



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 125 OF 2012

(Originally Nairobi Cause No. 1135 of 2012)

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

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

v

BOARD OF GOVERNORS,

WAA GIRLS HIGH SCHOOL.....
RESPONDENT

JUDGMENT

1. The Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (KUDHEIHA) filed a Memorandum of Claim against the Board of Governors, Waa Girls High School (the Respondent) on 3 July 2012 and the issues in dispute were stated as refusal by the Board of Governors to :-

- (a) deduct and remit union dues,
- (b) recognise the union and
- (c) negotiate a collective bargaining agreement.

2. The Respondent was served and it filed a Response on 13 May 2013 and after several false starts, I heard the submissions from the parties on 17 July 2013.

KUDHEIHA's case

- 3. According to KUDHEIHA, it recruited 27 unionisable employees of the Respondent between August 2010 and May 2011 after which it sent check off forms to the Respondent to start deduction of union dues through letters dated 10 September 2010 and 15 July 2011(annexure W1 and W2). The Respondent refused to deduct and remit union dues from these employees.
- 4. Further KUDHEIHA submitted that the Respondent had 27 unionisable employees and it had recruited all of them thus having 100% membership meriting recognition by virtue of section 54 of the Labour Relations Act. A recognition agreement was sent to the Respondent but it declined to recognise KUDHEIHA necessitating it reporting a trade dispute to the Minister for Labour on 14 April 2011 (annexure W3) which was accepted and a Conciliator appointed.

5. On 26 August 2011, the Conciliator issued a report in which he found as a fact that KUDHEIHA had recruited 27 unionisable employees of the Respondent who formed 100% membership and recommended that the Respondent deduct and remit to KUDHEIHA union dues effective August 2011 and also to sign a recognition agreement with KUDHEIHA not later than 30 September 2011(annexure W6).
6. The Respondent declined to sign a recognition agreement as recommended by the Conciliator.
7. KUDHEIHA submitted there was no rival union and that the Respondent had violated section 48 of the Labour Relations Act by refusing to deduct and remit union dues and it sought orders directing the Respondent to pay all outstanding union dues, to formally recognise it and conclude a collective bargaining agreement within 60 days of signing a recognition agreement.
8. KUDHEIHA submitted that Article 41 of the Constitution protected workers right to associate and participate in the activities of a union.
9. There were also other prayers which are not material for my determination, such as finding the Respondent guilty of committing an offence and convicting it.
10. In a brief reply to the Respondent's case, KUDHEIHA submitted that it was not aware of any withdrawals from the Union and no evidence was placed before Court and that ABOGE was not a registered union but a welfare association.
11. On the failure to file a verifying affidavit it was submitted that it was not intentional and it was an omission and the affidavit could be filed.

Respondent's case

12. The Respondent pleaded that it had been deducting and remitting union dues and it exhibited a list of 17 names and copies of payment cheques covering January, February and March 2013 (annexure WAA 1).
13. It was further pleaded that the Respondent had held various meetings to deliberate on signing a recognition agreement with KUDHEIHA but the meetings had ended in acrimony.
14. In submissions it was the contention of the Respondent that KUDHEIHA was not the sole union as there existed another rival union called ABOGE which had recruited 8 unionisable employees and that some employees had resigned from the union.
15. The Respondent also raised an objection to the effect that no verifying affidavit was attached to the Memorandum of Claim as required by rule 5(1) of the Industrial Court (Procedure) Rules, 2010 and therefore the Cause should be dismissed.
16. The parties did not cite any decided authorities on the issues in dispute.

Issues for determination

17. From the foregoing the issues which arise for determination, in my view are

- i. whether KUDHEIHA merits recognition by the Respondent
- ii. legal effect of failure to file a verifying affidavit and
- iii. appropriate relief if necessary.

18. I will discuss each of the issues in turn

Whether KUDHEIHA merits recognition

19. Article 41(2)(c) of the Constitution has expressly provided for the right of every worker to form, join or participate in the activities and programmes of a trade union. But this right should not be seen in isolation but is closely intertwined with the right of every person to fair labour practices.
20. Invariably in every employment relationship the employer is the stronger party and an individual worker may not be in a strong bargaining relationship when it comes to agreeing and setting the terms and conditions of employment. Two primary statutes, the Employment Act and the Labour Institutions Act have laid out various irreducible statutory minimums. Workers, in forming, joining and participating in the activities of a union come together to enhance their ability to negotiate with an employer to agree on better terms and conditions of employment.

21. It would serve no useful purpose if a worker could form, join and participate in the activities of a union when such union had no formal structures to engage with the employer.
22. Section 54 of the Labour Relations Act therefore steps in to provide the mechanisms and parameters within which the worker can meaningfully engage with an employer through the union he has formed and joined. The Union should demonstrate that it is representative of a simple majority of an employer's unionisable employees.
23. It is not disputed that the Respondent had a total of 27 unionisable employees. The Conciliator in his report found this as a fact. The Respondent's own document, though dated 18 April 2013 has named 27 employees. A few of the names in this list do not appear in the check off forms.
24. But I must bear in mind that the material time for determining whether KUDHEIHA had recruited a simple majority was when it sent the check off forms and not date of trial of the Cause. The check-off forms which were sent to the Respondent had names and signatures of 27 employees.
25. I am satisfied and I am fortified to find that KUDHEIHA had recruited more than a simple majority of the Respondent's unionisable employees.
26. When determining a dispute on recognition agreement section 54(8) of the Labour Relations Act enjoins the Court to take into account the sector in which the employer operates.
27. The Respondent did not provide sufficient material before me to establish that there is a rival union in the sector in which it operates. It was stated from the bar that ABOGE is a welfare association. My perusal of the list of registered unions in the website of the Ministry of Labour does not show any union by the name of ABOGE. The contention by the Respondent must therefore fail.

Legal effect of failure to file a verifying affidavit

28. Rule 5(1) of the Industrial Court (Procedure) Rules, 2010 requires a Statement of Claim to be accompanied by an affidavit verifying the facts relied on.
29. There are not so dissimilar provisions in the Civil Procedure Rules. There have been conflicting decisions from the High Court on failure to file a verifying affidavit at the time of filing a Plaintiff.
30. The procedures of the Industrial Court have been kept simpler than those under the Civil Procedure Rules. Failure to comply with a procedure may in certain instances amount to more than a procedural technicality. Many of the practitioners and parties appearing before this Court have no legal training, skills or knowledge. Many are union officials like in the present case.
31. Under the Civil Procedure Rules, the Courts have allowed or given Plaintiffs time to file verifying or proper verifying affidavit. In *Busia Teachers Co-Operative Credit and Savings Society Ltd v Nation Media Group Ltd* (2004) 1 KLR 603, the Court held that failure to file a verifying affidavit does not invalidate a plaintiff so long as a satisfactory reason is given.
32. The Respondent raised the issue of the verifying affidavit late in his submissions. It was not argued that the Court lacked jurisdiction because of the failure. I would endorse the holding in the aforementioned case and determine the Cause on substantive merits.

Appropriate relief

Deduction and remission of union dues

33. This particular head of claim was not really contested. The Respondent exhibited copies of cheques for January, February and March 2013. Because the monies are deducted from employees who have signified their union membership and consented to deduction of the Union dues, the Respondent should ensure it complies with the Labour Relations Act and remit the dues timeously.

Recognition Agreement

34. In my view KUDHEIHA has demonstrated that it complied with the law and is entitled to recognition by the Respondent. It is only through recognition that the unionisable employees can as a collective negotiate on better terms and conditions of employment.

Conclusion and Orders

35. In conclusion I do find that KUDHEIHA merits recognition by the Respondent and order the Respondent to recognise it by entering into a recognition agreement within the next 45 days.

36. The Respondent should also continue with deduction and remission of union dues to KUDHEIHA as by law ordained.

37. There will be no order as to costs because of the anticipated social partnership and ongoing relationship between the parties.

Delivered, dated and signed in Mombasa on this 30th day of August 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Osore (Union official) KUDHEIHA

Ms. Ndula, State Counsel

Instructed by Attorney General for Respondent