



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1160 OF 2017**

(Before Hon. Lady Justice Maureen Onyango)

**KENYA BUILDING, CONSTRUCTION, TIMBER AND FURNITURE**

**INDUSTRIES EMPLOYEES UNION.....CLAIMANT**

**VERSUS**

**KINGS DEVELOPERS LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant herein is a trade union registered under the Labour Relations Act to represent employees in the building and construction sector as more particularly set out in the union's constitution. The respondent is a limited liability company engaged in the business of building and construction, and therefore its employees are eligible to join the membership of the claimant.

In its Memorandum of claim dated 19<sup>th</sup> June 2017, the claimant avers that it had recruited a simple majority of the respondent's employees and therefore qualified for recognition. It has appended check off forms, referred to in the Act as "Form S". The claimant seeks the following orders –

1. An order directing the Respondent to sign a recognition agreement presented by the Claimant.
2. An order directing the Respondents to desist from intimidating its employees and interfering with the Union activities.
3. An order directing the Respondent to participate in a Collective Bargaining Agreement negotiations with the Claimant within a time frame to be set by this Court.
4. Costs of this claim.

In the respondent's reply to the memorandum of claim, it denies the averments in the memorandum of claim and further contends that the Claimant's purported communication with the Respondent annexed to the Memorandum of Claim predominantly includes a request for funds (from the wages and/or salaries of employees) to be deducted by the Respondent and remitted to the Claimant. This is despite the other numerous (non-monetary) functions a proper trade union ought to champion and/or concern itself with. The respondent avers that pursuant to serious potential public policy issues and noting the number of Ponzi schemes that have in the recent past defrauded Kenyans of their hard earned money, it wished to draw this Court's attention to this matter and request this Court to exercise its inherent powers and/or jurisdiction to call for a full audit in respect to the true intentions of the Claimant, its affairs, its status of compliance in respect to all applicable laws, its purported mandate and whether all its alleged members/officials are persons of good repute and standing.

The respondent avers that the law sets out various grounds pursuant to which an employer can terminate the employment of an employee. That any termination effected by the Respondent was carried out strictly in accordance with all applicable laws.

The respondent avers that when entering into employment contracts, it does not impose any form of duress and/or undue influence on any of its employees. Further, an employer is at liberty to assign employees various roles and/or designations with an aim of improving the morale and/or motivating employees towards better performance

The respondent averred that instead of championing the rights of employees as required of a proper trade union, the Claimant in total disregard to the parole evidence rule was exposing certain employees to possible claims of breach of confidentiality by providing certain

contracts of employment which the Claimant is not privy to and whose contents are confidential.

The Respondent further averred that it lacked visibility and confidence in respect to the true intentions of the Claimant and was not in a position to engage the Claimant.

The Respondent averred that it had a strict duty both in law and contractually to its employees to protect their wages/salaries. That this Court should not allow the Respondent to be coerced into dealing with third party entities whose intentions are not discernible and whose organizational structure and/or human resource standing and/or intentions have not been subjected to an independent credible audit/review.

The Respondent averred that attempts to coerce the Respondent to deduct and remit part of the employee wages/salaries to the Claimant will unduly overburden the Respondent in respect to additional payroll costs and/or additional human resource requirements.

The Respondent averred that, aside from the Claimant's constant request for remittance of funds from employee wages/salaries, any other purported function by the Claimant (including but not limited to ensuring a safe working environment for its alleged members) is already provided for in various statutes (including but not limited to) the Employment Act Cap. 226, Laws of Kenya, the Occupational Safety and Health Act, 2007 Laws of Kenya, the Work Injury Benefits Act, 2007 Laws of Kenya and the National Construction Authority Act No. 41 of 2011 Laws of Kenya.

The Respondent further averred that pursuant to the various demands by the Claimant for remittance of funds as annexed to the Memorandum of Claim, the Claimant was only eager to receive the said remittances without considering the strict statutory limits/conditions in respect to amounts that can be legally deducted from the wages/salaries of an employee.

In response to all the Prayers contained in the Memorandum of Claim, the Respondent contended that this Court should not be used as a platform to: -

- a. coerce the Respondent into dealing with and/or releasing (employee) hard earned earnings to a group of persons whose intentions are not clear; which dealing may in turn expose the Respondent to future liability;
- b. expose the Respondent to over regulation; and,
- c. set a precedent that will be totally adverse to Kenyan public policy.

## **Evidence**

The claim was at the request of the parties disposed of by way of written submissions.

## **Claimant's Submissions**

The claimant submitted that it recruited 56 out of 70 unionisable employees of the respondent, that it is the rightful union to represent the employees pursuant to Section 54 of the Labour Relations Act (the Act).

The Claimant submitted that the said recruited members signed check off forms (Form S) acknowledging their membership which forms were duly served on the Respondent with instructions by the recruited employees to have the union dues deducted by their employer and duly remitted to the Claimant.

The Claimant submitted that it supplied the Respondent with a draft recognition Agreement for purposes of signing and commencing the Collective Bargaining Agreement negotiations. That its requests were met with extreme resistance by the Respondent who chose instead to frustrate the activities of the Claimant by intimidating the employees who were allied to the Claimant.

That the Respondent upon receipt of the checkoff forms, the Respondent responded by victimizing the Union's shop floor representative by name CHRISTOPHER AMUNGA CHEBI with accusations that he was collecting money from fellow workers. He was suspended and later terminated despite the Claimant's protests.

The claimant submitted that thereafter the Respondent formulated employment contracts to be signed by all workers. Paragraph 16 of the said contract specifically prohibits an employee from joining a trade Union as the employee is serving under a Management Contract. (The claimant annexed a sample copy of a contract issued to an employee employed as a cleaner.)

The Claimant submitted that its efforts to have the Respondent sign the Recognition Agreement or deduct Union dues became futile and the Claimant reported the dispute for conciliation. The Respondent did not avail itself for conciliation. The Conciliator's certificate was issued to the Claimant to pursue the matter in Court.

With respect to the respondent's position, the claimant reiterated that it had recruited a simple majority of the Respondent's unionisable employees and this had not been denied anywhere in the Memorandum of response. That the Respondent in paragraph 6 of its response admits that it did not submit itself for conciliation under section 62 of the Labour Relations Act. That it is not denied that the Claimant has met qualification to be recognized by the Respondent is neither denied.

## **Respondent's Submissions**

It is the respondent's submissions that for a trade union to be recognised by a union it must prove that it had recruited a simple majority of unionisable employees, relying on Section 54(1) of the Act. That it is upon the party claiming recognition to prove that it is the right union to represent employees in the sector in which the employer operates.

The respondent relies on the case of **Kenya Petroleum Oil Workers Union v Kenol Mahavir Service Station and Another [2017] eKLR** where the court held that:-

"Section 54 provides for the threshold for recognition of a trade union being recruitment of a simple majority of members and taking into account the sector in which the employer operates. In the present case it is unfortunate that the Claimant has not supplied a copy of its constitution to the court for the court to determine the sectors that it is authorised to cover."

The respondent submitted that the union had not produced its Constitution and that the court can therefore not establish the sector that the union represents. That it required the claimant union to produce the Constitution vide notice to produce which the claimant did not respond to. That among the documents requested were tax compliance certificate, letters of good standing and audited accounts. That the employer has a statutory obligation to protect employee wages, noting the rampant cases of entities being unprocedurally dissolved and disappearing with funds rightfully held on behalf of hardworking Kenyans. That the court should not compel the respondent and its employees into forced union with an entity whose compliance standing is totally opaque, unknown to the court and the respondent.

The respondent submitted that it is not enough for a trade union to simply say it represents the simple majority of an employer's unionisable employees, it must lead evidence to that effect. That Ndolo, J. in **Kenya Shoe and Leather Workers Union v Crown Industries Limited & Another [2017] eKLR** held that:-

"Attainment of a simple majority for purposes of recognition is a matter of evidence...It follows therefore that a trade union pursuing recognition must lay before the Court documentary evidence that it has recruited a simple majority of the unionisable employees in the employment of the employer from which it seeks recognition."

