REPUBLIC OF KENYA.

IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI.

(Before: Charles P. Chemmuttut, J.,

O.A Wafula & J.M. Kilonzo, Members.)

CAUSE NO. 33 OF 2006.

KENYA SHOE & LEATHER WORKERS' UNION ..……..Claimants.

v.

HOUSE OF LEATHER (Owned by LEVS

TRADING CO. LTD.)……....Respondents.

Issue in Dispute:-

"Recognition Agreement."

Mr. Joseph Bolo, Secretary General, for the Claimants (hereinafter called the Union).

Mr. K.W. Akide, Advocate, of M/S Akide & Co., Advocates, for the Respondents (hereinafter called the Company).

A W A R D.

The Minister for Labour referred this dispute to this Court for consideration and determination on 7th March, 2006 under powers conferred upon, or vested in, him by Section 8 of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act); and his reference, together with the statutory certificate from the Labour Commissioner under Section 14(9)(e) of the Act, were received by the Court on 8th March, 2006. The dispute was then listed for mention on 28th March, 2006, when Messrs. Joseph Bolo and M.O. Odhiambo, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 19th April and 10th May, 2006, and the case was fixed for hearing on 8th June, 2006. Mr. Bolo for the Union belatedly submitted his memorandum on 27th April, 2006, but Mr. Odhiambo for the Company did not file his reply statement as directed. On 8th June 2006, Mr. Bolo appeared for the Union but there was no appearance for the Company. In the circumstances, the matter was rescheduled for hearing on 19th July, 2006. Mr. Akide for the Company filed his reply statement on the same day, i.e. 19th July, 2006, and the case was heard accordingly.

The Union was registered as such under Section 11 of the Trade Union Act, Cap. 233, Laws of Kenya, and according to Rule 3(a) of its Constitution, membership of the Union "shall be open of (to) all employees engaged in leather industry including sandal making, boot, shoe manufacturing and repairing, tanning of hide and skin, plastics, rubber making, all kinds of leather suitcase, shoes shops, shoes laces, shoe polish, handbag making, polythene, elastic, pvc shoes, cushion making, garment making and allied industries……." It was for this reason that on or about 17th November 2003 the Union approached the

Company for recognition on the following grounds:-

(a) that it had recruited more than 51% simple majority, i.e. 39 out of 53, or 73.7%, unionisable employees as its members (App. I a, b & c);

(b) that the Union was the sole and rightful or appropriate one to represent the interests of the unionisable employees of the Company on matters pertaining to terms and conditions of employment, and

(c) that there was no rival union claiming representation or recognition.

Consequently, the Union served the company with a check-off under Sections 45 and 46 of the Act signed by its employees for the deduction of union dues and also suggested that the parties should meet to sign the recognition agreement.

In his letter, 21st November, 2003 (App. II), which was copied to the Minister for Labour, the Managing Director of the Company, Mr. Lior Leviner, opposed the demand mainly on three grounds, namely:-

"1.) House of Leather trades in the retail business and has no connection with manufacturing or producing of leather items. I fail to understand what interest KSLWU could have in trying to represent our workers.

2.) The management treats and deals with all our employees in a more than fair and honest manner. My door as the managing director is always open to any requests or problems that our employees might have. We do not need a 3rd party to complicate this good relationship.

3.) I am aware that the vast majority of my workers 70% have shown no interest in joining any union as they are happy with the current situation. Fact is, since the union has become involved it has caused only tension and has divided our workers."

In the circumstances, the Union reported a formal trade dispute to the Minister for Labour under Section 4 of the Act. The Minister accepted the dispute and appointed Mr. J.A. Yidah of Ministry of Labour Headquarters to act as the Investigator; and in his investigation report, which was released to the parties on 3rd August, 2005, the Minister found and recommended as follows:-

"**FINDINGS:**

…….. the House of Leather situated on State House Road and **Tom Mboya Street engages in the sale of finished leather** products both on wholesale and retail basis.

……. they had engaged a total of 53 employees at the time of reporting the dispute, forty-six (46) being unionized and the rest in the management cadre.

…… the Union's constitution provides for representation of these employees. However…….. the union had not made any efforts to recruit employees through the prescribed check-off system, and notify the employer of the same. In fact the purported check-off was written and signed by one person, hence failing to fulfill any of the requirements of recognition.

Finally …… the union had only recruited ten (10) employees into their membership, which is below 51% requirement i.e
46x14 =4.6%
100

RECOMMENDATION:

….. it is noted that the union failed to follow recruitment procedures and requirements for recognition and miserably failed to garner a simple majority as the law dictates.

It is therefore recommended that the union should not be accorded Recognition Agreement. It is further recommended that the union should embark on a serious and vigorous membership recruitment drive and seek recognition after attaining the simple membership majority.

The Minister finally appealed to the parties to accept the recommendation as a basis of resolving this dispute (App. IV a,b & c). The Company accepted the recommendation, but the Union, rejected it, *inter alia,* for the following reasons:-

(a) that the Investigator erred in stating that the check-off was written by one person;

(b) that the Investigator erred in finding that the Union managed to recruit only 10 employees into their membership, and

(c) that the Investigator erred in stating that the Union had not made any attempt to recruit the employees into their membership and yehe (Investigator) had been given a letter which was written by the Managing Director of the Company wherein he expressly denied the union any access to the Company's premises and that he was not willing to enter into negotiation with any union whatsoever (App.II).

Mr. Bolo submitted that the Company had terminated the services of six employees and the Union intervened or interceded for them and they were paid their terminal dues (App. III). He pointed out that all Kenyans have a constitutional right and freedom under Section 80 of the Constitution to join any registered association of their own choice and nobody should deny them the said right and freedom. Mr. Bolo went on to submit that the Company contradicted themselves by giving different stories to the Investigator, even after communicating with the Union that they would not accept or negotiate with any union whatsoever. Furthermore, the Company had submitted that the Union had not approached them for recognition and at the same time they stated that they were not aware that some of their employees had signed check-off forms acknowledging their union membership.

Mr. Bolo stated further that the Company, through their correspondence, have clearly shown that they neither respected the rights of their employees by allowing them to join a trade union of their own choice nor obeyed the laws of this country. He argued that the Company want to continue to impose unfavourable working conditions on their employees as they have done in the past, and they do not want them to negotiate their terms of service collectively, through the Union, since they (employees) will demand better terms and working conditions. He pointed out that other employers of their size have unions in their establishments to represent their employees, and to allow the Company to continue frustrating and intimidating their employees, with poor working conditions, would give them undue advantage over their competitors.

Accordingly, Mr. Bolo prayed that the Company be ordered to sign a recognition agreement with the Union without further delay.

In his written reply, the learned counsel for the Company strenuously resisted the demand mainly on the following grounds:-

(i) That the Company is not engaged in the business for which the Union members are drawn; but, on the contrary, operates a retail shop and is not engaged in the manufacture or production of leather or leather products.

(ii) That the check-off forms (App. I a,b c & d) which have been relied on by the Union are not authentic.

(iii) That the Ministers' findings and recommendation, which have not been contested by the Union, are correct.

(iv) That, although the Union has cast aspersions at the integrity of the Investigator, Mr. J.A. Yidah, it has not filed any substantive complaints against him. Thus, the Unions claim or demand is riddled with malice, lies and bad faith.

(v) That the dispute is defective and bad in law.

During the hearing of this dispute, however, the learned counsel for the Company sprang a surprise on both the Union and the Court when he submitted that there was no legal entity called **House of Leather** but the correct name of the Company was "**LEVS TRADING COMPANY LIMITED**", and, on demand by the Court, he consequently forwarded a photostat copy of the certificate of incorporation, dated 10th September, 1996, in support of his contention. He also attached a letter, dated 20th July, 2006 and addressed to "TO WHOM IT MAY CONCERN" to show that the section that retains leather products contributes merely 2% of the gross turnover, and submitted that the Company could not by any stretch of imagination be said to manufacture or to produce leather, and that it (Company) engaged 95 employees in July 2004, which tallied with the findings of the Investigator.

In the circumstances, Mr. Akide prayed that the demand be dismissed for lack of merit.

The two conditions precedent for recognition of a union by an employer under Section 5(2) of the Act are:-

(a) that the trade union seeking recognition has in itsmembership a simple majority of the employees eligible by virtue of the union's constitution to join that particular union in a particular undertaking or a group of undertakings, and

(b) that there is no rival union claiming recognition or to represent such employees.

The above requirements enjoin an employer to recognize a union according to the criteria laid down as above. In broad terms the criteria require that (i) a union which recruits a simple majority of the employees in an establishment or a group of establishments and (ii) there is no rival union claiming recognition or representation ought to be accorded recognition by the

employer or employers – i.e. the taking of the employer or employers of all such actions with a view to the carrying on of relevant negotiations with the trade union as might reasonably be expected to be taken by him or them.

Rule 3(a) of the union's constitution stipulates, *inter alia*, that "membership of the union shall be open to all employees engaged in leather industry including……. shoes shops;……". In our view, therefore, the Union is the right or appropriate one to represent the unionisable employees of the Company and there is no rival union claiming recognition or to represent them. The learned counsel for the Company, Mr. Akide, argued, however, that the Union is not entitled to recognition because they have brought a wrong party to Court while the correct name of the Company is **"LEVS TRADING CO. LTD**" which is a distinct legal entity. True, a limited liability company is a distinct legal entity, But this cannot be a ground for rejecting the dispute as the existence of the Company was within its knowledge and the certificate of incorporation in their possession since the dispute arose and formally reported to the Minister for Labour. The Company hid their true identity from both the Union and the Investigator until during the proceedings or hearing of this dispute when the learned counsel sprang a surprise on both the Union and the Court by submitting that the correct name of the Company is "**LEVS TRADING CO. LTD**." The fact that the Company knowingly withheld from, or did not disclose their true identity to, the Union and the Investigator until during the hearing of the dispute shows that they did not come to Court with clean hands.

It is evident from the submission of the Union that they had recruited more than 51% simple majority of the unionisable employees, i.e., 39 or 73.6%, out of 53 of the total unionisable employees of the Company as their members. But the Company frustrated their efforts by denying them recognition. The findings and recommendation of the Minister hereof are also self-contradictory and I take great exception to the entire report on this matter.

The Company should realize that trade union power is an economic factor which has to be taken seriously, and certainly it is not capable of being wished away or overcome by crude show of force; and, as the Court observed elsewhere on several occasions before, "some employers in this country resent the emergence of trade unions in their concerns because they want to dictate terms and conditions of service to their employees. These employers are fighting a battle they cannot win, and the sooner they encourage unions to stand on their own feet the better, otherwise they (employers) will continue to have trouble on their hands as there will be no recognized employees' leader to whom they can talk" in case of industrial unrest. Therefore, the era of employers who refuse to accord recognition to trade unions and/or deny employees the right to join trade unions of their own choice should be a thing of the past.

In the result, and on the balance of probabilities, we are satisfied that the Union have fulfilled the requirements under Section 5(2) of the Act for recognition by the Company, i.e. "**LEVS TRADING CO. LTD."** Accordingly, we award that the Company accord formal recognition to the Union forthwith, and the parties must sign a recognition agreement within **two (2) months** from the date of this award for purposes of collective bargaining.

DATED and delivered at Nairobi this 24th day of August, 2006.

Charles P. Chemmuttut MBS.,
JUDGE.

O.A. Wafula,
MEMBER.

J.M. Kilonzo,
MEMBER.