



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 319 OF 2013

KENYA UNION OF DOMESTIC, HOTELS,

**EDUCATIONAL INSTITUTIONS, HOSPITALS & ALLIED
WORKERS.....CLAIMANT**

v

**FLAMINGO HILL TENTED
CAMP.....RESPONDENT**

JUDGMENT

1. The Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (KUDHEIHA) recruited 42 employees of Flamingo Hill Tented Camp (Respondent) and through two letters dated 5 February 2013 sent the Form S (check-off forms) to the Respondent.
2. The letters requested the Respondent to commence deduction of monthly union subscriptions from the named employees and remit the same to KUDHEIHA's account with effect from February 2013. The letters cited Gazette Notice No. 13572 of 28 September 2012. A similar letter dated 15 February 2013 forwarding Form S in respect of 6 further employees was also sent.
3. It appears the Respondent did not comply and on 24 September 2013, KUDHEIHA instituted legal proceedings against the Respondent. The issues in dispute were stated as
 - i. *refusal by the management to deduct and remit union dues and*
 - ii. *Refusal to sign recognition agreement.*
4. The Respondent was served and on 10 October 2013, it filed a Response to the Memorandum of Claim.
5. The Cause was set for hearing on 11 February 2014 when KUDHEIHA made submissions. In the course of the submissions, the parties agreed by consent to return to Court on 6 March 2014 to record settlement.
6. On 6 March 2014 only KUDHEIHA's representative attended Court. The Court directed that the Cause be mentioned on 18 March 2014 to record settlement. By this latter date no agreement had been reached and, by consent the parties agreed to return to Court on 1 April 2014, but again by this date there was no agreement.
7. On 19 September 2014, the Court directed KUDHEIHA to file and serve its written submissions by 26 September 2014 and the Respondent by 3 October 2014 (KUDHEIHA duly filed its submissions on 26 September 2014).
8. The Respondent did not file submissions and on 6 October 2014, the Court directed it to file and serve submissions on or before 8 October 2014 (Respondent's submissions not in file).
9. KUDHEIHA's case in respect to recognition is that it had recruited 51% of the Respondent's

- unionisable employees, there was no rival union and so it was entitled to recognition by the Respondent pursuant to section 54 of the Labour Relations Act.
10. On the union subscriptions, KUDHEIHA's case is that the Respondent in failing to commence deduction and remitting monthly union subscriptions was acting in violation of section 19 of the Employment Act, 2007 and section 48 of the Labour Relations Act.
 11. KUDHEIHA urged that the conduct of the Respondent was also in violation of Article 41 of the Constitution.

Respondent's case

12. The Respondent in its pleading admitted that KUDHEIHA had recruited a total of 48 of its employees but that the employees had reached an agreement to suspend their membership, and a note dated 15 March 2013 was annexed to the Response.
13. The Respondent contended that because of the suspension, KUDHEIHA had not attained a simple majority and that it had not violated sections 48 and 54 of the Labour Relations Act, and section 19 of the Employment Act, 2007.

Evaluation

Recognition issue

14. It is not disputed that KUDHEIHA had recruited 48 of the Respondent's employees. The question however is whether KUDHEIHA had attained a simple majority of the Respondent's unionisable employees.
15. This is a question of arithmetic. The Court has perused both the Memorandum of Claim and the Response. Nowhere have the parties disclosed the total number of unionisable employees working for the Respondent. There was no suggestion that KUDHEIHA sought the list from the Respondent and was denied the information.
16. The Court is therefore unable to determine whether KUDHEIHA has satisfied the simple majority qualification in section 54(1) of the Labour Relations Act. With the conclusion reached, the Court deems it unnecessary to discuss the pleaded suspension of membership by some 12 employees and existence of a rival union.

Monthly union subscriptions issue

17. The Respondent admitted receiving Form S with names of some 48 employees. The notice made reference to Gazette Notice No.13572 of 28 September 2012.
18. Pursuant to the Gazette Notice and section 48 of the Labour Relations Act, the Respondent was under a statutory obligation to start deduction of monthly union subscriptions from the employees who signed the forms within 30 days and remit the same to KUDHEIHA.
19. Further, under section 19 of the Employment Act, 2007 an employee is free to dispose of his/her wages anyway he/she deems fit. In signing the Form S, the 48 employees were instructing the Respondent in writing to deduct and remit such amounts from their wages as prescribed and remit to the Union.
20. In failing or neglecting to deduct and remit the subscriptions to KUDHEIHA, the Respondent was in violation of section 48 of the Labour Relations Act, the Gazette Notice and section 19(1)(f) and (g) of the Employment Act, 2007.
21. Because of the violation, KUDHEIHA submitted that the Respondent should be ordered to pay it Kshs 144,000/- being the subscriptions for 26 months upto time of filing the Claim.
22. And to support the submission, KUDHEIHA cited decisions of the Industrial Court in Nakuru Cause No. 14 of 2011, *KUDHEIHA v Sunbird Lodge Ltd* (Ongaya J), Nairobi Cause No. 42 of 2012, *KUDHEIHA v Board of Governors, Upper Hill Secondary School* (Marete DKN J) and Nairobi Cause No. 1220 of 2011, *KUDHEIHA v St. Teresa Girls Secondary School* (Rika J.).
23. It is only in the *Upper Hill* case that the Court ordered the Respondent to pay arrears of union subscriptions but no legal principle to that effect was set. The Court has not found any statutory basis in sections 48 to 53 of the Labour Relations Act to grant the order sought by KUDHEIHA in

respect to unremitted subscriptions.
24. Section 19(4) and (5) of the Employment Act, 2007 has created an offence where an employer has deducted an amount from an employee's wages and failed to remit the same as required by law or Court order. In the instant case, it was not even suggested that the Respondent had started to deduct union subscriptions.

Conclusion and Orders

25. Based on the discussion above the Court finds and holds

- a. That KUDHEIHA has failed to demonstrate that it had become representative of a simple majority of the Respondent's unionisable employees.
- b. That the Respondent was in violation of the law in refusing to commence deductions of monthly union subscriptions from the employees who had signed Form S within 30 days.

26. The Court therefore orders that

- a. The Respondent shall commence to deduct and remit monthly union subscriptions to such designated bank account of KUDHEIHA of those employees who signed the Form S and are still in its employment, commencing 31 October 2014.
- b. The relief for recognition is dismissed and the Union may commence organising afresh.
- c. The relief for Kshs 144,000/- union subscription arrears is dismissed.

27. Each party to bear its own costs.

Delivered, dated and signed in open Court in Nakuru on this 17th day of October 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Onwon'ga, Industrial Relations Officer, KUDHEIHA

For Respondent Mr. Koima instructed by Kiplenge & Kurgat Advocates