REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 273 OF 2012

KENYA CHEMICAL WORKERS UNION …….…… CLAIMANT

VERSUS

DAWA LIMITED ……..… RESPONDENT

JUDGEMENT

1. The dispute herein relates to Recognition Agreement (Agreement) between the claimant Union and the Respondent Company. The claimant Union was registered to represented workers engaged or working in the chemical and allied industries in Kenya which include pharmaceutical manufacturing among others. The respondent, Dawa Limited is a pharmaceutical manufacturing entity in the business of manufacturing medicines for human use and based in Nairobi.

2. On 28th December 2013, the Claimant Union filed this matter in court seeking for recognition by the respondent. They also seek costs be provided for. On 19th may 2014 the respondent filed their reply and contested that recognition of the Claimant union is not permissible as they have not recruited a simple majority of their unionisable employees and the matter should therefore be dismissed as the Union does not meet the statutory minimum majority that warrant recognition.

Case for the Claimant Union

3. On 12th June 2006 the claimant submitted a proposed model Recognition Agreement to the respondent with a check list of employees who had voluntarily consented membership with them. The respondent was to counter-sign the Agreement and implement the check-off system as the claimant had recruited 44 employees into its membership out of the 60 unionisable employees of the respondent being a 73.33% of the total workforce and above the mandatory simple majority. On 4th July 2006 the respondent wrote and acknowledged receipt of the Agreement, list check-off forms but failed to give feedback. On 4th November 2006 the claimant reported a dispute with the Minister as required under the provisions of Trade Disputes Act Cap 234 [now repealed].

4. On 9th February 2007 the Minister through the Chief industrial Relations officer appointed a Labour officer to act as investigator who wrote to the parties to attend a meeting. The claimant continued to recruit new employees as investigations were ongoing and on 17th November 2011 more check-off forms of 113 employees were forwarded to the respondent. The respondent remained adamant and refused to recognise the claimant. On 20th March 2012, the Investigator released the report with findings and recommendations that the respondent should recognise the claimant Union. The claimant accepted the report and again asked the respondent to sign the Agreement.

5. The claimant has continued to recruit new members and forward the lists and check-off forms to the respondent. The respondent has not signed the Agreement despite the following lists;

On 12th June 2006 the claimant had recruited 44 members from the respondent employees;

On 17th November 2011, 113 more members were recruited;

On 11th April 2012, 120 members were recruited;

On 9th October 2012, 12 members were recruited;

On 22nd November 2013, 19 members were recruited; and

On 11th February 2013, 7 members were recruited.

6. All the lists above were forwarded to the respondent with check-off forms but the respondent has failed and or refused to give the claimant recognition. This failure to sign the Agreement is contrary to the Constitution under Article 41(2) (c) which allows collective bargaining through trade union for the protection of fundamental rights and freedoms of employees within which Recognition Agreements are contemplated. The claimant is the right union to represent employees serving the respondent business where the claimant has met the provisions of section 54(1) of the Labour Relations Act and Article 36 and 41 of the Constitution with regard to the right to association and freedom to join a trade union of one's choice.

7. The claimant is seeking the court to find that the recognition sought by the claimant is genuine and to direct the respondent to afford the claimant formal recognition.

Respondent's case

8. The respondent on their part state that they have a workforce of 374 employees when in 2012 the claimant approached them to sign the Agreement on account that they had recruited a simple majority of the unionisable employees on the grounds that they had 264 employees out of the unionisable workforce of 270 employees thereby implying they had recruited 98% of the unionisable employees. On attempt to recover union dues from the said employees, the respondent established that;

19 employees resigned their membership;

68 employees left the respondent;

71 employees were duplicated on the various check-off forms

9. This left the actual membership at 106 out of the total workforce of 374 unionisable employees and thus a 28.3%. The respondent advised the claimant that with no simple majority they could not sign the Agreement with them. The employees have continued to withdraw membership to date. The claimant has thus failed to meet the legal threshold set out in the Labour Relations act in that the union must be the rights one to represent the employees in the section as under section 54(8); there should be no rival union; and the union should have recruited a simple majority as under section 54(1) of the Labour Relations Act. That the union has met the basic criteria of being the right union in the sector and there is no rival union but has failed to have the simple majority. The demand for recognition is therefore not justified.