The respondent also relied on the case of **Kenya Chemical & Allied Workers Union v Strategic Industries Limited [2016] eKLR** where the Court held thus:-

"Recognition is a matter of verifiable numbers and in the absence of tangible evidence of recruitment of a simple majority the Court has no basis to order recognition."

That apart from the check off forms, there was no other evidence adduced by the claimant to prove it had recruited a simple majority of unionisable employees. That it has been settled that where a union claims recognition, such union must not only state that it has attained a simple majority but it must also state the total number of eligible employees. Where the union fails to establish the total number of eligible employees, Courts have held that such unions have not proved their attainment of a simple majority. The respondent relied on the case of **Kenya Union of Commercial, Food and Allied Workers v Shade Net Limited [2017] eKLR (Cause 16 of 2017)** wherein the Court held *inter alia* that,

"While alleging that 51% of the employees have been recruited, the claimant has not stated the numbers recruited as against the total number of eligible employees... On a balance of probability and taking the material on record into account, the court returns that the claimant has failed to establish that it has recruited a simple majority of the eligible unionisable respondent's employees as per section 54(1) of the Act."

It is further the respondent's submission that no draft recognition agreement was sent to the respondent by the claimant as alleged at paragraph 5 of the claim. That failure to present the draft recognition agreement renders the prayers sought a nonstarter and should fail.

That a recognition agreement forms the bedrock and basis upon which *inter alia* employee rights would be protected. That the Claimant does not expect this Court and the Respondent to abandon innocent employees/Kenyans by subjecting them to a totally opaque and untested documents/process.

That the Claimant's prayer on the recognition of the "opaque" unseen and untested recognition agreement should fail and this Court should caution the Claimant against such practice that does not foster transparency and visibility hence possible lack of compliance.

The respondent further submits that there are discrepancies and contradictions in the check off forms. That some names were repeated while others contained different signatures. That the claimant failed to produce credible evidence to confirm it had indeed validly secured the signatures of employees without coercion or fraud. That the check off forms were *prima facie* invalid and void.

It is further the respondent's submission that the allegation of the claimant that Christopher Amunga Chebi, a shop steward at the respondent's workplace was frustrated in his duties was not true. That the claimant has exposed certain employees to possible claims of breach of confidentiality by providing the union with certain contracts of employees whose contents are private and confidential. That the court has not been provided with evidence that the employees consented to the public tabling of their sensitive confidential documents.

In the further submissions filed by the respondent, it submits that the claimant has not proved the averments in the memorandum of claim.

On the claimant union averment that it had recruited a simple majority of unionisable employees in the Respondent's employment and that the Claimant was the right union to recruit and represent unionisable employees in the Respondent's employment, the respondent submitted that it is trite law that he who claims must prove and that failure to rebut an averment, unless expressly admitted does not shift the burden of

proof to the Respondent. That even if the Claimant's submissions that the Respondent failed to rebut particular averments in the Statement of Claim were to be true, that still did not take away the Claimant's duty to prove that indeed it was the right union to represent unionisable employees in the Respondent's employment and that it had indeed attained a simple majority to warrant recognition by the Respondent.

That it has been held that a mere averment in a pleading is in itself not enough to support one's case but rather, such an averment should be accompanied by evidence to support it. That in the claim, the Claimant claimed that it had recruited a simple majority and that it was the right union to represent employees in the Respondent's employment to warrant recognition. These averments were without proof/cogent evidence to support them and should thus fail. That Madan JA of the Court of Appeal, in **Nairobi Civil Application No. 12 of 1978 CMC 444 Aviation Ltd V Kenya Airways (Cruis Air Ltd) (1) 119781 KLR 103** observed that.

“Pleadings contain the averments of the three concerned until they are proved or disproved, or there is admission of them or any of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.”

That in the case of **Nairobi HCCC 232 of 2012 Alfred Kioko Muteti v Timothy Miheso & Another [2015] eKLR**, the court observed as follows:

“It is trite law that he who alleges must prove and that burden does not shift to the adverse party' even if the case proceeds by way of formal proof and/or undefended.”

