



THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 31 OF 2017

[formerly Kisumu Cause No. 12 of 2017]

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

NEW ADATIA WHOLESALERS LIMITED.....RESPONDENT

JUDGMENT

1. By a Memorandum of claim dated 20th December, 2016 the claimant union seeks recognition by the Respondent in terms of Section 54 of the Labour Relations Act, 2007.
2. The claimant further seeks an order for payment of Kshs. 428,000/- with interest at 20% being union dues, owing to the claimant's union from the Respondent from 24th March, 2016, the date the union submitted the check off forms to the Respondent.
3. The basis of the suit is that the claimant has recruited 65 unionisable employees of the Respondent out of a total of 88 unionisable employees. That this comprises 73.8% of all the unionisable employees of the Respondent meaning that the claimant has fulfilled the conditions precedent for recognition.
4. The claimant further submits that it is the correct union for the sector, in terms of the objects of its Constitution, and that there is no rival union claiming to represent the unionisable employees of the Respondent.
5. The claimant relies on the check-off forms attached to the Memorandum of claim and the list of employees of the Respondent found in the Respondent's supplementary list of documents filed on 10th February, 2017.
6. The claimant prays the suit be allowed as prayed.

RESPONSE

7. The claim is opposed by the respondent vide a Memorandum of response of the Respondent filed on 26.1.17 on the basis that the claimant union has not at any one time recruited a simple majority of all unionisable employees of the Respondent.
8. That the dispute was referred to conciliation and the County Labour Officer Bungoma Mr. Peter Otwane made a report in which he recommended that the claimant union be accorded a conducive environment to conduct fresh credible recruitment of members since the present check – off was not authentic and the signatures of the employees in that check-off list did not match those of the targeted employees.
9. The conciliator further found that only 35 employees out of 89 names submitted were authentic.
10. The Respondent submits that the claimant union has not satisfied the requirements of Section 54 of the Act, and the claim be dismissed with costs.

DETERMINATION

11. Section 54 (1) of the Labour Relations Act, 2007 reads,

“An employee, including an employer in the public sector, shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.”

12. The court has carefully perused the check off list dated 24.3.16 submitted by the claimant union to the Respondent and having compared the said list of employees to the list of employees submitted to court by the Respondent on 10th February, 2017 and 7th March, 2017, is satisfied that the documents contain the same persons working for the Respondent and had as early as 24th March, 2016 joined membership of the claimant union.

13. The court has considered the conciliation report and found that the conciliator not being a handwriting expert, had no basis of concluding that the signatures contained in the check-off list were not genuine.

14. It is not for the Respondent, once served with a check-off list, issued in terms of The Labour Relations Act, to confront the employees individually and interrogate them about their having joined the union. The Respondent's only duty is to implement the deductions, unless and until the employer receives a written complaint from any affected employee that he/she did not join the union voluntarily.

15. It should be remembered that the check-off form, is a statutory document issued by the Minister in terms of Section 48 (2) and (3) of the Labour Relations Act and the form is presumed to be valid unless proved otherwise.

Under Sub-section 48 (6) -

“An employer may not make any deductions from an employee who has notified the employer in writing that the employee has resigned from the union.”

16. In the present case the Respondent submitted further list of documents dated 29th June, 2017 in which twenty (21) withdrawal letters from the union are attached.

17. If the court was to assume that these are genuine withdrawals after the check-off list was submitted and recognition of the union sought, which is not the case, the claimant union is left with 44 unionisable members out of 88 unionisable employees. That still leaves the claimant union with 50 + 1 % of all the unionisable employees.

18. The claimant union has placed on oath allegations of intimidation of its members by the Respondent. These allegations are not without merit. It beggars belief that employees who had voluntarily joined the union would wake up a few days later, between 22nd June, 2016 and 24th July, 2016 and start writing letters of withdrawal for no reason provided.

19. The court finds as credible the evidence of intimidation adduced by the claimant union and directs the Respondent to desist from violating Section (5) of the Labour Relations Act as read with Article 41 of the Constitution of Kenya 2010, which provisions guarantee all employees freedom of association and that of joining a union of choice.

20. Accordingly, the claimant has proved on a balance of probabilities, that it has recruited a simple majority of all unionisable employees of the Respondent and that the claimant is eligible for recognition by the Respondent in terms of Section 54 (1) of the Labour Relations Act, 2007. In this respect, the court relies on the decision in ***ELRC No. 526 of 2014 Kenya Union of Commercial Food & Allied Workers Vs. Jade Collection Limited*** by Wasilwa J. which had similar facts to this case and the court granted recognition to the union.

21. The court enters judgment in favour of the claimant as against the Respondent as follows:

- (a). The Respondent is directed to sign a Recognition Agreement with the claimant union within thirty (30) days of this judgment.
- (b). The Respondent is directed to remit all arrear union dues to the claimant union in the sum of Kshs. 428,000/- as prayed, less any amount already remitted and continue to so remit on a monthly basis.
- (c). The claimant to pay interest at court rates in respect of Kshs. 428,000/- union dues quantified from date of filing suit till payment in full.
- (d). The Respondent to pay costs of the suit.

Dated at Bungoma this 26th day of January, 2018.

HON. MATHEWS NDERI NDUMA , JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA.

In the presence of:-

Mr. John Owiyo for Claimant

Mr. Maloba for Respondent

Mr. Chrispo Aura – Court clerk.