REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 234 OF 2015

AMALGAMATED UNION OF KENYA METAL WORKERS .....CLAIMANT

v

JUMBO NORTH EAST AFRICA LTD..... RESPONDENT

JUDGMENT

1. The Amalgamated Union of Kenya Metal Workers (Union) was registered as a trade union on 28 January 1975. According to the Union's constitution, it draws its membership from persons employed in undertakings/ businesses in the areas of *motor trade, electrical and electronic trades, tyre manufacturers and re-treading, battery manufacturing and allied industries.*

2. The Union, in exercise of its right to organise recruited certain employees said to work for Jumbo North East Africa Ltd (Respondent).

3. On or around 21 May 2012, the Union forwarded to the Respondent the names it had recruited and also sought to be granted recognition in terms of section 54(1) of the Labour Relations Act.

4. The Respondent, it appears declined to grant the Union recognition and a trade dispute was reported to the Minister for Labour.

5. A conciliator heard submissions from the parties and a report was released on 4 December 2012. The Conciliator recommended that the Respondent grant the Union recognition.

6. That was not to be, hence the Union commenced the present proceedings on 18 August 2015 seeking

> 4.1 A permanent injunction to restrain the Respondent, either by herself, her authorised employees, servants and agents from victimising the members of the Claimant on account of trade union activities or membership.
>
> 4.2 An ORDER to be issued to compel the Respondent and the Claimant to sign the Recognition Agreement within the specific shortest time possible to pave way for CBA Negotiations.
>
> 4.3 THAT, an Order be issued compelling the Respondent to comply with Section 48 of the Labour Relations Act, 2007 by way of deducting Union dues and remitting the same into the account gazette (sic) by the Minister.
>
> 4.4 THAT, the cost of this suit to be met by the Respondent.

4.5 ……..

7. The Memorandum of Claim was served upon the Respondent, and it filed a Statement of Defence on 29 October 2015.

8. On 20 November 2015, the Respondent filed List of Authorities and List of Documents (List of employees and ex-employees).

9. When the Cause was mentioned before Court on 10 November 2015, the hearing was fixed for 7 March 2016. Present were Mr. Patrick Makale for the Union and Mr. Aim holding brief for Mr. Okari for the Respondent.

10. However, when the Cause was called out for hearing on 7 March 2016, the Respondent was absent/not represented.

11. The Court therefore directed that the Cause be determined on the basis of the record and submissions to be filed.

12. The Union filed its submissions on 22 March 2016, while the Respondent's submissions were filed on 22 April 2016.

13. The Court has considered the pleadings, documents filed and the submissions and is of the view that the main question for determination is whether the Union has met the statutory threshold for grant of recognition.

14 .According to the Union, it recruited 144 unionisable employees of the Respondent out of a possible 200 and that this comprised 72% hence it had achieved more than a simple majority (the names in form S were annexed to the Memorandum of Claim).

15. However, despite forwarding the names to the Respondent, it refused to grant it recognition.

16. The Respondent on the other hand took the position that it was not privy to the 144 employees recruited by the Union or that the Union had carried out any recruitment; that the list exhibited by the Union had no payroll numbers/union membership numbers; that some of those listed in the form S had ceased to be its employees; that it had received the form S and that it had more than 200 employees.

17. Further, the Respondent contended that the Union had sent to a list of 32 persons during the pendency of the proceedings, and these 32 were not its employees.

18. In sum, the Respondent asserted that the Union had not met the statutory threshold for grant of recognition.

Was Respondent furnished with list of names?

19. It has been a long practice and tradition that unions would recruit and then forward the names of recruited employees to the employer.

20 .Although there is no direct evidence that the Union delivered the list of names to the Respondent, the Conciliator's report is clear that the Respondent's representative (Branch Administrator) during the conciliation process admitted that the check-off forms were received and forwarded to directors based in Nairobi.

Sufficiency of details of recruited employees

21. The Respondent raised an issue that the names of employees lacked pay roll numbers and or union membership numbers.

22. The Court has looked at the applicable statutory framework but has not been able to find any explicit requirement that a union indicates an employee's payroll or union membership number.

23 .Of course, the Court is of the view that providing such details would make it easier for an employer to verify the genuineness and correctness of the list, but such failure to provide the details should not be decisive in determination of whether a Union has met the threshold for grant of recognition.

Simple majority

24. The Union contended that the Respondent had 200 employees, while the Respondent which was in a position to disclose the exact number of unionisable employees was content with merely stating that it had more than 200 employees.

25 .An employer is under an obligation under the *doctrine/principle of good faith in industrial relations* to cooperate with a union and make full disclosure in utmost good faith by providing true and accurate information on its work force to a union during the process of ascertaining whether a union has recruited a simple majority (see Court of Appeal judgment in *Civicon Ltd v Amalgamated Union of Kenya Metal Workers* (2016) eKLR).

26. The Court is therefore more inclined to find that the Respondent had 200 unionisable employees as of May 2012.

27. This Court has held previously that the relevant and material time for determining whether a union has achieved a simple majority is not the time of trial of a Cause, but the period as near as possible to when a union sought recognition.

28. The list of employees as of 2015 as provided by the Respondent, therefore in the view of the Court ought not to be a consideration in this case.

29. The Union annexed a list of 144 employees it had recruited at the relevant and material time.

30. The Respondent also exhibited a list of 58 employees who had ceased to work for it as of 13 May 2012.

31 .The Union did not challenge the list or suggest that the 58 had not ceased working for the Respondent as of 13 May 2012.

32.When the 58 employees are removed from consideration, there is no doubt that the Union had 86 unionisable members out of 200. This was below the statutory threshold.

33 .The Court therefore reaches the conclusion that the Union had not met the simple majority threshold for grant of recognition as of the time it sought recognition in 2012.

34. Due to the time lapse, the Union may consider fresh recruitment to achieve the statutory threshold and seek recognition from the Respondent.

Permanent injunction

35 No evidence or material was tendered in Court to remotely suggest that the Respondent had been victimising employees on the basis of their union membership or activities.

Deduction of Union dues

36 In the Court's considered view, by signing a check-off form, an employee is giving lawful instructions to the employer to act in a certain way.

37 Further, it has been a long recognised principle in employment law that an employee is free to dispose of his wages as he likes or wishes.

38 Therefore, in terms of sections 48 of the Labour Relations Act and 19(1)(f) and (g) of the Employment Act, 2007, the Respondent should deduct and remit to the Union monthly union subscriptions of those still in its employment who signed the check-off forms.

39 Before concluding, the Court wishes to note that the statute envisages recognition disputes being determined expeditiously due to the impermanent nature of employment and change in numbers, and regrets that the Union decided to move to Court nearly 3 years after conclusion of conciliation.

Conclusion and Orders

40 The Court finds and holds that

(a) the Union did not meet the threshold for grant of recognition.

(b) the Union has failed to prove any of its members were victimised on basis of union participation.

(c) the Union has made out a case for deduction and remission of union dues.

41 The Court in effect orders the Respondent to commence deducting and remitting to the union, monthly subscriptions for those employees still in employment who signed the check-off forms.

42 Save for the above order, the Memorandum of Claim filed in Court on 18 August 2015 is dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 29th day of July 2016.

Radido Stephen

Judge

Appearances

For Union Mr. Patrick Makale, Industrial Relations Officer

For Respondent Buluma & Co. Advocates

Court Assistant Nixon