That the court went on to state as follows;

“Thus even where there is no rebuttal, in a matter that requires proof, Section 107 of the Evidence applies, that whoever desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...it was therefore, in my view, not sufficient for the plaintiff to merely assert that since the 1st defendant did not file any defence or controvert the pleadings or rebut the statement that the plaintiff was lawfully crossing Ngong Road when the 1st defendant violently knocked him, then he needed not prove how the accident happened and hence the liability of the 1st defendant....”

That the Claimant's assertions that it should be granted recognition by virtue of the fact that the Respondent did not deny particular averments in the Memorandum of Claim is a wrong interpretation of the law and an attempt by the Claimant to mislead this Court, that should not be allowed. The burden of proving that the Claimant was the right union to recruit and represent unionisable employees in the Respondent's employment and that it had recruited a simple majority of unionisable employees in the Respondent's employment as required under Section 54 of the Labour Relations Act still lay on the Claimant and it is the Respondent's position that the Claimant failed to discharge that burden.

It is the further submission of the respondent that the employees recruited by the claimant were the respondent's employees. That in the case of in the case of **Nairobi ELRC Cause No. 127 of 2013 Kenya National Private Security Workers Union v Watchdog Limited [2018] eKLR**, this court at paragraph 16 and 17 of its judgment had this to say on this issue:

“In terms of sections 106, 107, 108 and 109 of the Evidence Act, Cap 80 of the laws of Kenya, he who alleges must prove on a balance of probabilities the allegations to want the court to find in his/her favour...”

The Claimant has in respect of both the Claim for recognition and underpayment failed to tender any tangible evidence to prove on a balance of probabilities that it had recruited a simple majority of 50+1% in terms of section 54(1) of the Labour Relations Act, 2007 to warrant recognition by the Respondent nor has it tendered any evidence to show that its members who are employees of the Respondent were being underpaid and were not paid overtime, when they worked beyond the regulated normal hours.”

The respondent avers that the Claimant had not proved that it had indeed recruited a simple majority of employees in the Respondent's employment.

That in **Nairobi ELRC Cause No. 378 of 2013 Kenya Shoe and Leather Workers Union v Falcon Tanners Company Limited & another [2013] eKLR** the court held that:

“It is not enough for a trade union to say it represents the simple majority of unionisable employees. This assertion must be supported by clear documentation.”

The respondent submitted that where a union claims to have recruited a simple majority of unionisable employees without stating and/or giving evidence of the total number of unionisable employees against whom such a simple majority has been attained against, recognition should not be granted to that particular union. That the Claimant in this case only produced check off forms and claimed to have recruited a simple majority, they never stated and/or proved to this court the total number of employees in the Respondent's employment against who such a majority had been obtained.

The respondent further relied on the following cases:

**Nairobi ELRC Cause No. 1347 of 2018 Kenya Private Universities Workers Union v Don Bosco Utume Salesian Theological College [2019] eKLR** where the court held that;

“... in spite of the withdrawal of seventeen (17) employees there is no proof of the exact number of the employees of the Respondent

who are unionisable. The Claimant has therefore not proved that it is qualified for recognition under Section 54(1) of the Act.”

**Nairobi ELRC Cause No. 16 of 2017 Kenya Union of Commercial, Food and Allied Workers v Shade Net Limited [2017] eKLR** wherein the Court held inter alia that,

“While alleging that 51% of the employees have been recruited, the claimant has not stated the numbers recruited as against the total number of eligible employees...On a balance of probability and taking the material on record into account, the court returns that the claimant has failed to establish that it has recruited a simple majority of the eligible unionisable respondent’s employees as per section 54(1) of the Act.”

**Nairobi ELRC Cause No. 164 of 2016 Kenya Petroleum Oil Workers Union v Kenol Mahavir Service Station & Another [2017] eKLR** where the court held that;

"Section 54 provides for the threshold for recognition of a trade union being recruitment of a simple majority of members and taking into account the sector in which the employer operates. In the Present case it is unfortunate that the Claimant has not supplied a copy of its constitution to the court for the court to determine the sectors that it is authorised to cover.”

## **Determination**

I have considered the pleadings and submissions filed by the parties.

