



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 275 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL AND
HOSPITALS WORKERS (KUDHEIHA WORKERS).....CLAIMANT**

VERSUS

LIMURU COUNTRY CLUB.....RESPONDENT

JUDGMENT

Kenya Union of Domestic, Hotels Educational and Hospital Workers filed a Notice of Motion application and Memorandum of Claim both dated 29th June 2020 against the management of Limuru Country Club for refusing to deduct and remit union dues and also refusing to sign the Recognition Agreement. The Application and the Claim were disposed of together by way of written submissions pursuant to the directions of the Court issued on 20th July 2020.

In the Notice of Motion Application, the Claimant/Applicant seeks for orders that:

1. *Spent.*
2. *Spent.*
3. *The Court be pleased to issue orders compelling the Respondent to negotiate and sign Recognition Agreement within 30 days from the date of determination of this application.*
4. *The Court be pleased to issue orders compelling the Respondent to deduct and remit Union Dues to the Applicant/Claimant with immediate effect.*
5. *The cost of this application be paid by the Respondent*

The Application is grounded on the reasons that the Claimant is a Trade Union registered under the Labour Relations Act 2007 while the grievant are employees of Limuru Country Club who are members of the Applicant. That 93 out of the 103 of the Respondent's employees joined the Claimant union between 30th September 2019 and 15th October 2019, which number constitutes 93% of the total workforce. That the Claimant thus effectively met the threshold for commencement of negotiation with the Respondent which it had had a working relationship lasting up to 2018. That the union availed its Recognition Agreement document to the Respondent's management on 8th October 2019 and thereafter several meetings took place between parties with a view of receiving counter proposals from the Respondent. That however no proposal has been forthcoming from the Respondent and the Claimant's members are to their detriment currently being sent to indefinite unpaid leave by the Respondent.

The Supporting Affidavit is sworn by the Claimant/Applicant's Secretary General, Albert Obed Njeru who avers that the check off were communicated to the Respondent vide letters dated 14th and 18th October 2019 also annexed in his affidavit. That even though the practice has been in place, the Respondent's management stopped deducting union dues of its members and has further resisted the same. He avers that the Respondent has refused to sign a recognition agreement which is a gateway to the Claimant negotiating on behalf of its members which led to the union filing a trade dispute with the Ministry of Labour. That a conciliator was appointed and parties met upon invitation to joint conciliation but parties failed to agree and the conciliator issued a certificate of conciliation dated 30th September 2019 which escalated the dispute to this Court. He also avers that the Claimant even tried ADR before filing the Claim herein in court.

In the Memorandum of Claim, the Claimant avers that 93 out of 110 unionisable staff of the Respondent translates to 84.5% which is well over the 50 + 1% required. That after refusing to deduct and remit the union dues, the Respondent embarked on interfering with the Claimant's members' right of association by intimidation and issuance of threats with the sole intention of unduly influencing the withdrawal of membership from the Claimant. The Claimant calls upon the Court to protect the Respondent's employees' right to form, join and participate in trade union activities provided for under **Article 41 of the Constitution of Kenya** as the same is unlawfully and unfairly being denied by the Respondent. It is the Claimant's averment that the union and its members will suffer irreparable loss if the orders sought are not granted and it makes the following prayers:

1. *The Court to find the Respondent to be in fundamental contravention of law and be ordered to deduct and remit union dues to the Claimant.*
2. *The Respondent be further ordered to enter into recognition agreement with the Claimant and commence negotiations of Collective Bargaining Agreement immediately to safeguard the right of Claimant's members.*
3. *The court to issue orders and relief they deem just fit.*
4. *The cost of the Claim be paid by the Respondent.*

The Respondent never appeared in any of the proceedings herein before Court to defend the claim against it.

Claimant's Submissions

The Claimant submits that besides **Article 41 of the Constitution, Section 4(1) of the Labour Relations Act** provides that every employee has the right to participate or join or leave a trade union while **Section 48 of the Labour Relations Act** provides for trade union dues as a subscription for union membership. Further, that **Section 54(1) of the Labour Relations Act** provides for recognition of a trade union for purposes of collectively bargaining if that trade union represents the simple majority.

The Claimant relies on **Kisumu ELRC Cause 19 of 2015; Kenya Union of Domestic Hotels, Education Institutions, Hospital and Allied Workers v Lukhokho Secondary School [2016] eKLR** where this Court held as follows:

“From the foregoing I find and hold that the Claimant is the proper union for purposes of unionisation of employees of the Respondent, that the Claimant recruited the said employees and achieved a simple majority and therefore is qualified to be recognised by the Respondent.

I therefore make the following orders -

- (1) The Respondent is directed to deduct and remit union dues from the wages of all employees whose names are in Form S submitted to the union and who are still in its employment from December 2016. For clarity this means that the deductions will be effected from the wages of December, 2016.*
- (2) The Respondent is directed to sign Recognition agreement with the Claimant within 30 days from date of Judgment to pave way for negotiation of collective bargaining agreement.”*

It is the Claimant's submission that the Respondent is therefore legally and duty bound to deduct, remit union dues in respect of unionisable employees in the Claimant's membership and further sign recognition agreement for purposes of negotiating collective bargaining agreement. It urges the Court to compel the Respondent as prayed and allow the Claim with cost to the Claimant.

Analysis and Determination

The dispute in the suit is the refusal by the Respondent to recognise the Claimant Union and the issue for consideration therefore is whether the claimant union qualifies for recognition by the Respondent. The second issue for determination is whether the Respondent should be compelled to deduct and remit union dues to the Claimant.

Section 54 of the Labour Relations Act provides as follows:

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.

5.

6.

7. 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.

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.**

Ndolo J. emphasised the need for proof for purposes of recognition in the case of **Kenya Shoe and Leather Workers Union v Crown Industries Limited & Another [2017] eKLR** and 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.”

In the instant case, the Claimant pleaded that it had recruited more than 50+1 majority of the Respondent’s employees and produced the check off forms *Nos. 000851, 000852, 000853 and 000865* signed by 93 employees together with the letters forwarding the same to the Respondent. The Respondent did not enter appearance in the suit. The evidence on record is therefore uncontroverted. In its submissions the Claimant states that at the time of seeking recognition it had a simple majority of 93 out of 103 employees total workforce and which position was also not rebutted by the Respondent as under section 11 of the Labour Relations Act.

On the issue of deduction of dues, **Section 48(2) of the Labour Relations Act** provides as follows –

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.”**

Section 19(1)(g) of the Employment Act, 2007 further obliges an employer to deduct from the employees’ wages, 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.

The Claimant has produced letters demonstrating its instructions to the Respondent to deduct and remit union dues for the employees who had signed the check off forms accompanying the said letters. Upon such request in writing, the Respondent is under obligation vide section 19(1) of the Employment Act to comply. Section 48(3) of the Labour Relations Act further compels an employer who has bene served with check off forms to make the deduction and remit to the union as instructed therein.

The Court may be guided by **Kenya Building, Construction, Timber and Furniture Industries Employees Union v Kings Developers Limited [2020] eKLR** this Court while directing the respondent to recognise the claimant union and to further deduct and remit union dues of all employees currently in its employment and who had signed check off forms, stated that:

“...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.

.....

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...”

Orders

Having found that the claimant has recruited more than a simple majority of the Respondent’s employees into its membership, I make the following orders –

- 1. The Respondent is directed to deduct and remit union dues from all its employees who are in service as of the date of this judgment and have signed the check off forms (Form S) and to remit the same to the claimant as provided in the check off forms.**
- 2. The Respondent is directed to sign a recognition agreement within the Claimant with 30 days from the date of this judgment.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF DECEMBER 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