REPUBLIC OF KENYA

IN THE IN THE EMPLOYMENT & LABOUR RELATION

AT MOMBASA

CAUSE 197 OF 2015

KENYA SHOE & LEATHER WORKERS UNION.........................CLAIMANT

VERSUS

MODERN SOAP FACTORY..RESPONDENT

JUDGMENT

Introduction

1. On 9th April 2015, the Claimant brought this suit seeking orders to compel the Respondent to deduct and remit union dues to the Claimant in respect to her members who are employees of the Respondent. In addition, the Claimant prayed for an order directing the Respondent to sign Recognition Agreement in favour of the Claimant for purposes of collective bargaining. In response the Respondent filed defence and the Notice of Preliminary Objection (P.O) dated 15th May 2015 seeking to have the suit struck out with costs for being incompetent, premature and bad in law for offending section 48, 50 and 54 of the Labour Relations Act (LRA). In addition the respondent filed defence on 18.5.2015 reiterating the grounds raised by the said P.O and further denied that the Claimant had met threshold for the grant of recognition to represent her unisable employees.

2. After considering the arguments for and against the P.O, I dismissed it by a ruling rendered on 14.9.2015. The grounds upon which I dismissed the P.O was that the conciliation proceedings before the conciliator had lapsed by the operation of the law by dint of section 69(b) of the Labour Relations Act after parties failed to extent the period for the conciliation by an agreement. In addition, it was my finding that the dispute was unresolved because the parties never signed any agreement before the Conciliator to signify that the dispute had been resolved as required by section 68 of the Act.

3. The Respondent was dissatisfied with the said ruling and filed a Notice of Appeal on 6.10.2015. However, 2 years thereafter the appeal was never formally lodged and no stay of proceedings herein was obtained. Consequently, the suit was fixed for hearing on 26.7.2017 when the parties agreed to dispose of the suit by written submissions on the strength of their respective pleadings and supporting evidence filed in Court. The

Claimant filed her submissions on 4.8.2017 while the defence filed on 8.11.2017.

Claimant’s Case

4. The Claimant contended that she complied with section 48, 50 and 54 of the LRA by recruiting more than a simple majority of the Respondent's unionisable workforce; forwarding the check off forms to the employer to notify her of the recruitment; and requesting for recognition and deduction of union dues from the recruited members' wages and remittance of the same to the union. However the Respondent refused to accord the recognition and to deduct and remit the union dues as requested prompting the Claimant to report a labour dispute before the Labour Cabinet Secretary. Thereafter a conciliator was appointed and who after hearing the matter made his findings and recommendations on 9.3.2015 that the Claimant had not met the threshold for recognition being a simple majority of the respondent's unionisable staff but directed the Respondent to deduct union dues from the union members' wages and remit it to the Claimant. By letter dated 14.3.2015 the Claimant wrote to the Respondent requesting her to deduct and remit union dues as per the conciliator’s recommendations but the respondent declined. As a result, the Claimant brought this suit.

5. The Claimant contended that she recruited 56 out of 62 unionisable employees of the Respondent by 25.2.2015 and prayed for recognition to represent the Respondent's staff for purposes of collective bargaining. She also prayed for order that the Respondent be directed to deduct union dues from her union members and remit the same to the union in accordance with section 48 (2) of the Act.

Defence Case

6. The respondent has submitted that this suit is unsustainable because the same dispute was referred for conciliation and the conciliator resolved it on 9.3.2015. It is the defence case that, because the parties herein voluntarily submitted themselves to the conciliation process to its finality, they are bound to respect and fulfill the recommendations expressed by the conciliator and not to bring this claim. She therefore prays for the suit to be dismissed.

7. In addition the Respondent has denied that the Claimant has recruited a simple majority of her unionisable staff. She contends that the same issue was raised before the conciliator and it was determined in his recommendations to the parties herein. According to her, the conciliator found that the Claimant had not recruited a simple majority and recommended that she continues with the recruitment while the Respondent was directed to deduct union dues from her staff who members of the union and remit the same to the Claimant. She further contended that her core business involves manufacture of soap and candles which does not fall within the representation of the Claimant. She submitted that plastic drums and paper bags which have attracted the Claimant are by-products which are dealt with by casual employees who are engaged on a daily basis and are not consistent attendants.

8. The Respondent further contended that the Claimant has not filed any genuine check off forms for recruited members and she never did so before the conciliator to prove that she recruited a simple majority. In her view the check off forms annexed as APP.II by the Claimant do not support the averments in the claim and should be expunged from the record. She contended that the conciliator relied on the list of members MSF-A 1 & 2 filed by her for the verification of members but which the conciliator ruled in her favour. She further contended that, if we synchronize the APP.II and MSF-A1 & 2, only 24 out of 56 workers in APP.II were among the 62 workers in the Respondent's MSF-A1&2 and such the number was below a simple majority required by section 54 of the Act.

9. Finally, the respondent has submitted that he has in compliance with the conciliator's recommendation been deducting and remitting union dues in respect of her employees who are members of the claimant. She therefore prayed for the suit to be dismissed with costs.

Analysis and Determination

10. After carefully perusing and considering the pleadings, and the written submissions filed, it is clear that the parties herein were engaged in conciliation of a trade dispute brought under section 62 of the LRA before the Labour Office which ended with the findings and recommendations by the Conciliator contained in his letter dated 9.3.2015. According to the Conciliator, the Claimant had not recruited a simple majority of the respondent’s unionisable staff and recommended that she should continue with the recruitment in order to achieve the required numbers for recognition. He however recommended that the Respondent should deduct and remit to the Claimant, union dues in respect of the voluntary union members of the staff. The issues for determination are:

a) What is the effect of conciliation process before moving to Court?

b) Whether the Claimant union is entitled to recognition by the Respondent under section 54 of the Act.

c) Whether the Respondent has failed to deduct and remit union dues to the Claimant.