The issue in dispute in this suit is the refusal of the respondent to recognise the claimant union. In order to determine the same, the issue for consideration are whether the claimant union qualifies for recognition by the respondent.

Section 54 of the Act provides for recognition of trade unions as follows –

### **54. Recognition of trade union by employer**

- 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.**
- 2. A group of employers, or an employers’ organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers’ organisation within a sector.**
- 3. An employer, a group of employers or an employer’s organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers’ organisation recognises a trade union.**
- 4. The Minister may, after consultation with the Board, publish a model recognition agreement.**
- 5. An employer, group of employers or employers’ association may apply to the Board to terminate or revoke a recognition agreement.**
- 6. If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.**
- 7. If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.**
- 8. When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.**

From the Section, it is discernible that for a union to qualify for recognition it ought to prove that it has recruited a simple majority of the employees of the respondent, where the employer is a single entity or a simple majority of employees of members of an association, where the union seeks to be recognised by an association. This is the first qualification which is contained in subsection (1), (2) and (3) of Section 54.

The second qualification is at subsection (8), that the court will take into account the sector in which the employer operates.

In its submissions, the respondent has raised a lot of issues over the Constitution of the union and other irrelevant matters such as tax clearance certificate and certificate of good conduct. These are not provided for as criteria for recognition in the Act.

The Respondent has further raised issues about its responsibility to safeguard “*hard earned funds*” of employees. Again, this is not the respondent’s responsibility. Section 17(11) of the Employment Act is explicit that no employer shall limit the right of an employee to dispose

of his income in the manner he deems fit. The Section provides as follows –

**No employer shall limit or attempt to limit the right of an employee to dispose of his wages in a manner which the employee deems fit, nor by a contract of service or otherwise seek to compel an employee to dispose of his wages or a portion thereof in a particular place or for a particular purpose in which the employer has a direct or indirect beneficial interest.**

Further Section 19(1)(f) and (g) of the Employment Act, 2007 obliges an employer to deduct from the employees' wages –

**(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;**

Union dues are in the nature of deductions under Section 19(1) (f) and (g) and the employee is free to require the employer to make deductions from his wages to remit as provided in the said Section.

Further, Section 48 of the Labour Relations Act gives power to the Minister of Labour to gazette union dues and employers are under obligation to set up a check off system for deduction and remittance of such union dues from the wages of employees who have signed the check off form which in the Act is referred to as Form S in the Third Schedule of the Act, provided the same has been signed by the employee. Section 48 provides as follows –

#### **48. Deduction of trade union dues**

**1. In this Part “trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.**

**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.**

**4. The Minister may vary an order issued under this section on application by the trade union.**

**5. An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.**

**6. An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.**

**7. A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.**

**8. An employer shall forward a copy of any notice of resignation he receives to the trade union.**

Further trade unions are registered organisations and are supervised by the Registrar of Trade Unions. Should an employer have any doubts as to whether a trade union is operating legally, it can confirm the position with the Office of the Registrar of Trade Unions.

The respondent's demand for the claimant union to authenticate would amount to interference with the affairs of a trade union by an employer, which is prohibited under Section 8(1)(a) and (b) of the Labour Relations Act which provides as follows –

#### **8. Rights of trade unions, employers' organisations and federations**

**Every trade union, employers' organisation or federation has the right to—**

**a. subject to the provisions of this Act—**

- i. determine its own constitution and rules; and**
  - ii. hold elections to elect its officers;**
- b. plan and organise its administration and lawful activities;**

Employee's rights to form, join and participate in affairs of trade unions are also protected under Sections 4 and 5 of the Labour Relations Act which provides as follows

#### **4. Employee's right to freedom of association**

##### **1. Every employee has the right to—**

- a. participate in forming a trade union or federation of trade unions;**
- b. join a trade union; or**
- c. leave a trade union.**

##### **2. Every member of a trade union has the right, subject to the constitution of that trade union to—**

- a. participate in its lawful activities;**
- b. participate in the election of its officials and representatives;**
- c. stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and**
- d. stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.**

