



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE No. 2098 of 2011**

**AMALGAMATED UNION OF KENYA METAL ..**

**WORKERS ..... CLAIMANT**

**VERSUS**

**DATHLEY INDUSTRIES LTD ..... RESPONDENT**

**JUDGEMENT**

1. On 15<sup>th</sup> December 2011 the Claimant union, Amalgamated Union of Kenya Metal Workers filed their claim and the issue in dispute is that of refusal by the Respondent to sign a recognition agreement, deduct and remit Union dues and victimization of workers on grounds of Trade Union activities/affiliation. The Respondent Dathley Industries Limited entered appearance, replied to the interlocutory applications but failed to file any statement of defence to the claim herein. The absence of a defence being filed by the Respondent is a matter worth an outline from the onset. This court has on several occasions urged the Respondent to file the defence;

On 21<sup>st</sup> December 2011, the court directed the Respondent to file their defence;

On 2<sup>nd</sup> October 2012, the Respondent counsel was in court and was granted 30 days to file a defence;

On 25<sup>th</sup> February 2013, Respondent advocate was in court when he was given 7 days to reply;

On 8<sup>th</sup> March 2013, the Respondent was given 14 days to reply;

On 26<sup>th</sup> March 2013; the Respondent had filed a Replying Affidavit to the pending application but not a defence.

2. Since 26<sup>th</sup> March 2013, the Respondent has remained absent from court despite several hearing dates being taken and service being effected upon them. I note several affidavits of service have been filed by the Claimant in this regard and are on record.

**Claimant's case**

3. The Claimant Union is the registered Trade Union with mandate to represent employees in the engineering industry while the Respondent is situate in Thika with her economic activities being that of motor vehicles battery that is within the sector where the Claimant has members. In 2003, the Claimant recruited 31 members from the employ of the Respondent out of the total 40 unionisable workforce that

constitute a 78%. Check-off forms were forwarded to the Respondent for action within the meaning of section 48 of the Labour Relations act, which the Respondent declined. The Claimant also qualified for a recognition agreement within the meaning of section 54(1) of the Labour relations act approached the Respondent to facilitate the signing of the same and which the Respondent declined hence a dispute was reported to the minister. The Minister appointed a conciliator and made recommendations on 25<sup>th</sup> August 2011 that parties should sign a recognition agreement within 14 days as the Claimant had met all the 3 requirements of the law for recognition by the respondent.

4. The Claimant also stated that all requirements under section 54 of the Labour Relations Act where there is no rival Union in the Respondent industry, the Claimant is the most appropriate representation Union in the Respondent industry and the Claimant has recruited more than 51% simple majority of the unionisable employees of the respondent. Section 48 of the Labour Relations Act is mandatory of which the Respondent is in breach of. The Claimant and its members who are in the employ of the Respondent are exercising their constitutional right to unionize and are entitled to fair labour practices as under Article 41 of the Constitution.

5. The Claimant is seeking for a permanent injunction restraining the Respondent from victimizing its members in their employ due to Union activities; an order compelling the Respondent to sign the recognition agreement and pay way for a Collective Bargaining Agreement negotiations; an order compelling the Respondent to comply with the provisions of section 48 of the Labour Relations Act by way of deducting Union dues and remitting the same to the account of the Claimant as gazette by the Minister and that costs be paid by the respondents.

6. In submissions, the Claimant stated that the claim herein commenced with the application by the Claimant seeking for orders that the Respondent be directed to comply with the provisions of section 48 of the Labour relations Act where they had also locked out and or terminated the Claimant members. The Respondent failed to comply with the interim orders granted as well as did not deposit the sum of Kshs.13, 904.00 for the month of February 2013 as well as subsequent dues to the claimant. Despite this matter being set up for hearing the respondents have failed to file their defence to the claimant.

7. The Claimant also submitted that they recruited 31 employees of the Respondent out of the total 40 unionisable employees which constitute 78% which has not been disputed. When checks off forms were forwarded to the Respondent they declined to comply with section 48 of the Labour Relations Act, and did submit for one month when the Claimant commenced contempt proceedings. A Recognition Agreement was forwarded to the Respondent under the provisions of section 54 of the Labour Relations Act but declined to sign. Due to the prevailing non-compliance with the law, the Claimant forwarded the dispute to the Minister but the Respondent refused to attend to any summons, meetings or filing of any responses or memoranda to the conciliator so appointed. In this regard, the Claimant has complied with all requirements for recognition by the respondent who has refused to oblige despite efforts made by the Claimant in this regard.

8. The Claimant also submitted that due to non-compliance with interim orders herein and the provisions of section 48 and 54 of the Labour Relations Act, the Claimant is owed Kshs.333, 904.00 in Union dues to date.

## **Determination**

9. Unionization is now a constitutional right under the Bill of Rights as under article 41 of the Constitution. This cannot be contested unless there are limitations set out under the constitution which I do not find. However, in unionization, there are provisions of the law that a Union such as the Claimant must comply with, being the provisions of section 54 of the Labour Relations Act. In this case, the law requires an employer to recognize a Trade Union for purposes of collective bargaining if that Trade Union has members in its employment who represent a simple majority from all the unionisable employees. The Union proposing recognition but is relevant with regard to the area sought to be represented. Once such criteria of the law is established, the Minister must issue an order for the collection of Trade Union dues where the employer must effect such deduction and remit the same within 30 days to the Union that

served such notice.

10. In this case, the Claimant submitted that they recruited 31 employees of the Respondent out of the 40 unionisable employees which comprise 78% majority. The recruitment was in 2011. However, even where the Respondent failed to file their defence to the claim, I note that on 25<sup>th</sup> March 2013 the Respondent through the affidavit of Satwant K. Dathley he notes that the Respondent had permanent and casual employees and due to low business majority we relying idle at the Respondent firm and by the end of January 2013 some sought to be paid and released from their employment which the Respondent did wide vouchers annexed concerning 8 employees. However such list of payments for 8 employees is not indicated as to whether they belonged to the Claimant or were part of the 9 or 31 who had not joined the Claimant or had joined the Claimant union. In the absence of a defence and submissions by the Respondent to challenge the averments in the claim or in submissions, I take it that the claim has not been defended and the court cannot infer from the affidavit or any other document that indeed the 78% majority has been achieved by the Claimant out of the total unionisable employee of the respondent.

11. There is sufficient evidence that the Claimant recruited 31 out of the total 40 unionisable employees of the Respondent which represent 78% majority. Even assuming that the 8 employees who left the Respondent employment as of January 2013, there is 23 members remaining which is over the 51% majority rule hence the Claimant still retains the numbers required for recognition. The Claimant constitution covers the industry in which the Respondent is engaged. I find no evidence that there is a rival Union that has come forward to claim the same recognition or collective bargaining apart from the claimant.

12. I therefore find that all the prerequisites for grant of recognition have been met and fully satisfied in fact and in law. The Respondent shall sign the recognition agreement with the Claimant Union within 30 day of this judgment.

13. The notice by the Minister with regard to the provisions of section 48 on remittances to the Claimant was not filed together with the claim. To order that the Respondent do remit these dues without this notice by the Minister would be to pre-empt the recognition addressed above. This prayer is declined.

14. The Claimant is granted access to the Respondent premises to access members in the employ of the Respondent upon the Claimant giving reasonable notice and without interfering with ongoing work/duties and other tasks allocated by the Respondent as employer.

**Judgement is therefore entered for the Claimant against the Respondent and court orders;**

- 1. The Respondent shall sign the recognition agreement with the Claimant Union as under section 54(1) of the Labour Relations Act within 30 day of this judgment;**
- 2. The Claimant shall obtain and serve the Respondent with the requisite notice under section 48 of the Labour Relations Act for Union deductions which shall take effect 30 days after such service;**
- 3. Costs of the suit awarded to the claimant.**

**Delivered in open court at Nairobi this 2<sup>nd</sup> Day of March 2015.**

**M. Mbaru**

**Judge**

In the presence of:

Lilian Njenga: Court Assistant

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