The effect of conciliation before filing suit.

11. I wish to observe from the onset that the Respondent's submissions are in sharp contradiction with her pleadings and the P.O which I dismissed by my ruling dated 14.9.2015. In the P.O and the defence, she contended that the conciliation process was not yet concluded and as such, the suit now before me was premature and incompetent. In her current submission, she now contends that the conciliation process was concluded after the conciliator made his recommendations on 9.3.2015 and no one challenged the decision. In my view if the said submission formed part of the pleadings in the defence and the said P.O the Courts could possibly have arrived at a different decision on the P.O.

12. Be that as it may, it is now clear from the material placed before the Court that on 21.8.2014, the Claimant reported a trade dispute before the Labour Ministry under section 62 of the Act and on 21.10.2014 the Minister appointed Mr. J. Nyaga as a Conciliator who after a series of meetings with the parties herein, made his recommendations to them on 9.3.2015 and copied to the Chief Industrial Relations Officer, Labour Ministry. The conciliator's stated as follows:

> ***"7. Recommendations***
>
> *After considering the facts presented by both parties coupled with my findings, I recommend that:-*
>
> *I. The union put more effort to achieve the required simple majority to be accorded a recognition agreement.*
>
> *II. The employer deducts union subscriptions from wages of those who have voluntarily joined the union and submit the same accordingly."*

13. The question that begs answer is whether the foregoing decision amounted to resolution of the trade dispute and thereby barred the parties from bringing this suit. Under section 68 of the Act a trade dispute is deemed settled after conciliation if, an agreement in writing is signed by the parties in the presence of the conciliator and lodged with the minister. On the hand, section 69 of the Act provides that a trade dispute is unresolved and conciliation proceedings closed if, the conciliator issues a certificate that the dispute has not been resolved by the conciliate; or thirty day period from the appointment of the conciliator or any longer period agreed by the parties, expires.

14. As I observed in my ruling to the P.O, the foregoing provisions makes it is clear that a trade dispute does not last before a conciliator forever. It must come to an end within 30 days after the appointment of the conciliator unless the parties agree to extent the period. In this

case the dispute was never resolved as no written agreement was signed by the parties and the conciliator as provided under section 68 of the LRA. Likewise the dispute was never terminated by the conciliator through a certificate under section 69 (a) of the Act.

15. After considering the said provisions and the fact presented to me during the P.O, I ruled that the conciliatory proceedings had ended automatically under section 69 (b) on 25.2.2015 when the parties met at the conciliator's office following a written agreement signed by them and the conciliator dated 27.1.2015. It has however become clear now after the hearing that in fact both parties were happy with the recommendations by the conciliator. The foregoing view is fortified by the Claimant's letter dated 14.3.2015, which demanded that the Respondent should comply with the said recommendation by the conciliator to deduct union dues from the wages of her members and remit to her. The said demand came only 5 days after conciliator's decision and it was copied to him. The Claimant's demand letter stated as follows in part:

> *RE: TRADE DISPUTE- MLSSS/LD/IR/20/17/2014.*
>
> *Reference is made on the above mentioned dispute and the Recommendations made by the conciliator on the same dispute.*
>
> *We hereby write to ask you to deduct union subscription from the wages of those who have voluntarily joined the union and submit the same accordingly the end of this month.*

16. The Claimant contended that after the said demand, the Respondent failed to deduct union dues from the Claimant's members and remit the same to her as recommended by the conciliator as a result of which she brought this suit. The Respondent has however contended in her submissions that she has since been deducting union dues from the union members' wages and remitting to the Claimant in compliance with the conciliator's recommendations. The said submission has not been contested by the Claimant and I therefore find on a balance of probability that the parties herein impliedly accepted the conciliator's decision even without a signed agreement and this Court does not see the need to interfere with the parties choice to comply and benefit from the said recommendations.

17. In my view, and as submitted by the defence, where parties like in this case, chose and fully submit themselves to conciliation process under section 62 of the Act to its finality, they are bound to respect and fulfill the decision/recommendations expressed by the conciliator and avoid unnecessary litigation. The forgoing view is buttressed by the decision of Ndolo J in ***Wario Gorise -v- Vicky Nyaithiru Kabetu [2013] eKLR*** where she quoted from another decision of this Court in ***Elizabeth Wanjiru Njogu Vs Kangei Nyakinyua Building Co. Limited*** where it was held as follows:

> ***"A party who voluntarily submits himself to ADR and even reaps the benefits thereof cannot come to court and question the process if they did not take issue during the process. The court will only interfere with the process and/ or outcome of ADR if manifest miscarriage of justice has occurred or where the constitution or any written law has been contravened."***

18. In view of the foregoing finding that the parties herein accepted the decision by the conciliator and so far benefited from the same, the dispute stands resolved by dint of that choice to be bound by the conciliator's decision. I will therefore dismiss the entire suit with no order as to costs but direct the parties to comply with the same conciliator's recommendations that:

> a) The union put more effort to achieve the required simple majority to be accorded a recognition agreement.
>
> b) The employer deducts union subscriptions from wages of those who have voluntarily joined the union and submit the same accordingly.

Disposition

19. Save for the directions given above, the suit is dismissed with no order as to costs.

Dated and signed at Nairobi this 18th day of January, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 22nd day of February, 2018

LINNET NDOLO

JUDGE