##### **3. Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation to—**

- a. participate in its lawful activities;**
- b. participate in the election of any of its office bearers or officials; and**
- c. stand for election or seek for appointment as an office bearer or official and, if elected or appointed, to hold office.**

#### **5. Protection of employees**

**1. No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act.**

**2. Without limiting the general protection conferred by subsection (1), no person shall do, or threaten to do any of the following—**

- a. require an employee or a person seeking employment not to be or become a member of a trade union or to give up membership of a trade union;**
- b. prevent an employee or person seeking employment from exercising any right conferred by this Act or from participating in any proceedings specified in this Act;**
- c. dismiss or in any other way prejudice an employee or a person seeking employment—**
  - i. because of past, present or anticipated trade union membership;**
  - ii. for participating in the formation or the lawful activities of a trade union;**
  - iii. for exercising any right conferred by this Act or participating in any proceedings specified in this Act; or**
  - iv. for failing or refusing to do something that an employee may not lawfully permit or require an employee to do.**

**3. No person shall give an advantage, or promise to give an advantage, to an employee or person seeking employment in exchange for the person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act:**

**Provided that nothing in this section shall prevent the parties to a dispute from concluding an agreement to settle that dispute.**

These rights are further protected under the Bill of Rights in the Constitution of Kenya 2010. Article 36 and 41 thereof provide as follows –

**36. Freedom of association.**

- 1. Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.**
- 2. A person shall not be compelled to join an association of any kind.**
- 3. Any legislation that requires registration of an association of any kind shall provide that—**
  - a. registration may not be withheld or withdrawn unreasonably; and**
  - b. there shall be a right to have a fair hearing before a registration is cancelled.**

**41. Labour relations.**

- 1. Every person has the right to fair labour practices.**
- 2. Every worker has the right—**
  - a. to fair remuneration;**
  - b. to reasonable working conditions;**
  - c. to form, join or participate in the activities and programmes of a trade union; and**
  - d. to go on strike.**
- 3. Every employer has the right—**
  - a. to form and join an employers organisation; and**
  - b. to participate in the activities and programmes of an employers organisation.**
- 4. Every trade union and every employers' organisation has the right—**
  - a. to determine its own administration, programmes and activities;**
  - b. to organise; and**
  - c. to form and join a federation.**
- 5. Every trade union, employers' organisation and employer has the right to engage in collective bargaining.**

It is thus clear that both the employees of the respondent and the claimant union were exercising their constitutional rights by the employees joining membership of the claimant union and the union seeking recognition by the respondent. Recognition is thus not a privilege to be dished out by the respondent but a right to be exercised by the rights holder. Section 49 and 54 of the Labour Relations Act are couched in mandatory terms, that once a union has recruited a minimum of 5 employees the employer is obliged to set up a check off system for deduction and remittance of union dues. Further, that once a union has acquired a simple majority the employer is obligated to recognise the union and thereafter, to collectively bargain with the union.

It has been necessary to set out the position of the law because of the position taken by the respondent in both its response and submissions. No wonder the union unleashed such a scathing attack on the respondent when it stated in its submissions thus:-

“The Memorandum of Response could be the most embarrassing defence drawn and filed by an Advocate in the history of this Court. The same is an expose of pathetic, inexcusable ignorance exuded by an advocate and ought to be struck out as being the sham it is. It raises no triable issues.

It is highly doubtful in the mind of the author of this submissions that your ladyship has the time to school a learned Counsel on the law applicable to Trade Unions. It is deducible from the contents of the Memorandum of response that the Respondent considers Trade Unions to be rogue outfits with the sole aim of collecting money from their members; That Trade unions are unregulated 'Ponzi' schemes with bush mentality out to defraud Kenyan's of their hard earned money.

It is a very unfortunate day for this Court to be subjected to the insulting contents of the Respondent's defence and the Claimant's requests your ladyship to treat the memorandum of response with the contempt it deserves."

