REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 361 OF 2013

(*Before Hon. Lady Justice Maureen Onyango****)***

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

NAIROBI SPORTS HOUSE LIMITED.....RESPONDENT

JUDGEMENT

By memorandum of claim dated 27th February 2013 and field on 19th March 2013, the claimant union seeks the following orders –

i. To recognize the claimant union as a properly constituted and representative body and the sole labour union representative labour interests of their employees.

ii. To deduct and remit union dues from all unionisable employees who have signed the claimant's check off forms thereby acknowledging membership.

iii. Not to victimize intimidate harass or coerce or otherwise dismiss or terminate any of the union members as a result of their trade union activity.

iv. To other the respondent to engage the claimant in collective bargaining within thirty (30) days upon signing Recognition Agreement.

v. To meet the cost of this suit in favour of the claimant.

In the memorandum of claim, the issue in dispute is framed as

"*REFUSAL BY THE EMPLOYER TO SIGN RECOGNITION AGREEMENT*"

The memorandum of claim was filed together with an application by notice of motion in which the claimant union prays for the following orders

1. That the court certifies this application as urgent.

2. That service of this application/claim on the respondents be dispensed with and that the application be heard ex parte in the first instance.

3. That the court be pleased to issue orders restraining the respondent from victimising, intimidating, coercing, harassing, terminating, dismissing or disciplining the claimant members whose names appear on the check-off forms on account of their trade union membership.

4. That this court sets this matte for hearing and determination on priority basis.

5. That costs of this application be provided for.

The grounds in support of the application summarise the claimant's justification for the reliefs sought in both the application and the claim as follows –

i. That between 16th July 2010 and 10th November 2010, the claimant/applicant recruited 118 out of 160 unionisable employees of the respondent which is over 51% simple majority as required under Section 54 (1) of the Labour Relations Act, 2007 for purposes of recognition.

ii. That the claimant/applicant's constitution and rules allows it to recruit, enrol and represent the respondent's unionisable employees.

iii. That the claimant/applicant recruited more than 69% of the unionisable employees as its members being more than the numbers required for purposes of recognition but was unfairly, unjustifiably and unlawfully denied recognition.

iv. That the claimant/applicant has pursued the recognition dispute in accordance with the provisions of the Labour Relations Act, 2007 but still the respondent did not find it necessary is recognize the union.

v. That the respondent's adamant behaviour is aimed at denying their unionisable employees the right of trade union representation.

vi. That the respondent's action to refuse to recognize the claimant/applicant amounts to unfair labour practice is unlawful and unconstitutional.

vii. That the respondent's unjustifiable action violates relevant ILO Conventions, the Labour Relations Act, 2007 and the Constitution of Kenya 2010.

The respondent filed a memorandum in reply to the claim on 21st August 2013 denying the allegations of the claimant union. The respondent contended that the claimant union had not met the threshold for recognition as the claimant did not serve union check off forms "Form S" upon the respondent and only produced the forms during conciliation meeting upon being directed to do so by the Conciliator, that upon scrutiny of the check off forms it emerged that of the 149 unionisable employees in employment at the time the union sought recognition in December 2010 only 51 had been recruited into membership by the respondent translating to 32%, well below the statutory threshold of a simple majority of above 50%.

The respondent further averred that it was unable to remit union dues as no check off forms had been served upon it as provided in Section 54 (a) of the Labour Relations Act.

On the prayer to restrain the respondent from victimising, harassing or coercing employees who had signed the check-off forms, the respondent avers that no evidence was tendered by the claimant in support thereof. It denied the allegations.

The respondent further avers that having not met the threshold of recognition, the claimant union does not quality for commencement of negotiations of collective bargaining agreement as prayed.

The respondent prays that the claim be dismissed with costs.

On 23rd June 2014, parties filed a consent in the following terms –

"By consent of the parties it is hereby agreed as follows:

1. That a ballot exercise be conducted under the supervision of the Ministry of Labour and/or their appointed representative to verify whether or not the claimant/applicant has attained statutory simple majority membership of the unionisable employees of the respondent and file a report with the court to that effect.

2. That the respondent will provide a comprehensive list of its unionisable employees to the Ministry of Labour and/or their agents and to the claimant/applicant for the purpose of conducting a ballot.

3. That parties shall meet under the Chairmanship of the ministry of Labour and/or their appointed agents to agree on how the ballot will be conducted including ballot papers, who are eligible to vote, observers and their role, time, date and venue for the exercise, among other issues.

