



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 758 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 5th March, 2018)

BANKING, INSURANCE AND

FINANCE UNION (KENYA).....CLAIMANT

-VERSUS-

PESA TRANSACT LIMITED.....RESPONDENT

JUDGEMENT

1. The Claim before Court was filed by the Claimant Union on 5/5/2016. The Claimant's contention was that they recruited 51 employees of the Respondents into their Union on 23-1-2015. That since then, the Respondents have totally refused/failed to remit Union dues for the unionisable employees who signed the check off list despite acknowledging receipt of it.
2. The Claimant's case is that the Respondent is a financial institution duly allowed by law to transact financing business within the Republic of Kenya and therefore refusal by the Respondent is tantamount to blocking justice and wishes of the workers to enjoy freedom of association and to bargain collectively.
3. The Claimant seeks orders that the Respondent do with immediate effect deduct union dues from all the unionisable employees who have already signed the check off forms and remit such dues to the Claimant Union account. They also want the Court to order the Respondent and Claimant to sign a recognition Agreement forthwith since they have already recruited more than a simple majority.
4. The Claimant also seeks that the Respondent should stop the harassment, intimidation and coercion of unionisable employees who have already joined the Claimant's Union or those who may express their interests to join the Union.
5. The Respondents opposed this claim. They filed their Memorandum of Reply on 6/10/2017 through the firm of Oraro & Company Advocates.
6. The Respondents contend that they are a limited liability company incorporated under Cap 486 Laws of Kenya carrying a business in the telecommunication industry of sale of telecommunication services. The Respondents attached their certificate of incorporation and an extract of their Memorandum and Articles of Association and Profile to confirm the same.
7. They also aver that they are not a bank or financial institution regulated or supervised by the Central Bank Act and the Claimant is therefore not a relevant Union to the sector in which the Respondent resides.
8. The Respondent avers that they manage financial service kiosks in various branches of Nakumatt Supermarkets across the country on behalf of multiple mobile money and agency banking services such as Safaricom Mpesa and Airtel's Airtel Money Platforms, within the telecommunication industry and not the financial sector.
9. The Respondent further contends that on or about 23rd January, 2015, the Respondent received a check-off list from the Claimant for forty eight (48) members of staff demanding submission of union dues and full schedule of names of paying members with accompanying notification.
10. They allege that the number of the Claimant's members was 42 out of total unionisable workforce of 107 employees and out of the said number as at 31.12.2014 six members on the list were not employees of the Respondents due to expiry of their contracts and resignation.
11. It is contended that during the process of compliance with the check-off system on 23.1.2015, the Respondent received reports that its

employees were not aware of the deduction of monthly union dues at rate of 1% of the basic salary and some employees specifically in the Nairobi area had been misled to believe that they were joining a welfare society and the same had been authorized by the Company.

12. They further allege that some employees were called by individuals masquerading as management and were sent forms to sign under the guise that they were sanctioned by management which actions are both unlawful and a misrepresentation of facts in order to obtain union membership.

13 The Respondent avers that upon the Employees understanding the functions of the Claimant and the monthly deductions, voluntarily withdrew from the Claimant with 28 voluntary withdrawals from the union vide letters dated 27.1.2015. That when the Union received this letters, they returned to confuse and force the employees to rejoin the Union and some employees joined as a result.

14. That on 2.2.2015, the Claimant served the Respondent with another check-off list alleging that a further 3 employees were members of the Union and that the total number of members recruited was 51 which in their view was not the position as the name of one Andrew Lihanda had been repeated in the list of 23.1.2015 and that of 27.1.2015.

15. It is further alleged that on 2.2.2015, the Claimant reported a trade dispute on the issue of harassment and intimidation of unionisable employees after joining the union and a conciliator was appointed who after the process of conciliation found that the Claimant had not attained the simple majority required for recognition and the employees should not be subjected to any harassment or intimidation by both management and the Union.

16. The Respondent avers that they have fully complied with deduction and remittance to the Claimant's account of union dues from employees who are members of the Claimant union, which as at February 2016 was 5 members.

17. That on 3.2.2015, the Respondent received statutory check-off forms with 52 members having been recruited. That due to the history of misrepresentation and harassment of employees for recruitment by the Claimant, the Respondent began the process of verifying the check-off forms and processing deduction and remittance of unions based on confirmations which were 3 out of the 52 employees.

18. Further, that from the check-off forms provided by the Claimant on 3.2.2015, 7 employees no longer work for the Respondent. They also state that in 2016 only 50 employees of the Claimant union out of a unionisable workforce of 109 had signed off as members of the Claimant, which is not a simple majority.

