



REPUBLIC OF KENYA

**Industrial Court of Kenya**

**Cause 1362 of 2011**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT**

**VS**

**UKWALA SUPERMARKET LTD..... RESPONDENT**

**RULING**

Henry Nyumba for Claimant/Applicant

Cyprian Onyony for Respondent

The Application under Certificate of Urgency dated 28<sup>th</sup> July 2011, was filed on 9<sup>th</sup> August, 2011 seeking for orders:-

1. **THAT**, the Honourable Court certifies this application as urgent.
2. **THAT**, service of this application on the Respondents be dispensed with and the application be heard ex parte in the first instance.
3. **THAT**, this Honourable Court be pleased to issue orders restraining the Respondent from victimizing, intimidating, harassing, terminating or dismissing the claimant members on account of their Trade Union membership.
4. **THAT**, this Honourable Court lists this matter for hearing and determination, the issue in dispute being urgent as it touches on Recognition of the Claimant Union.
5. **THAT**, costs of this application be provided for.

**WHICH APPLICATION** is grounded on the annexed affidavit sworn by **Benson D. Luvayi** and on the following grounds among others:-

- i. **THAT**, between 2008-2011, the Applicant/Claimant **recruited 915 employees** of the Respondent which is over and **above 51%** required under **Section 54 of the Labour Relations Act, 2007**.
- ii. **THAT**, the Claimant's constitution allows it to **recruit, enroll and represent the Respondents**

**unionisable employees.**

- iii. **THAT**, the Applicant/Claimant recruited more than a simple majority of the Respondent's employees required for purposes of Recognition but was **unfairly, unjustifiably and unlawfully denied recognition.**
- iv. **THAT**, the Claimant has pursued the matter in accordance with the provisions of law but still the Respondents are not willing to recognize the union.
- v. **THAT**, the Respondent has evaded Trade Union representation from the year 2003 to date.
- vi. **THAT**, the Respondents action to **unjustifiably deny** the Claimant Recognition amounts to **unfair labour practice, unconstitutional and unlawful.**
- vii. **THAT**, the Respondent's action violates relevant **I.L.O. Conventions on the issue of Recognition and of Collective Bargaining** much as it denies employees their right under the Labour Relations Act, 2007 and the Claimant/Applicants Constitution and Rules.

The same is provided on the Supplementary Affidavit of Benson D.

Luvayi, the Director of the Applicant Union in charge of organization and recruitment of members amongst other duties.

He contends that between 2008-2011, the Claimant recruited 915 unionisable employees of the Respondent who constituted a simple majority of the Respondent's employees and procedurally forwarded the duly signed check-off forms and the model Recognition Agreement to the Respondent to effect deduction of Union dues and to study and sign the draft Agreement. The documents are appended to the Application.

That the Respondent has in violation of the relevant provisions of the Labour Relations Act refused or neglected to sign the Recognition Agreement even after it was clear that a simple majority had been realized.

That the employees have sought a Trade Union representation unsuccessfully since 2003 but have been frustrated by the Respondent by employing unfair labour practices such as dismissing union members at a high rate so as to scare the remaining ones from joining the Union.

The dispute was referred to the Minister in terms of Section 62 of the Labour Relations Act, 2007. A conciliator was appointed and the parties were invited to several conciliation meetings at the end of which it was claimed that the Claimant had not realized 51% membership and that it had to recruit more employees. The 51% was realized and a communication was sent to the Respondents on 4<sup>th</sup> July, 2011 marked Annex '20' to the Application. The Respondent was invited to meet the Applicant/Claimant on 11<sup>th</sup> July, 2011 to sign the Recognition Agreement. The Respondent replied by a letter of 6<sup>th</sup> July, 2011 stating that no evidence had been furnished to prove that the Union had attained 51% membership alleging further that they had evidence that less than 30% of the unionisable employees had joined the union.

The Applicant has submitted letters from the employees between 11<sup>th</sup> October, 2010 to 18<sup>th</sup> April, 2011 withdrawing from the union due to alleged intimidation by the Respondent. The Respondent selectively deducts union dues from a few members leaving out the others so as to defeat the effort by the union for recognition.

