



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 748 OF 2014

KENYA CHEMICAL AND ALLIED

WORKERS UNION.....CLAIMANT

VERSUS

TATA CHEMICAL MAGADI LIMITED.....RESPONDENT

Mr. Mweke for Claimant

Mr. Wetende for Respondent

JUDGEMENT

1. The issue in dispute in this claim is non-implementation of the check-off system as consented by 135 employees. The Union recruited 116 members in the year 2011 from Respondent's employees. The employees gave consent to the Respondent as per **Section 48 of the Labour Relations Act, 2007** for union dues to be deducted.

2. The Claimant forwarded the check-off list to the Respondent on 9.2.2011; 19.4.2011 and 9.5.2011 for 19, 80 and 36 members respectively as per appendix I. The Respondent has refused to implement the Minister's order notwithstanding conciliation effort which led to a recommendation by the conciliator that the 116 employees recruited by the union be deducted union dues and the same deductions be remitted to the union.

3. The Claimant clarifies that the affected members are not 116 but are 135. The Claimant prays that the Respondent be ordered to effect the deductions in accordance with the Law

Response

4. The Respondent opposes the claim by a memorandum of defense filed on 2nd July 2014 and states that;

- i. The Respondent's Senior Management and/or Senior Staff grade employees are not unionisable.
- ii. The Claimant is acting in violation of the CBA and the Recognition Agreement signed between the parties and the Industrial Relations Charter.
- iii. The Claimant does not represent the Respondent's employees in management as alleged
- iv. The Claimant is not entitled to the orders sought.

5. The Respondent submits that in terms of the CBA signed by the parties on 11th September

2012 the union represents employees in the USG grades per appendix “I”. These are the unionisable employees. The Respondent therefore submits that it is unlawful for the union to recruit senior staff and/or management categories hence its refusal to implement the check-off forms. The Respondent prays that the suit be dismissed with costs.

Determination

6. The court has considered submissions by the parties and has in particular taken into consideration the recommendation by the conciliator from the Ministry of Labour, Mr R. J. Twaga on the matter.

7. The findings of the conciliator were as follows;

“The Union has recruited the said employees (116). No employee out of 116 has resigned from being union member. The position of a supervisor in the company is not enough to deny the same employee from being a member of the union as this will be against the constitution as well as the Labour Relations Act, 2007”.

8. With that the conciliator recommended that the 116 employees recruited by the union be deducted union dues and the same deduction be remitted to the union.

9. The Respondent relies on the demarcation set out in the Industrial Relations charter. The charter is a product of the tripartite i.e The Government of the Republic of Kenya, the Federation of Kenya Employers and the Central Organization of Trade Unions setting out agreed guidelines on Labour Relations in Kenya. The document was developed and promulgated on 30th April 1984.

10. In Appendix ‘C’ to the charter it was agreed;

- i. Executive Chairman; Managing Director, General Manager (and his deputy) and Functional Heads that is Department heads (and their Deputies)
- ii. Branch Manager (and his Deputy)
- iii. Person In charge of Operation in an area (and their deputies)
- iv. Persons having authority in their organizations to hire, transfer, appraise, suspend, promote, reward, discipline and handle grievances provided that such persons fall within the Industrial Relations charter clause No. 1(i)-(iii).
- v. Persons training for above positions (including undergraduates)
- vi. Personnel secretaries to persons under 1 above
- vii. Persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties.
- viii. Any other category of staff who may in the case of any particular undertaking be excluded from union representation by mutual agreement.

11. It is common cause that the Claimant union is a member of COTU which is a signatory to the Industrial Relations Charter and is therefore bound by the terms of the charter. However, it is for the parties in every case to negotiate and agree on the demarcation boundaries of their employees in the recognition agreement or in the Collective Bargaining Agreement.

12. Such a demarcation has not happened in respect of the parties to this suit. The onus is on the employer to demonstrate that the employees who have been recruited by the union are excluded by fact of their positions from joining the union in terms of their employment contracts and the responsibilities assigned to the said employees in their particular contract of employment.

13. **Section 4(1) of the Labour Relations Act 2007** provides;

“4(1) Every employee has the right to:-

(b) Join a trade union; or

(c) Leave a trade union”

14. The right is buttressed under **Article 41** of the **Constitution of Kenya 2010** in exact terms. Therefore, where an employee has expressed interest to join a trade union of choice and actually goes ahead and does so; it is unlawful for the employer to purport to deny them that right. It is for the employer to agree on the terms of employment with every employee in the letter of appointment and/or employment contract and let the employee understand that because of responsibilities assigned to them, they are not at liberty to join a trade union.

15. No such letters of appointment and/or contract of employment excluding the 116 employees the subject of the suit from joining a union of choice. It does not suffice to wave the Industrial Relations Charter to deny employees their constitutional right to join a trade union of choice.

16. The Claimant has demonstrated on a balance of probability that it has lawfully recruited the 116 employees in respect of which check-off forms were presented to the employer with a view to deduct their union dues.

17. Accordingly, Respondent is directed to effect the check-off forms in respect of all the affected employees and submit the union dues to the claimant within 30 days from date of the Judgement. The Employer is at liberty in subsequent CBA to negotiate and provide demarcation in the CBA for purposes of determining which employees are unionisable and which ones are not.

18. The Respondent is to pay the costs of the suit.

Dated and delivered in Nairobi this 1st day of April, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE