



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1458 OF 2015

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS CLAIMANT

VERSUS

EASTLEIGH MATTRESSES

LIMITED (EASTMATT) RESPONDENT

JUDGEMENT

Issue in dispute – recognition of the claimant by the respondent

1. The claimant by Memorandum of Claim avers that this is a trade union registered in accordance with the law with a constitution and covering commercial food and allied workers sectors. The respondent is a registered company running a chain of shops selling consumer goods and with branches along Mfangano street, River Road, Eastleigh, Kitengela, Mwea, Tala and Lokitang Road Nairobi and is in the sector in which the claimant has members.
2. On various dated from 2011 and 2014 the claimant recruited the respondent's employees as its members all being 602 from a total work force of 896 employees. This forms more than 51% simple majority required for purposes of recognition.
3. On 18th August, 2011 the claimant addressed the respondent informing them their unionisable employee had joined the union for purposes of trade union representation. A copy of draft Recognition Agreement was enclosed for their study and the claimant proposes a meeting to sign the agreement on 26th August, 2011.
4. On 31st August, 2011 the respondent asked for the list of members to which the claimant replied to and proposed another meeting for 9th September, 2011. The respondent postponed several proposed meetings and this was causing anxiety to claimant members.
5. On 18th October, 2011 the claimant referred a dispute to the minister in accordance with section 62 of the Labour Relations Act, 2007. A Conciliator was appointed and on 19th January, 2012 the claimant forwarded its proposals and check-off forms. The respondent failed to attend or file any record.
6. On 29th February, 2012 the claimant members in the respondent entity reported that they had received letters requiring them to re-apply for their jobs. This is a form of intimidation due to unionisation the

claimant wrote in protest. On 16th July, 2012 the claimant addressed the respondent on continued harassment of its members and termination without reason, demotions and wage adjustments. On 17th July, 2012 the conciliator addressed the parties in an effort to resolve the dispute without settlement.

7. The claimant is seeking recognition by the respondent in terms of article 36 and 41 of the Constitution, 2010 and sections 4 and 57 of the Labour Relations Act, 2007 with regard to the right to association and unionisation and read together with section 54 of the Labour Relations Act, 2007. The claimant has attained the threshold for recognition and in terms of Convention No.87 and 98 of the ILO.

8. Orders sought are;

I. To recognise the claimant union as the properly constituted and representative body and the sole labour union representing 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 union membership;

III. Not to victimise, intimidate, harass or coerce or otherwise dismiss or terminate any of the union members as a result of their trade union activity;

IV. To order the respondent to engage the claimant in collective bargaining within thirty (30) days upon signing recognition agreement; and

V. To meet the costs of this suit in favour of the claimant

Defence

9. In response the respondent states that they have employed about 700 unionisable employees and the claimant has never approached the respondent for recruitment of its employees to be members. The claim that the claimant recruited 602. unionisable employees or that they signed check off forms is denied. The lists attached in the memorandum of claim are fictitious and the said signatures do not belong to respondent employees.

10. On 19th January, 2012 long after the alleged recruitment the claimant write to the conciliator that they had recruited 131 employees of the respondent and not 602 as stated earlier. Upon scrutiny of the lists, of the 602 listed persons, 207 are not the employees of the respondent. The list has a multiplicity of names thus resulting in a reduced number of employees to 169. The genuine employees have denied belonging to the claimant union.

11. The claimant has no proof of enjoying 51% simple majority required for recognition. The various letters written by the claimant to the respondent were responded to and the alleged recruitment of unionisable employees is not a true fact. The respondent has not coerced any of its employees or threatened them with termination for joining the union. The claim should be dismissed with costs.

12. Both parties filed written submissions.

13. Due to the nature of the matters before court and the same relating to contested number of employees recruited by the claimant from the respondent business and employment, the court directed the minister through its officers to do a verification exercise with the parties. There are reports filed in this regard.

14. The claimant submits that between June, 2011 to June, 2014 the respondent employees registered with the claimant as members and a list of 409 members was presented to the respondent on 17th August, 2011 and a further list on 16th June, 214 comprising 193 members. The respondent has since refused to sign a recognition agreement. Efforts to have the matter resolved by a conciliator did not yield settlement on 17th July, 2012.

15. By order of 19th August, 2015 the court ordered that the respondent should not intimidate or harass claimant members and on 15th December, 2016 the court ordered for a verification exercise. On 17th January, 2017 the chief industrial relations officer invited parties to a joint verification exercise which was to be done on 14th February, 2017 but the claimant later learnt the officer had visited the respondent on 13th February, 2017. The claimant protested to this process in court and was directed to submit their report in 14 days.

16. Upon the claimant going through the report with the County Labour Officer it was found unnecessary to do a repeated exercise. Thus on the close of the report parties agree there is a list of 358 employees listed once and of the 244 repeated names and this well counted once all being 107 and total member are 465 employees.

17. With a membership of 465 the claimant has simple majority and 51% to enjoy recognition by the respondent. The respondent employees have the right to unionise and there being no other trade union claiming recognition, the claimant is the right union to enjoy the same having met the requisite threshold.

18. The respondent submits that on the orders sought by the claimant, the lists used to allege recruitment of members and employees of the respondent are fictitious and thus fraudulent and cannot be used to claim recognition. Page 14 of the claimant's bundle has check off forms with 2 employees whose names are repeated using different signatures similar to several other forms which are a manifestation of fraudulent and intentional effort to gain recognition.

Determination

19. On 15th December, 2016 the court directed the County Labour Officer to conduct a joint verification exercise in terms of the number of unionised employee's visa-a-vies unionisable employees of the respondent. The County Labour Officer filed reports on 27th February, 2017 and 7th March, 2017. This is the same report dated 20th February, 2017.

20. The County Labour Officer report states as follows;

*The said verification is now complete and was strictly restricted to the **list of singed up** members as submitted in court.*

The following is a summary of how the names have been repeated.

21. The County Labour Officer well cites the order of the court on 15th December, 2016 and which directed that;

... The County Labour Officer shall visit the Respondent's premises for verification exercise in terms of number of staff and unionised staff visa-a-vies unionisable employees.

The County Labour Officer to visit on 16th February, 2017 for a joint verification and mention on 28th February, 2017 for directions.

22. Verification exercise thus before crucial to enable the court address the core of the dispute and noting the issue in dispute being that of failure by the respondent to recognise the claimant. The total number of employees in the establishment must be verified. From such a number, the total number of unionisable employees must be identified and from such a number, be separated as to the unionised employees. In

Civicon Limited versus Amalgamated Union of Kenya Metal Workers [2016] eKLR the Court of Appeal held as follows;

... 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. ...

23. Thus the lists before court noted the challenge by the respondent on the authenticity of the same, by undertaking a verification exercise to know the total number of unionisable employees and out of whom state the number of unionised employees, the County Labour Officer would have facilitated an independent exercise. The court would then have well been able to know with clarity as to the exact numbers involved and whether out of the stated numbers the claimant has attained the required threshold of 51% for recognition.

24. The exercise then undertaken by the County Labour Officer does not confirm access to the employer records and what such revealed. To thus only rely on the lists submitted by the claimant and make an elimination process, such is not as directed by the court.

25. Without a proper verification exercise, the material before court is not sufficient. Each is presented by an interested party.

26. The respondent does not help either. The defence is that the respondent has about 700 unionisable employees. No lists are attached. The averments that on the lists filed by the claimant alleging recruitment of 602 employees, 207 are not their employees and from the duplicated lists, there is only a membership of 169 verifiable members and that the genuine employees have denied ever being recruited into the claimant union, such does not aid the court. It is simply to deny and then fail to state the correct position and provide documents to facilitate verification.

27. The respondent has attached a list of Statutory Declarations from 19 employees. These employees have made oath and stated that they did not sign the check off forms to be members of the claimant. The claimant has not addressed these matters at all. Where indeed several listed employees in the check off forms have denounced membership through an affidavit made before a Commissioner for Oaths, without challenge, I take this to be true.

28. Without the County Labour Officer undertaking a verification exercise on site to confirm the total number of employees within the respondent entity and separate these with unionisable employees within the respondent establishment and out of such employees how many are unionised, recognition on the basis that there are list of employees now confirmed as belonging to the claimant as between the claimant and the County Labour Officer does not pass the test. A proper verification on site would have given the current status of records from 2011 to this date and particularly as of 19th August, 2015 when the claim herein was filed.

29. Recognition being a matter addressed in law, the claimant must meet the requisite threshold. The respondent as the employer and the entity required to recognise the claimant union, cannot hind behind failure to remit records and deny the claimant the same. The County Labour Officer did not state the respondent failed to allow them access into the enterprise so as to access the records, employees or any other material so as to be able to undertake the orders of the court as directed.

30. The above put into account, unionisation of employees is a constitutional right protected under articles 36 read together with 41 of the constitution. Every employee has the right to join the trade union of their choice. Such cannot be restricted by the employer.

31. The constitutional right to unionise set out under article 41 of the Constitution is given effect through the provisions of Part II of the Labour Relations Act, 2007 with regard to the right to association and unionisation as follows;

4.(1) Every employee has the right to -

(a) participate in forming a trade union of federation of trade unions; and

(b) join a trade union.

(2) Every member of a trade union has the right, subject to the constitution of that trade union to -

(a) participate in its lawful activities;

(b) ...

32. Where an employee has signed up to join the trade union of their choice, section 5 of the Labour Relations Act, 2007 grant protection to the extent that the employee should not be victimised for engaging in trade union activities. Equally section 48 allow for the deduction of trade union dues from the salary of an employee who has signed up with a trade union of choice. The trade union must submit with the employer the prescribed Notice following their submission with the Minister documents in terms of section 48(2) of the Labour Relations Act, 2007 as follows;

(2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to –

33. With or without recognition, the employer is bound in law to remit all trade union dues from employees who have joined the claimant union as members and are in their employment. With the submission by the respondent that there are over 131. employees who have joined the claimant union, such is a number over and above what is required under section 48 for deduction and remittance of trade union dues. Such should not wait for recognition of the claimant.

34. Where the respondent has recognised that over 131 employees have joined the claimant and failed to deduct and remit the trade union dues, such dues should be paid from its own accounts. for the employer to comply, the trade union must serve the employer from whom it has recruited over 5 members with the Notice from the Minister directing remittance of trade union dues deducted in accordance 48(2) Labour Relations Act, 2007.

35. Therefore in this case, pending the claimant verifying from its records the exact number of employees in the respondent employment and where there is a number of up to 5 employees so recruited, and upon service of the Notice from the Minister on trade union deductions and remittance to the published account, the orders sought cannot issue.

36. Recruitment of members within the respondent has to be undertaken by the claimant. Such cannot be aided by the respondent or the court. the employees within the respondent must be allowed their free will to join the trade union of their choice. Where there are requisite numbers recruited, recognition can be addressed this claim notwithstanding. By the court not allowing the claims herein, such does not stop the claimant rom recruiting and aging recognition.

Accordingly, the claim dated 15th August, 2015 is hereby dismissed save that where the claimant has recruited over 5 members from the respondent unionisable employees and served the requisite notice from the Minister, the respondent is bound in law to deduct and remit the trade union dues.

Each party shall bear own costs.

Delivered in open court at Nairobi this 28th day of September, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor: Court Assistants

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