The Applicant alleges that the conduct by the Respondent violates the Constitution of Kenya 2010; Industrial Relations Act, 2007 and the ILO Conventions 87 and 98.

The Applicant seeks the Court *inter alia* to issue orders restraining the Respondent from

victimizing, intimidating, harassing, terminating or dismissing the claimant's members on account of the Trade Union Membership. It is apposite to note that no order was sought from this court to compel the Respondent to recognize the Claimant's Union.

The Respondent filed a replying Affidavit in opposition to the Application deposed to by Mr. Joshua Were, the Human Resource and Administration Manager of the Respondent. He states that the Claimant has not attained the simple majority membership as mandated by law for recognition.

That this Application was not preceded by a reference to the Minister for conciliation, the last such reference having been done in 2009 wherein the Minister determined that the claimant/Applicant had only recruited 30% of the unionisable employees.

That the Respondent is not anti-union, does not engage in victimization of employees who join the union but has as a matter of fact deducted union dues and remitted same to the Claimant notwithstanding that there is no recognition of agreement in place.

He avers therefore, that the grounds for the Notice of Motion are untrue, misleading and designed to mislead the Court. That the issue before court is one of recognition but not on Collective Agreement and matters that relate to Collective Bargaining must be canvassed under a suit for either refusal and or neglect to bargain.

The Respondent has filed supplementary affidavits of 53 employees who allege that their signatures were forged in an attempt to fraudulently attain a simple majority which the Respondent denies it has attained at any one time.

He further states that the Respondent never threatened and/or forced any employees to withdraw from the union membership.

The Claimant/Applicant has in an effort to reinforce its case for recognition filed further check-off forms in addition to those earlier annexed to the Application as further proof that it had attained 51% membership of all the unionisable employees of the Respondent. These were filed on 4<sup>th</sup> September, 2012 and they date between 3<sup>rd</sup> October 2011 to 3<sup>rd</sup> July, 2012.

They therefore, seek that the court grants prayer 35(ii) of the Memorandum of Claim dated 28<sup>th</sup> July, 2011 to the effect that the Respondent deducts and remits union dues from all members as directed by the members themselves through the check off forms.

The Respondent has raised objections in *limine* to the Application in the memorandum of reply to wit:-

- (i) That the check-off Forms presented to court are fatally defective and violate Section 74 of the Industrial Relations Act, on records to be kept by the employer and Section 90 of the Employment Act, with regard to limitation.
- (ii) That the check-off Forms are fatally defective as provided under Section 35(b) of the Labour Relations Act, 2007 as they have been executed by non-officers of the Union.
- (iii) That there is doubt on the legal standing of the suit pursuant to Sections 62 and 74 of the Labour Relations Act, 2007 arising from non-compliance with the form and manner of dispute processing.

Mr. Onyony for the Respondent in his submissions in support of the points in *limine* stated:-

This matter was brought under Section 74(a) of the Labour Relations Act as an urgent referral. That this Section must be read together with Section 62 on Dispute Resolution and Section 69 that requires the conciliator to issue a certificate of unresolved dispute before the Application is filed in court.

That no Certificate relating to the current dispute has been issued by a conciliator since the parties accepted the resolution by the conciliator on 11/12/2009. That the Claimant/Applicant had not obtained 51% membership and was advised to recruit more.

On 16/12/2009, the Claimant accepted to recruit some more and the process should have been followed to its logical conclusion until a certificate is issued by the conciliator.

He argued further that Rule 6(1)(b) of the Industrial Court (procedure) Rules 2010 provides that a Statement of Claim must be accompanied by

- (i) a report of the conciliator and the Minutes of Conciliation meeting; and.
- (ii) a Certificate of Conciliation issued under Section 69(a) of the Labour Relations Act. That these documents are lacking and in terms of Rule 6(2) where a Certificate is not issued, an affidavit of claim stating why the Certificate was not issued is necessary.

He submitted therefore that the Court lacked jurisdiction to entertain the matter in the absence of a certificate of unresolved dispute and/or an Affidavit of Claim explaining why the Certificate was not issued.

On the issue of Limitation; he submitted that Section 90 of the Employment Act, bars any claims where cause of action arose more than three (3) years from the date of filing. He therefore submitted that check-off forms that date back to 25<sup>th</sup> March, 2003 cannot be used to found the claim before court. That no forms presented support the recruitment from 2008-2011. That further documents were filed on 4<sup>th</sup> September, 2012 and the check-off lists attached thereto are post the cause of action as they date between 29<sup>th</sup> November 2011 to July 2012.

He adds that this is an abuse of the court process as one cannot file a suit and then go on a fishing expedition for new evidence to augment it and therefore, the further documents should not be considered at all in support of the Notice of Motion and the Claim.

Finally, Mr. Onyony submitted that Mr. Boniface M. Kavuvi who claims to be the Secretary General of the Claimant Union is no longer an official of the Union and has therefore signed the court documents in violation of Section 35(6) of the Labour Relations Act and the Application and Claim should be dismissed for want of authority to bring the suit.

In response, to the Legal Objection, Mr. Henry Nyumba for the Claimant Union outlined the history of the matter and states that they have continuously recruited new members and the cause of action arose on 6<sup>th</sup> July, 2011 when they wrote to the Respondent on 4<sup>th</sup> July, 2011 informing them that they had attained 51% membership and invited the Managing Director to meet them on 11<sup>th</sup> July, 2011 to sign the Recognition Agreement. However, on 6<sup>th</sup> July 2011, the Respondent through Mr. Joshua D. Were, the Administrative Manager declined to meet the Claimant stating that it had information that the union had only attained 30% of the membership.

He submitted that there was no longer any need to return to the conciliator since he had issued a report dated 11<sup>th</sup> December, 2009 asking the Union to recruit more members and directed the Respondent not to victimize any party for either being a union member or not being a union member.

Mr. Henry Nyumba further submitted that employees that had joined the union were continuously being victimized in various ways resulting in others writing letters to withdraw from the Union. It was in that light the Application pending before court was filed on 28<sup>th</sup> July 2011.

On considering these submissions by the parties, the Court finds the following:-

On the issue of Limitation, the Court finds that the cause of action arose on 6<sup>th</sup> July, 2011 when the

Respondent declined to meet the Union to sign a recognition Agreement and/or to verify the claim by the Claimant Union that it had recruited 51% membership.

The recruitment in issue arose between 2008 and 2011 and so is the alleged victimization. The last report of the conciliator dated 11<sup>th</sup> December, 2009 is also within the 3 year period the matter was brought to court. Furthermore, the Application under Section 74(a) need not await the certificate of conciliation as submitted by the Counsel for the Respondent. The Court has jurisdiction to entertain both the Application and the Claim as filed and this point in limine is dismissed.

With respect to the other preliminary objections relating to the manner of execution of the check-off forms in that they violate Section 35(6) of the Labour Relations Act, this is not a true point of law capable of determination without getting into the facts of the suit and thus the same is dismissed.

During the hearing of the matter especially upon perusal of the documents filed on 4<sup>th</sup> September, 2011 it became apparent that what required to be done was to verify the membership standing of the Applicant/Claimant Union presently so as to facilitate a pro-active resolution of the matter rather than engage in legal technicalities and niceties.

The Court made suggestions to the parties in this respect and both were amenable to the court's suggestion. Accordingly, the Court directs as follows:-

- (i) A verification exercise be conducted under the supervision of the Minister for Labour and/or his appointed representative to verify whether or not the Claimant/Applicant has attained 51% membership of the unionisable employees of the Respondent and file a report with the Court within 30 days from the date of this order.
- (ii) That the Respondent is directed to deduct and remit to the union dues from all employees who have requested for deductions through the signed check-off forms not in dispute.
- (iii) Court shall make further directives upon receipt of the Minister's Report.

**It is so ordered.**

**DATED** and **DELIVERED** at Nairobi this 27<sup>th</sup> day of February, 2013.

Mathews N. Nduma

**PRINCIPAL JUDGE**