



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 46 OF 2018

KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL INSTITUTIONS

HOSPITALS AND ALLIED WORKERS.....CLAIMANT

VS

PWANI UNIVERSITY..... 1ST RESPONDENT

KENYA UNIVERSITY STAFF UNION.....2ND RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (Kudheih Workers) seeking orders to compel the 1st Respondent to remit agency fees on account of 75 employees in Grades I-VI. The Claimant also seeks an order directing the 1st Respondent to negotiate an internal Collective Bargaining Agreement (CBA).

2. The claim is contained in a Memorandum of Claim dated 5th April 2018 and filed in court on 30th April 2018. The 1st Respondent filed a Memorandum of Reply on 22nd June 2018 to which the Claimant responded on 10th August 2018.

The Claimant's Case

3. The Claimant states that on 24th March 2010, it signed a Recognition Agreement with the 1st Respondent. This was after the Claimant had recruited more than 51% of the 1st Respondent's unionisable employees in Grades I-IV. Subsequently, a CBA was negotiated and signed on 15th January 2014.

4. The Claimant avers that on 10th July 2015, the Chairman of the Works Committee, Alex Thoya forwarded a workers meeting attendance list to the 1st Respondent's Finance Officer asking him to stop deduction of union dues in favour of the Claimant. Thoya also wrote to the Claimant's Secretary General informing him that the employees had withdrawn their union membership.

5. Upon receiving the workers meeting attendance list, the 1st Respondent's management stopped deducting union dues in favour of the Claimant.

6. On 20th May 2016, the Claimant prepared and sent CBA proposals to the 1st Respondent, proposing to start negotiations on 15th June 2016. By letter dated 10th June 2016, the 1st Respondent's Vice Chancellor, Prof M.S Rajab informed the Claimant that its members had joined a rival union, Kenya University Staff Union (KUSU), the 2nd Respondent herein. The Claimant therefore no longer enjoyed a simple majority in membership and for this reason, the 1st Respondent declined to hold any CBA negotiations with the Claimant.

7. Following failed attempts to reach an agreement, the Claimant reported a dispute to the Cabinet Secretary, Ministry of East African Community, Labour and Social Protection. The Chief Industrial Relations Officer appointed Willy Kimani of Malindi Labour Office as Conciliator.

8. The matter was not resolved at the conciliation stage and on 13th November 2017, the Conciliator issued a certificate of disagreement, thus paving way for filing of the matter in court.

The Respondent's Case

9. In its Memorandum of Reply dated 20th June 2018 and filed in court on 22nd June 2018, the 1st Respondent admits having signed a CBA which was in force up to 30th June 2014.
10. Regarding the issue of withdrawal of membership from the Claimant, the 1st Respondent states that it acted on instructions of its unionisable employees as per Section 48(6) of the Labour Relations Act, 2007. The 1st Respondent adds that the Claimant was duly informed of this. The 1st Respondent maintains that it no longer recognises the Claimant as having a majority membership within its institution.
11. The 1st Respondent denies the allegations of refusal to deduct union dues and states that it has continued to pay union dues for its employees who are still members of the Claimant Union.
12. The 1st Respondent further states that no notice under Section 49 of the Labour Relations Act had been served upon it and it cannot deduct agency fees without a ministerial order.
13. The 1st Respondent submits that the Claimant having lost simple majority status to the 2nd Respondent with whom the 1st Respondent had negotiated a CBA, there was no room for negotiation with the Claimant. The 1st Respondent further submits that the Claimant's members had themselves benefited from the internal CBA negotiated by the 2nd Respondent.

Findings and Determination

14. In its claim, the Claimant makes two related prayers. First, an order directing the 1st Respondent to pay agency fees on account of 75 employees in Grades I-IV and second, an order compelling the 1st Respondent to negotiate a CBA.
15. In response to the Claimant's claim, the 1st Respondent states that the Claimant lost its simple majority status upon resignation of many of its members. The Claimant did not render any evidence to counter this submission by the 1st Respondent.
16. Looking at the pleadings and submissions filed by the parties, it seems to me that the real issue is a fight for members between the Claimant and the 2nd Respondent who are evidently rival unions. In its written submissions filed on 12th November 2018, the Claimant takes issue with the manner in which the employees withdrew their membership, which the Claimant deems to have run counter to the provisions of Section 48(6) (7) & (8) of the Labour Relations Act.
17. I have looked at the withdrawal procedure adopted by the Claimant's members and find nothing to suggest any violation of the provisions of Section 48 of the Labour Relations Act. That said, the Court finds and holds that pursuant to the resignations aforesaid, the Claimant lost its simple majority status.
18. As held in *Kenya Jockey and Betting Workers Union v Resort Kenya Limited [2014] eKLR* the simple majority status is not given; it is dynamic. It follows therefore that a trade union that no longer has a simple majority of unionisable employees within an establishment, as its members has no right to insist on recognition for purposes of collective bargaining. This in my view, is the essence of Section 54(1) of the Labour Relations Act.
19. With regard to the claim for agency fees, the only thing I will say is that under Section 49 of the Act, agency fees cannot be levied without a ministerial order (see *Tailors and Textiles Workers Union v Ashton Apparels (EPZ) Limited [2015] eKLR*). Without such an order, the 1st Respondent could not lawfully recover agency fees from any of its unionisable employees. It was the responsibility of the Claimant to procure such an order and having failed to do so, it cannot turn around and claim agency fees from the 1st Respondent.
20. Pursuant to the foregoing findings, the Claimant's claim fails and is dismissed.
21. Each party will bear their own costs
22. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF MAY 2019

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JUDGE

Appearance:

Mr. Tonge Yoya (Union Representative) for the Claimant

Miss Kabuthi for the 1st Respondent

No appearance for the 2nd Respondent