4. That the respondent to commence deduction and remittance of union dues for employees who have requested for deduction through the check off forms not in dispute.

5. That the court shall make further directives upon receipt of the Minister's report.

The consent was adopted by the court on the same date. However, the ballot did into take place until 22nd February 2017. The report of the Labour Commissioner on the ballot, which is self-explanatory, is reproduced below –

"MINISTRY OF EAST AFRICA COMMUNITY, LABOUR AND SOCIAL PROTECTION

DEPARTMENT OF LABOUR

Social Security House, Bishops Road

P.O. Box 40326 – 00100

Nairobi

KENYA

23rd February 2017

Hon. Judge

Employment and Labour Relations Court

NAIROBI

ELRC CAUSE NO. 361 OF 2013

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS AND NAIROBI SPOTS HOUSE LIMITED

This is pursuant to order of the Honourable Court issued on 8th July 2014 by Hon. Lady Justice Linnet Ndolo, that in accordance with the parties consent, the parties shall meet under the Chairmanship of the Ministry of Labour and/or their appointed agents to agree on how the ballot will be conducted including ballot paper, who are eligible to vote, observe and their role, time, date and venue for the exercise.

I wish to report that the parties did jointly meet under the Chairmanship of this office, where an agreement was reached on the date, venue, ballot papers and observer's role in the ballot exercise.

Pursuant to this, the ballot exercise was conducted on 22nd February 2017 as was agreed and hereunder is the outcome of the exercise:

Nairobi [eight (8) Nairobi Sports House branches]

Total number of votes cast 248

Votes cast for "Yes" 49

Votes cast for "No" 199

Mombasa [two (2) Nairobi Sports House branches]

Total number of votes cast 8

Votes cast for "Yes" 2

Votes cast for "No" 6

Two employees abstained

Hence, the total number of employees who are in support of the union representation are 51, while those against union representation are 2008. In which case, the union has failed to get a simple majority to warrant recognition by the employer.

Yours Faithfully

J. A. Yidah

For: Labour Commissioner

cc

General Secretary

KUCTAW

P.O. Box 46818

NAIROBI

Managing Director

Nairobi Sport House Limited

P.O. Box 4518 – 00100

NAIROBI

On 20th November 2017, parties agreed to proceed by way of written submissions. The submissions were to cover the report of the Labour Commissioner on the ballot as well as any other outstanding issues and would be the basis upon which judgment would be rendered.

Claimant's Submissions

In the claimant's submissions, it states that it does not challenge the ballot results. If further admits that based on the report it does not meet the threshold of recognition as set out under Section 54 of the Labour Relations Act. The claimant however submits that the respondent has failed to comply with the court's orders of 23rd June 2014 adopting the report and prays for the following orders –

i. Confirm item 4 of the consent agreement and order the respondent to commence deduction and remittance of union dues to the claimant from July 2011.

ii. That union dues which would have been deducted and remitted from 117 members with effect from 31st July 2011 be paid by the respondent from their own funds and that such deductions should continue after the judgment and as required under Section 48 of the Labour Relations Act, 2007.

iii. That the said unpaid accumulated union dues to earn interest at court rates each year from 31st July 2011 as tabulated by the clamant amounting to Kshs.4,650,678 together with 14% interest.

iv. The claimant further prays that the quest for recognition agreement should continue once 51% simple majority is realized as recruitment of union members is a continuous exercise and that such a quest should not be abandoned forever following the results of the just concluded ballot exercise and that the workers right of freedom of association exists even aft the just concluded ballot exercise.

v. That part of the costs of this suit be granted in favour of the claimant for reasons stated herein above.

Respondent's Submissions

In its submissions, the respondent reiterates the averments in the defence to the effect that the claimant has not met the threshold of recognition and collective bargaining, that the claimant did not serve check off forms upon the respondent and can therefore not claim either union dues or interest thereof. The respondent further submits that –

1. Five (5) out of the 117 employees listed on the check-offs were duplicated names and hence double entries.

2. Sixty seven (67) employees out of the 117 listed in the check-offs heavily contested the check off list of employees and wrote letters to the employer denying joining the union.

3. Eight (8) employees out of the 117 listed in the check-offs who allegedly signed the said check offs left employment before the 4th July 2011.

4. Twenty three (23) employees out of the 117 listed in the check-offs who allegedly signed the forms never confirmed signing the check offs and ah delft employment by the 4th July 2011.

5. Ten (10) employees who allegedly signed the said check offs did not confirm membership but since left employment after 4th July 2011.

6. Only eleven (11) employees out of the 117 listed in the check-offs who allegedly signed the said check offs are still in employment at the respondent company but have failed to confirm their membership to the union.

7. There were also alleged signatures of employees who were in management and hence not unionisable according to the Industrial Relations Charter.

The respondent relied on the decision of the court in the case of **Kenya Union of Hair and Beauty Salon Workers -vs- Style Industries Limited and Another [2017] eKLR** where the court stated: -

> *"Section 48 of the Labour Relations Act is clear with regard to deduction and emittance of trade union dues. As Section 48 (2) it provides*
>
> *A trade union may in the prescribed for request the Minister to issue an rode directing an employer of more than five employees belonging to the union to –*
>
> *The provision is to have an employer who has more than 5 employees who have joined a union to deduct and remit the same to their union. Such is a right under Article 41 of the constitution.*
>
> *However, for the union to enjoy such rights they have a duty and responsibility set out under Section 48 of the Labour Relations Act requirements and to submit check off forms in accordance with the schedules to the Labour Relations Act, signed and acknowledged by the employees who have joined the union with the employer. The employer is then to abide by the list setting out the unionisable employees who have indicated that they have joined a union of choice.*
>
> *The claimant in their submissions have admitted that they never signed the check off forms upon the 1st respondent on the ground that they feared their members listed in the check off forms would be victimised and terminated. Such forms were then served upon the 1st respondent when the dispute was reported to the Minister and the parties attended before the Conciliator. However, service of check off forms should not be through the Conciliator but should be directly to the employer who should acknowledge such service. To report a dispute to the Minister and then seek to serve critical forms and information that should have essentially been placed with the employer before a dispute is reported, I find to be engaging in unfair labour practices. Such should not receive the sanction of this court.*
>
> *Where the claimant has admitted that check off forms have not been served upon the respondent, it becomes apparent that the 1st respondent cannot be bound to comply with Section 48 and 54 of the Labour Relations Act as they are not aware of which employees who have joined the claimant union and further recognition cannot be assumed before the employer such as the 1st respondent has confirmed that all listed employees in the check off are in service and from a simple majority of all its unionisable employees."*

Determination

I have carefully considered the pleadings filed by both the claimant and the respondent together with documents attached thereto, the report of the Labour Commissioner and the final written submission by the parties. I have further considered the authority relied upon by the respondent.

From the submissions of the claimant, it has admitted that it has not met the threshold for both recognition and collective bargaining based on the ballot report in which only 51 out of 2005 unionisable employees of the respondent voted in favour of union representation. The only issues for determination are therefore whether the clamant is entitled to union dues from 117 members in the check off forms as at 31st July 2011 and interest thereon.

The claimant has not denied the averments at paragraphs 4, 5, 6, 8, 10, 11, 13 and 14 of the response to claim, wherein the respondent stated that the claimant union did not serve any check off forms upon it and only produced them when directed to do so during conciliation meetings and further that they ignored the directive of the Conciliator to go and verify the staff signature at the respondent's office. This therefore means that there were no authentic check-off forms upon which the respondent was to rely for the purpose of deduction of union dues.

The ballot report confirms only 51 employees voted in favour of union membership. This means that only 51 employees can be verified as being members of the union. However as provided in Section 48 of the Labour Relations Act and confirmed in the decision of the court in the case of **Kenya Union of Hair and Beauty Salon Workers -vs- Style Industries Limited and Another** referred to above an employer can only deduct check off forms from employees who have signed the check-off forms once the same have been served upon the employer. Section 48 (3) of Labour Relations Act provides as follows –

> **"An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction."**

Having not served the respondent with check-off forms in the manner provided in Section 48(3), the respondent has no basis for deduction of union dues. It follows that the employer could not have deducted union dues from any of the 117 employees referred to by the claimant from 31st July 2011 and therefore the employer does not have the money to remit to the union.

The logical conclusion is therefore that the claim fails in *toto* and is dismissed. The court hastens to add that the union is not barred from recruiting or submitting fresh check-off forms to the respondent in the manner provided for in the Act and that the respondent would be under statutory obligation to comply should that be done.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE