



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 240/2013

(Before Hon. Justice Hellen Wasilwa on 14th March, 2014)

KENYA CHEMICAL & ALLIED WORKERS UNION CLAIMANTS

-VERSUS-

JUMBO FOAM INDUSTRIES LTD RESPONDENT

JUDGMENT

The claimants' Union Kenya Chemical and Allied Workers Union filed their Memorandum of Claim on the 20.8.2013. The issues in dispute are;

- 1. Refusal by the company (Respondent) to sign a recognition agreement,**
- 2. Refusal to implement deduction of union dues,**
- 3. Threat and intimidation of workers who have joined the union.**

The claimant's case is that; they are a trade union registered as such on 11.8.1958 to represent the interest of workers engaged in the Chemical and Allied Industries in Kenya. The respondents on the other hand are engaged in the business of manufacturing foam mattresses which fall under the scope of representation under Chemical Products.

The claimants aver that on 26.10.2012 they recruited workers of the respondents and forwarded a draft recognition agreement to them to sign up in order to formalize a relation. This is per documents App2. The respondents however choose not to respond nor acknowledge receipt of the said documents. The claimants further sent several reminders to the respondents but they also never responded. This prompted the claimant to report a trade dispute to the Minister for Labour on 14.12.2012 (App 4). A conciliator was duly appointed on 18.12.2012 (App 5).

The conciliator invited the parties for several meetings and it was agreed that the conciliator visits the respondent's factory to ascertain union membership. On 8.5.2013 the conciliator presented her report App. 7 indicating that the claimants had recruited 78 out of 132 employees representing 59% thus above a simple majority. It is the claimant's contention that they did more recruitments and now have recruited 146 employees out of 230 which is equivalent to 63% (App 8) and are therefore ripe for recognition.

The respondents on the other hand filed their memorandum of appearance and a list of documents through their counsel L. G. Menezes Advocates on 23.9.2013. The parties further agreed to file their submissions.

In their submission, the claimants content that they have recruited 156 members out of 230 which is equivalent to 67.8% as per their appendix 1. They also submitted that they submitted check off forms to respondents who declined to effect the deductions. They also submitted that the workers who have opted to join the union have been threatened and intimidated by the respondents. That some of these workers were dismissed verbally and others were forced to write letters denouncing their union membership. They therefore ask court to order as they have prayed.

The respondents on the other hand have submitted that the claimant has not recruited a simple majority as contended. They also contend that some of the employees have been outsourced to Norgen and Liberty Associates which are manpower/employment agencies. The respondents contention is that only 36 employees out of a total workforce of 280 have joined the union. That of the 280 workers, 170 have been outsourced and are employees of Liberty Associates and that of the remaining 110 employees who fall under the respondent, 22 are management and not unionisable.

The respondents presented before court a list signed by some employees indicating that they have left the union in the month of January and February 2014. They also submitted another list of employees who are purportedly under Liberty Associates for Jumbo Foam Mattresses Limited as at January 2014.

Having considered the submissions of the parties, the issues for determination are as follows:-

1. **Whether the claimant has recruited a simple majority of employees from the respondent company to warrant being recognized.**
2. **Whether the respondents has declined to implement deduction of union due to the claimants.**
3. **What are the implications of alleged outsourcing of the respondents employees to another company in January 2014.**
4. **Whether the claimants are entitled to the prayers sought.**

On the first issue of recruitment, the claimant has exhibited the forms for the workers recruited which show that they have recruited 67-8% of the workforce.

The respondents on the other hand contend that the workers recruited are employees of Norgen Enterprises & Liberty Associates and do not appear in the respondents records and have either resigned, left work or are not known to the respondents. The respondents contend that these workers were employed by Norgen Enterprises Limited from April 2013. Despite this contention, the respondent have not exhibited before this court this alleged outsourcing. What the respondents have exhibited are some forms signed by some workers in January and February 2014 indicating that they were quitting the union. This case was filed in 2013 August. It is mischievous for respondents to rely on forms signed by some employees in January and February 2014 as their evidence that these workers are no longer interested in being members of the union.

In the case of *Kenya Chemical & Allied Workers Union VS Ruby M. W. F. Floor Mills LTD, Industrial Court at Nakuru Cause No. 102/2013* (formerly Nairobi No. 792 of 2011) Hon. J. Ongaya dealt with a case of similar nature and made a finding that it is not the duty of the union **“to sustain the threshold failing which recognition lapses or becomes untenable”**. I agree with the learned judge. Under S. 54 (1) of the Labour Relations Act all that the claimant is to do is to demonstrate that they represent a simple majority. The claimants have demonstrated that at the time of filing this case, they had recruited a simple majority of workers in the respondents firm.

The issue of outsourcing being relied upon by the respondents has not been proved. I dealt with the issue of outsourcing in *Case No. 74 of 2013, Industrial Cause at Kisumu – Kenya Engineering Workers Union VS Abyssina Iron and Steel Ltd* where the respondents raised the same defence of outsourcing in a bid to have the quest for recognition defeated. One can only say with uncertainty that there is labour outsourcing when the employee ceases to be under the control of the principle employer. But where the indication are such that the employee is still carrying out work under the instruction and control of the principle and not the purported outsourced agency, then that is not outsourcing.

In this case, the respondents have alleged that they outsourced labour to Norgen and Liberty Associates. The evidence of this outsource was not submitted to court nor was there any agreement shown nor new contracts to the employees after their consent. Without such evidence, this court finds that the alleged outsourcing is a sham meant to defeat the quest for recognition. I therefore find that the claimants have demonstrated that they have recruited a simple majority of respondents employees and are therefore entitled to be recognized by the respondents which I so order.

Having made the finding on recognition, it follows that the deduction and submission of union dues follows as a matter of right. Under S. 48(2) of the Labour Relations Act 2007:-

“ 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;

(a) deduct trade union dues from the wages of it's members and ---”

The issue of deduction and remittance of trade union dues must therefore follow and I order that the respondent shall forthwith deduct and remit trade union dues as per the list submitted by the claimant union unless it is shown that the members has since resigned, died or otherwise not in the employment of the respondent.

In view of my findings above, what remedies are the claimants entitled to?

I find that claimants are entitled to prayers sought and I order as follows:-

- 1. The respondent shall forthwith recognize the claimant union and enter negotiations leading to signing of a Collective Bargaining Agreement within 60 days.**
- 2. The respondents shall forthwith and in any case not less than 30 days from the date of this judgment, remit trade union dues to the claimants.**
- 3. The respondent shall forthwith cease to intimidate or otherwise deal with the employees unfairly with the aim of defeating their right to freedom of Association.**
- 4. The respondents shall meet costs of this suit.**

HELLEN WASILWA

JUDGE

14/3/2014

Appearances:-

Mwake for claimant

Menezes for respondent

CC. Wamache