Determination

10. The respondent admitted that the entire workforce comprise **374 employees**. The full list is a set out in **annexure No. 1** of the respondent's bundle of documents. Both parties were invited by the court to make an analysis of all the employees in the business of the respondent who belongs to the union which

resulted in the claimant confirming that as of 5th June 2014, out of the 374 total numbers of employees of the respondent, their members were **214.** The assessed list had 371 employees out of whom, 22 are noted as managers with a unionisable number of 349 employees. From the 349 unionisable employees, 214 are members of the claimants, which amount to 61.3% of the total membership. The respondent notes that out of the 214 union members, 74 have withdrawn, 25 have left the respondent employment and 44 are not on any check-off which reduces claimant's membership to 70 and comprise 20% of unionisable employees.

11. I found this the responses by both parties most useful.

12. The right to associate and organise as workers, employees or as trade unions and employer associations is now a fundamental right under the Constitution. Article 2 of the International Labour Organisation (ILO) Convention Number 87 on the freedom of association provides that;

> *Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.*

13. These provisions of the ILO Convention 87 find more meaning in the Constitution under Article 36 and 41 that states;

36. *(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.*

(2) A person shall not be compelled to join an association of any kind.

(3) Any legislation that requires registration of an association of any kind shall provide that—

> *(a) Registration may not be withheld or withdrawn unreasonably; and*
>
> *(b) There shall be a right to have a fair hearing before a registration is cancelled.*

14. Article 36 therefore sets the conceptual framework within which the right to association can be enjoyed. This is where every person has the freedom to form, join or participate in the activities of any kind for the common good and in association acting in the interest of one or more of its members. With regard to workers' rights Article 41(4) states;

> *(4) Every trade union and every employers' organisation has the right—*
>
> *(a) To determine its own administration, programmes and activities;*
>
> *(b) To organise; and*
>
> *(c) To form and join a federation.*
>
> *(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.*

15. Where the Constitution contemplates collective bargaining, then as a consequence, matters with regard to Recognition and the resultant agreements thereto are important. To be entitled to a recognition agreement, a union needs to establish that it has complied with section 54 of the Labour Relations Act, in that it represents more than a simple majority of the unionisable employees of the employer. The evidence presented before me was that the Union had in 2006 recruited 44 out of 60 of the unionisable employees of the Respondent. This translated to 73.33%. This testimony is supported by the check-off forms and the report of the Investigator/Chief Industrial Relations Officer dated 20th March 2012. The respondent admits that there was no rival union and that the claimant union was the relevant union for employees of the Respondent.

16. When the claimant Union sought initial recognition in 2006, there was a simple majority of the unionisable employees in the respondent business to warrant recognition. The respondent has however submitted that since 2006 some employees have left their employ, some have withdrawn from the claimant union and others have not submitted their check-off forms. The respondent even where they allege knowledge that several members of the claimant have withdrawn or ceased their membership have failed to comply with the provisions of section 48(7) and (8) of the Labour Relations Act which require that;

> *(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.*
>
> *(8) An employer shall forward a copy of any notice of resignation he receives to the trade union.*

17. This is a practice that is expected of a party acting in good faith and not acting to frustrate the other even where circumstance are that the party being frustrated has dully complied with the law. This is what amount to unfair labour practices that are outlawed by Article 41 of the Constitution and go against the spirit of collective bargaining for the worker's good. When the claimants first filed the dispute with the Minister, they had met the simple majority as confirmed by the report of the Minister official. The employees who have left the respondent after the fact or withdrawn from the Union as alleged, the court and the claimant were denied that information. It is not lost to the court that for the respondent to fail to abide with any legal requirements as under section 48 of the Labour Relations Act, they are undertaking an unfair labour practice that should not be sanctioned by the court as within such practices, employees who would have otherwise remained or joined the claimant union are intimidated, prone to victimisation and other unfair practices so as not to join or remain members of the union. There is no justification for the mass withdrawal since the claimant union commenced requests to have the Agreement for recognition signed by the respondent. In any event there is no evidence for such withdrawal which is to be in writing.

18. Considering the testimony and documentation placed before me, I am satisfied that the Union has complied with the requirements of section 54 of the Labour Relations Act and is thus entitled to recognition by the Respondent

Orders

Considering the foregoing, it is my finding that the Union has established that it is entitled to an order directing the Respondent to deduct and remit union dues in respect of those employees who have acknowledged union membership and recognition by the Respondent.

I therefore do order that;

a. The Respondent does grant the Claimant Union recognition by signing a recognition agreement within the next 14 days.

b. There will be no order as to costs.

Delivered in open Court at Nairobi and dated this 18th Day of June 2014.

Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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