19. The Respondent aver the Claimant is not entitled to any of the reliefs sought and prays for the Claim to be dismissed with costs.

Submissions.

20. It is submitted on behalf of the Claimant that according to the Memorandum of Association of the Respondent Company, it is a financial institution, accordingly in January 2015, they served the Respondent with 48 check-off forms and 4 days later 4 others followed and the Respondent acknowledged them by stamping on the said forms.

21. The Representative for the Claimant submits that they started a verification process, which was to write to employees to ask if they had joined the union to which they responded that they had not but had joined a Savings and Credit Society. It is the Claimant's position that the Respondent's contention that they performed a verification exercise is untrue as the process was only meant to harass and intimidate employees to withdraw membership from the Claimant.

22. It is also submitted that during the process of conciliation it was established the total number of the Respondent's workforce was 80 not 115 as alleged. He urges that the Respondent have not proved the said allegation as only a list of names has been given to the Court and the said list does not separate management from unionisable employees. He is also of the view that in light of this, the Claimant has a simple majority and the Claim should therefore be allowed.

23. The Claimant's representative cites the case of **Civicon Limited Vs Amalgamated Union of Kenya Metal Workers (2016) eKLR**, where it was held:

“It must be borne in mind that the trial Court is only concerned with the numbers as at the time the claim is made. If verification has to be done it must relate to the number of employees stated in the claim against that asserted by the employer. That, in our view, is the reason why section 54(7) requires that if dispute is not resolved by conciliation it must be referred to court under a certificate of urgency before conditions change.”

24. Counsel for the Respondent on the other hand submits that the Claimant has not attained a simple majority requisite for recognition and cites the case of **Kenya Jockey and Betting Workers Union Vs Resort Kenya Limited (2014) eKLR** where it was held:

“The presence of a simple majority is not given. It is dynamic. It keeps on changing based on the employer's turn over, continuation of employment and other factors of labour like terminations, resignation and movements from unionisable employees to management positions. Thus a union that enjoys the status of recognition by an employer is not given, such recognition is not automatic, efforts must be put in place to ensure the simple majority retention at all times.”

25. It is the Respondent's submission that at no single time did the Claimant achieve a simple majority required for recognition.

26. On the issue of harassment and intimidation of employees to exit from the Claimant union Counsel cites the case of **Kenya Scientific Research International Technical and Allied Institutions Workers Union Vs Kenya Agricultural Research Institute & Another (2013)eKLR**, where it was held:

“Recognition of trade unions rests on freedom of association. Employees have the right to join and leave trade unions. Recruitment is a continuous process. Even where an employer has formally granted trade union recognition, employees belonging to that recognized trade union are not barred by any law from shifting allegiance to another trade union. Freedom of Association acknowledges the right to associate is co-joined to the right to dissociate just as much as the right of recognition includes the right of de-recognition. Employees look at the trade union that is best placed to articulate their collective rights and interests of the moment and do not take a lifelong vow of fidelity, by joining any one trade union”.

27. On whether the Claimant and the Respondent were to sign a recognition agreement it is submitted that Section 54(1) of the Labour Relations Act provides that an employer shall recognize a trade union for the purposes of collective bargaining if that trade union represents a simple majority of unionisable employees. Counsel also cites the case of **Kenya Jockey and Betting Workers Union Vs Resort Kenya Limited (Supra)** to buttress this position.

28. As to whether the check-off forms as signed by the employees were served on the Respondent it is submitted that they received reports that the employees had been falsely represented to join a welfare society and those were the forms that the Claimant presented as check off forms. That this is also evidenced by the mass withdrawal from the union upon the employees understanding the import of recruitment.

29. The Respondent are of the view that the Claimant has not established their case and the same should be dismissed with costs.

30. I have examined all the evidence and submissions of the parties. I note that the issues complained of relate to whether the Claimant is the rightful union in the Respondent’s business. There is also a complaint relating to the membership of the union i.e. those who have registered *vis a vis* the unionisable employees of the Respondents. The records in this case have not been presented to the Court.

31. In determining whether the Claimant is the rightful Union to represent employees of the Respondent, I note that from the Respondent’s own admission, they deal with finances in the communication industry. The Claimant deal with banking, Insurance and Finance Industries. In my view the Claimants fit properly well in the Respondent’s business as they deal with finances.

32. However, this Court is unable to determine the requisite number of unionisable employees in the Respondent’s company without proper investigation and documents being availed to Court. I therefore direct that as provided for under Section 15 of Employment & Labour Relations Court Act, that this matter be referred to the Labour Commissioner to appoint a Labour Officer to carry out a verification exercise on this issue and report back to Court within 60 days.

33. Costs in the cause.

Dated and delivered in open Court this 5th day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties