



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 1362 OF 2011

**KENYA UNION OF COMMERCIAL
FOOD & ALLIED WORKERS.....CLAIMANT**
-VERSUS-
UKWALA SUPERMARKET LTD.RESPONDENT

Mr. Nyumba for the Claimant union.

Mr. Onyony for the Respondent Employer.

R U L I N G

This is a recognition dispute between the Claimant union and the Respondent Employer.

On 27th February, 2013, the court directed the Ministry of Labour to conduct a verification exercise to ascertain whether the Claimant union has attained the 51% simple majority membership of the unionisable employees of the Respondent and thereafter file a report to the court within thirty (30) days.

The Ministry of Labour filed a report dated 14th May, 2013 wherein it noted the following discrepancies to the check-off list of members submitted by the Claimant:

- a. 172 repeated names.
- b. 406 undated list of members.
- c. 167 list of members in photocopied check-offs.
- d. 261 non employees.
- e. 30 resignations from the union membership.

Due to these discrepancies, the report states that the employer has only been able to remit union dues for 147 genuine members which does not constitute 51% membership of unionisable employees. The report further indicates that there is no rival union in the organization. That the request by the union for direct balloting of all unionisable employees was rejected by the Respondent.

The report adds that the check-off list is the basis of remittance of union dues in terms of **Section 48** of the **Labour Relations Act** and it is

recommended that the union presents current check-off list (Form S) to satisfy the simple majority rule of 51% membership which it failed to do this time round.

The **Industrial Relations Act No. 14 of 2007** does not define a member of a union nor does it indicate conditions precedent for one to be termed a member of the union.

Part IV of the Industrial Relations Act titled “**Trade Union Dues Agency Fees and Employer’s Ogranisation Fees**” provides for remission of union dues by the members of a union by way of a check-off list.

Under **Section 48 (2)** a trade union may in the prescribed form, request the Minister to issue an order directing an employer of more than five (5) employees belonging to the union to deduct union dues from the wages of its members and pay monies so deducted into a specified union account(s).

The employer is obliged to start making such deductions within thirty (30) days from the date of the Minister’s order.

It must be understood that the check-off list (Form S) is not a prerequisite of union membership. In fact, membership of a union precedes the request for deduction.

It should also be understood that **Section 48 (2)** provides that a trade union may in the prescribed form request for the Minister to order deductions by the employer. (emphasis mine)

The forms are just a manner of facilitating remittance of union dues after the fact of recruitment. The fact of membership may be established through other agreeable, transparent and accountable means of doing so.

In practice, balloting has been applied regularly and is accepted by ILO as a credible way of establishing membership.

From the report of the Chief Industrial Relations Officer, Ministry of Labour Mr. Makaa, it is apparent that there exists a major weakness in establishing union membership through the check-off lists.

These have been identified as undated list of members, photocopied check-offs, repeated names and inclusion of non-employees.

In short, the labour officer is pointing out loopholes that may prevent a credible and accurate count of members.

Employees right to freedom of association under **Section 4 (b)** to join a trade union of choice is presently buttressed under **Article 36** and **41 (2) c** of the **Constitution of Kenya 2010**.

This is therefore a fundamental freedom that may only be limited in terms of **Article 24 (1)** of the Constitution by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

In terms of **Article 10 (2) (b)** a legislative provision shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation.

It is the court’s considered view that **Section 48 (2)** does not limit the freedom to join a union of choice in a clear and specific manner and therefore cannot be relied upon to deny employees their right to be and to remain members of their union of choice.

To this extent, the use of check-off list (Form S) in a manner that may exclude and deny many employees who are members of a union the right of membership and representation is unlawful, unconstitutional and null and void.

It is the court's decision that the only lawful and credible way of establishing whether or not employees are members of a trade union is by conducting a ballot based on agreed rules between the union and the employer.

To this end, the court directs that the Ministry of Labour by itself or through its appointed agents conduct ballot of all unionisable employees in all the branches of the Respondent countrywide to establish whether or not the union has attained 51% membership of the unionisable employees of the Respondent.

The ballot be conducted in terms of rules agreed upon by both parties within 60 days from the date of this judgment.

A report of the ballot be presented to court upon conclusion of the ballot for purposes of determining the issue of recognition between the parties and make appropriate orders accordingly.

It is so ordered.

Dated and delivered at Nairobi this 30th day of August, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE