no basis for the Court to grant the prayer for deduction of union dues. In conclusion, it urged the court to dismiss the claim or in the alternative order for a conduct of balloting.

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.

The Claimant avers that it has recruited 142 employees out of the 180 unonisable employees of the Respondent. It avers that this is equivalent to 78% majority. The Respondent avers that its unionisable employees are 378 thus a simple majority would translate to 190 employees. The Claimant disputes this and avers that out of the 378 employees only 250 are unionisable with 128 being in management.

Section 54 (1) of the Labour Relations Court provides:

> **"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 produced check of forms duly signed by its members as proof of having recruited 142 employees. As rightly submitted by the Respondent, the check off forms are submitted twice from pages 16 to 22 and again from pages 24 to 30. The total number of names in the check off lists is 143 with the name of one Abiud Kipsang repeated as No. 2749 at page 17 and again as No. 2731 at page 18. This means that the number recruited is 142. If the illegible names at page 17 (No. 2750) and 20 (No. 2650) are excluded, this leaves the claimant with 140 names. It is not for the respondent to demand proof from the claimant of records that are held by itself. What it ought to have done is to produce its records to disprove the averments of the claimant that it had recruited 143 of the respondent's unionisable employees while 128 of the respondent's employees are non-unionisable.

There was opportunity for the respondent to submit its records first to the claimant at their own level, then to the Conciliator and finally to court. All it has produced is a list of employees who were employed between December 2018 and June 2020 when this dispute was already in court. This was thus information that could not have been availed at the time material to this suit which is in 2017.

I find that the respondent has not submitted any evidence to warrant my departure from the finding of the Conciliator to the effect that the claimant had recruited a simple majority of the unionisable employees in the employment of the respondent as of the date the claimant union sought to be recognised by the respondent.

In respect of deduction of the union dues, the Claimant avers that the Respondent has refused to deduct and remit union dues despite being issued with the check off forms. The Respondent avers that it is yet to be served with the check off forms.

The check off forms produced by the Claimant were forwarded to the respondent vide a letter dated 6th April 2017. The letter stated that the deduction of the Union dues was to be effected at the end of April 2017. The respondent has not denied receiving the check off forms. The only reasons advanced by the respondent are that the claimant has not proved that the employees did in fact join the union membership voluntarily.

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.**

As was stated in the findings of the Conciliator, the respondent did not dispute the fact that the union had recruited more than the requisite simple majority of the unionisable employees of the respondent into membership. The Labour Officer therefore recommended that –

> *"RECOMMENDATIONS*
>
> *That after going through the two parties' verbal submissions and their written memorandum, I recommend that the Union should be accorded the recognition forthwith, since the employees had exercised their constitutional right by joining a Union of their choice and the Union had recruited the simple majority of the Companies employees."*

As I have already pointed out above employees list produced by the respondent are all for the period between December 2018 and June 2020 and therefore do not relate to the period when the claimant submitted check off lists or sought recognition.

According to Section 48(3) of Labour Relations Act, the only proof of membership by employees that the claimant requires to produce to the respondent is the signed check off forms, that is, Form S of the Third Schedule to the Act. The schedule forms produced by the claimant were signed between June and October 2016. The forms were submitted to the respondent on 7th April 2017. That is when the claimant union alleges to have attained recruitment of a simple majority of the respondent's employees.

The respondent is obligated by Section 48(3) to commence deduction of union dues and remit to the employer as directed therein. The wording of the Section is in the compelling format, that the employer "*shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving the notice in Form S…"* This requirement is supported by Section 19(1) of the Employment Act which provides that –

19. Deduction of wages

(1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—

(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;

(g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

(i) such other amounts as the Minister may prescribe.

The Court of Appeal in its decision in **Banking Insurance Finance Union (K) v Kenya Revenue Authority (2018) eKLR** 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.

For the foregoing reasons I find that the respondent is under obligation to deduct and remit union dues as provided under Section 48(3) of the Act from any employee who has signed a check off form that is Form S in the Third Schedule of the Act.

I further find that the respondent has not adduced any evidence to controvert the evidence of the claimant and the findings of the Conciliator, that as at the time of seeking recognition the claimant had recruited in its membership more than a simple majority of the respondent's unionisable employees.

I therefore order as follows –

1. The respondent is directed to commence deduction of union dues and to remit the same to the claimant as provided under Section 48 of the Labour Relations Act commencing June 2020.

2. That the respondent do sign Recognition Agreement with the claimant within 60 days.

3. **The Respondent to pay costs of the claimant in the sum of <u>Kshs.50,000</u>.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

<u>ORDER</u>

In view of the declaration of measures restricting court of 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