



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 115 OF 2014

KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS CLAIMANT

v

T.S.S. GRAIN MILLERS LIMITED

RESPONDENT

RULING

1. The Kenya Union of Commercial, Food & Allied Workers Union (Union) filed a Memorandum of Claim against T.S.S. Grain Millers Ltd (Respondent) on 26 March 2014 stating the issue in dispute as *refusal to sign a recognition agreement*.
2. Together with the Memorandum of Claim was a motion under certificate of urgency seeking various reliefs. The motion was certified urgent on 27 March 2014 with *inter partes* hearing fixed for 3 April 2014. The Respondent was served but by 3 April 2014 it had not filed its reply to the Motion and the Court ordered it to file reply/grounds of objections before 4 April 2014. The motion was thus adjourned for hearing on 8 April 2014.
3. The hearing of the motion could not proceed on 8 April 2014 because the Respondent filed its replying affidavit to the motion on 7 April 2014 and served the Union on the morning of the hearing (The Respondent did not seek to have the reply admitted out of time but stated that it filed the reply late because of the security situation in Mombasa on 4 April 2014).
4. The Court granted leave to the Union to file further responses to the replying affidavit if necessary and fixed a mention for 12 May 2014. The Court however did not sit on this day. Subsequently, the Court fixed the motion for hearing on 12 June 2014.

Union's case on the motion

5. The Union sought 3 substantive orders in the Motion. These relate to ordering the Respondent to deduct union dues and remit the same to the Union, restraining the Respondent from victimizing or disciplining union members and directing the Respondent to recognise the Union. This last prayer will have to await determination on the merits.
6. In respect to the order for deduction of Union dues, the Union case is that it had recruited 38 of the Respondent's employees and submitted Form S (check-off forms) to the Respondent.
7. The supporting affidavit to the motion sworn by Samwel Baya annexed as appendix 2 has a list of 39 names. 38 of the names had signatures. The Form S made reference to Gazette Notices Nos. 11887 and 7315 of 7 December 2007 and 22 June 2011 (Court was not able to retrieve this latter

- notice from the online archives) respectively but the notices were not annexed.
8. On the victimisation and disciplinary order, the Union did not lay any grounds either on the face of the motion or the supporting affidavit.

Respondent's response

9. The Respondent's Personnel Manager Edinson Orina swore a replying affidavit on 4 April 2014. The affidavit deposed that the Respondent already has a recognition agreement with the Bakery, Confectionary, Food Manufacturing & Allied Workers Union of Kenya (Bakery Union) in 2009 (copy attached) with whom it has agreed a Collective Bargaining Agreement.
10. Mr. Orina also deposed that it has been deducting and remitting union dues to the Bakery Union and that 2 of the employees recruited by the Union are already members of the Bakery Union..
11. The affidavit also stated that the Union had not served the Respondent with a copy of order by the Minister directing it to deduct and remit union dues to the Union.
12. In respect of victimisation, the affidavit deposed that the allegations were unfounded and no proof of the same had been given. No employee had been disciplined on the basis of union activities.

Evaluation

13. This ruling is not concerned with the question of recognition. Therefore the existence of a recognition agreement with another union is not material at this juncture.
14. The Court has considered the submissions of the parties and authorities cited (relate to recognition agreement and not the subject of the ruling) in its evaluation even if no direct reference is made to the authorities.
15. Under the common law, an employee was free to dispose of his wages in any way he deemed fit. This position has now been given statutory underpinning in **section 17 (11) of the Employment Act, 2007**. The provision provides that:

No employer shall limit or attempt to limit the right of an employee to dispose of his wages in a manner which the employee deems fit, nor by any contract of service or otherwise seek to compel an employee to dispose of his wages or a portion thereof in a particular place or for a particular purpose in which the employer has a beneficial interest whether direct or indirect.

16. On the basis of the cited provision of statute, an employer cannot legally resist an attempt by an employee to have a portion of his wages deducted to be paid to any third party or to more than one union. The employee is merely exercising control over his wages and this fact has nothing to do with an employer granting a union recognition.
17. This statutory right of an employee to dispose of his wages as he deems appropriate is given further force by section 19(1)(g) of the Employment Act, 2007 which creates a positive duty upon an employer to deduct such part of an employee's wages as the employee may request the employer in writing to deduct. An employer may only suffer the administrative burden/cost of transferring the money to a third party but no prejudice at all.
18. All employees have a constitutional right to join a trade union of their choice. Under section 48 of the Labour Relations Act, 2007, a trade union may request the Minister to order an employer who has employed more than 5 employees belonging to a union to deduct from such employees union dues and pay such dues into a specified account held by a union. The deductions should commence within 30 days of the union serving the employer with Form S.
19. The Respondent admitted in submissions that it was served with Form S around 27 September 2012. The Respondent even wrote to the Union on 11 August 2012 with the subject of the letter being introduction and recognition agreement (Union appendix 3).
20. By appending their signatures to Form S, the 38 employees were instructing the Respondent in writing to commence deducting and remitting to the Union dues on a monthly basis and the only hindrance was for the Union to show that the Minister had made an appropriate order.
21. The Union's letter dated 27 September 2012 was clear in its body that it was making the request pursuant to Gazette Notice Nos. 11887 and 7315 of 7 December 2007 and 22 June 2011

- respectively.
22. The Respondent faults the Union for not serving upon it copies of the Gazette Notices. The Respondent has a point, but in my view the non service of a copy of a Gazette Notice where it is cited in the body of Form S is a mere technical irregularity which does not cause any prejudice or injustice to an employer.
 23. But it is a good practice and a diligent and prudent Union should strive to serve a copy of the Gazette Notice with the Form S (check-off forms) otherwise it is the Union that will be prejudiced, like will become clear in the orders issued herein.
 24. Like in the instant case, the Respondent cannot be faulted for failure to remit union dues when it does not know in good time which bank account and which bank such deductions should be transmitted to.
 25. The Respondent however, was put on notice that the Minister had made an order and it cannot argue that the Union did not comply with the law. The status of the Kenya Gazette is well known and the Court need not delve into a debate about what has been published in the Gazette.
 26. The Respondent's failure to effect/deduct and remit the union dues was unlawful. In the view of the Court, more than one trade union may serve an employer with check-off lists and that such an employer must deduct union dues in favour of the different unions. The existence of a recognition agreement with one union cannot be a bar to the implementation of a second check-off with another union provided it has more than 5 members employed by the employer.
 27. In the view of the Court, implementation of a check-off cannot and should not undermine the validity of a recognition agreement with a union with majority membership.
 28. The minority or second union must off course be aware that until it meets the threshold for recognition, it may not conclude valid and binding agreements with the employer. It may not acquire or exercise any other organizational rights.
 29. Employees who are members of such unions may enjoy very limited benefits for making monthly contributions (value for subscriptions) but that is their decision and the Court or the employer has no business restricting them from exercising their constitutional and statutory rights of association and organization. However, a discussion on proliferation of several unions in one workplace is appropriate while dealing with issue of recognition agreement, which is not the case at present.

Conclusion and Orders

30. The Court is satisfied that although the Union did not serve copies of the relevant Gazette Notices together with Form S (check-off forms), the Respondent was properly served and that the Respondent was under a legal obligation to commence deducting union dues from the 38 employees and remit the same to the specified Union account.
31. Prayer 3 of the Motion dated 21 March 2014 is therefore granted in terms that
 - i. the Union serves Gazette Notices Nos 11887 of 7 December 2007 and 7315 of 22 June 2011 upon the Respondent forthwith
 - (ii) the Respondent to commence deducting and remitting to the Union monthly union dues from the 38 employees named in Form S with effect from July 2014.
32. Prayer 4 is dismissed.
33. The Court further directs that the main Cause be fixed for hearing on the merits. And because of the allegations of a rival union, the Court *suo moto* orders that Bakery, Confectionary, Food Manufacturing & Allied Workers Union be joined as an Interested Party to this Cause as it may be affected by the final outcome of the suit.
34. The Claimant Union is further directed to serve the Bakery, Confectionary, Food Manufacturing & Allied Workers Union with the Pleadings and copy of this ruling so that it can file its Responses if it wishes, within 14 days of service.

Delivered, dated and signed in open Court in Mombasa on this 18th day of July 2014.

Radido Stephen

Judge

Appearances

Mr. Owiyo, Industrial Relations Officer, Kenya Union of Commercial, Food & Allied Workers for Claimant

Mr. Kongere instructed by Muriu Mungai & Co. Advocates for Respondent