Having clarified the foregoing, it is clear that the only evidence required by the employer to deduct and remit union dues is the check off form. And it is the same check off forms that are considered in assessing whether or not the union has recruited a simple majority. Section 11 of the Labour Relations Act provides that –

#### **11. Burden of proof**

**In any proceedings under this Act—**

**a. a party that alleges that a right or protection conferred by this part has been infringed shall prove the facts of the conduct; and**

**b. the party who is alleged to have engaged in that conduct shall prove that their conduct did not infringe any provision of this Part.**

Going back to the fact of this case, the claimant pleaded that it had recruited more than 50+1 majority of the respondent's employees. It produced the check off forms signed by the employees. The respondent did not deny that the names of the employees in the check off forms were those of its employees. The 8 forms produced at pages 6 to 17 of the claimant's bundle contain 130 names with national identity card numbers. In the submissions the claimant states that at the time of seeking recognition it had a simple majority of 56 out of 70 unionisable employees. This position is not rebutted by the respondent. The respondent did not deny all the names in the check off forms. It did to deny that it had 70 unionisable employees at the material time.

The averment in the respondent's submissions that there were discrepancies is not backed by specifics. It is made in very general terms. It did not point out which names were repeated, or which one it alleges had different signatures. It further alleges coercion and fraud in the submissions but without any particulars.

The court further notes from the Conciliator's report that the respondent refused to participate in the conciliation proceedings. The report is reproduced below –

“RE: MLSS/LD/IR/12/64/2016      DATE: 17<sup>th</sup> October 2016

The parties to the dispute:-

The General Secretary

K.B.C.T & F.I.E.U

P. O. Box 49628

NAIROBI

The Managing Director

Kings Developers

P. O. Box 18215 - 00500

NAIROBI

**ISSUES IN DISPUTE:** *“Refusal by the company to recognize the union.*

#### **SUMMARY OF SUBMISSIONS**

- 1. Union:** The union attended all the scheduled meetings and submitted its memorandum to the conciliator.
- 2. Employer:** The employer on the other hand neither submitted his memorandum nor attended any of the scheduled conciliation meetings.
- 3. FINDINGS BY THE CONCILIATOR:** The dispute is still pending due to the failure of the employer to co-operate and the

union still demands for recognition.

#### **4. RECOMMENDATIONS:**

The Union is requested to refer the dispute to the next level of arbitration.

SIGNED BY:

P. KANYOTU, CONCILIATOR “

As was stated by the court in the case of **Kenya Chemical & Allied Workers Union v Base Titanium Limited [2016] eKLR** that –

"Courts must always focus on the status quo when the suit was brought because time is of essence in determining recognition disputes and that is why under Section 74(a) of the Labour Relations Act, such disputes are to be treated with urgency."

On the averment that the claimant did not produce a copy of its Constitution, the respondent had opportunity to request for the same the very first time it was served with check off forms but did not. In any event, from the name of the union, it is evident that it operates in the building and construction sector. The respondent admits that it operates in the sector.

For the foregoing reasons, I find that the claimant has proved on a balance of probabilities that it recruited and had in its membership more than a simple majority of unionisable employees of the respondent at the time material to this suit and was therefore entitled to recognition.

I further find that the respondent is guilty of intimidation of employees as it has included in its contracts at paragraph 16 thereof that states –

#### **“16. Union Matters**

You have agreed that you will be serving under a MANAGEMENT CONTRACT and is not permitted to join a trade union.”

Apart from intimidating employees not to join union membership, that clause is in direct contravention of Article 41 of the Constitution, Section 46 of the Employment Act, Section 4, 5 and 9 of the Labour Relations Act and is thus null and void. The respondent is directed to remove the offending paragraph from the employment contracts issued to its employees forthwith.

#### **Conclusion**

In conclusion, the court makes the following orders –

1. The respondent is directed to recognise the claimant union with 30 days.
2. The respondent is directed to immediately deduct and remit union dues of all employees currently in its employment who have signed check off forms.
3. The respondent is directed to grant access to the union in the manner provided in Section 56 of the Labour Relations Act for purposes of the union meeting its members subject to the same not interrupting operations.
4. The respondent is directed to withdraw paragraph 16 of its contracts forthwith.
5. The respondent shall pay the claimant’s costs assessed at Kshs.50,000 to cover reasonable expenses and disbursements.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF AUGUST 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**