



**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 406 OF 2013**

**(Originally Nairobi Cause No. 528 of 2012)**

**KENYA UNION OF COMMERCIAL**

**FOOD & ALLIED WORKERS**

**CLAIMANT**

**v**

**ELDOMATT SUPERMARKET LIMITED**

**RESPONDENT**

**JUDGMENT**

1. The Kenya Union of Commercial, Food & Allied Workers (Union) filed a Memorandum of Claim against Eldomatt Supermarket Limited (Respondent) and the issue in dispute was stated as *refusal to deduct and remit union dues and refusal to sign recognition agreement*.
2. Together with the Memorandum of Claim was a Motion under certificate of urgency. On 31 July 2012, Makau Onesmus J granted prayer 3 of the motion. The orders were not complied with and contempt proceedings were filed but withdrawn.
3. The Motion and the Claim were served upon the Respondent and on 15 August 2012, the Respondent filed a Memorandum of Defence and a Replying Affidavit sworn by one Jaideep Shah.
4. After several false starts the hearing of the main Cause proceeded on 6 October 2014. Both parties opted not to call oral evidence and relied on the record and oral submissions.

**Union's case**

5. According to the Union, its constitution allows it to recruit workers employed in warehousing, merchandising, flour milling, coffee and spice mills, food processing, banks, insurance, cinemas, shop workers industries, (Respondent is involved in wholesale, distributive and retail business in Eldoret), and that it recruited 84 of the Respondent's unionisable employees and forwarded Form S (check-off forms) to the Respondent on 31 January 2012 (Union's appendix 2).
6. According to the Union, the 84 employees comprised more than a simple majority of the Respondent's unionisable employees.
7. The Respondent despite service of the check-off forms refused to commence deduction of monthly union subscriptions from the employees in violation of Gazette Notice No. 11887 of 7 December 2007, and or recognise the Union in violation of section 54 of the Labour Relations Act. Consequently, the Union reported a trade dispute to the Minister for Labour on 23 March 2012.
8. The Union further asserted that the Respondent had resorted to victimizing workers who had joined the Union.
9. Mr. Atela, Assistant Secretary General of the Union in his submissions stated that under the law, the Respondent had 30 days to implement the deduction of union subscriptions and the failure to

comply was in violation of section 19 of the Employment Act, 2007 and section 48 of the Labour Relations Act.

10. Mr. Atela further urged that the action of the Respondent was in violation of Article 41 of the Constitution which guarantees workers the right to fair labour practices including joining and participating in activities of a union and also in violation of ILO Conventions Nos. 87 and 98.
11. Regarding the assertion by the Respondent that most of the workers who had joined the Union had withdrawn, Mr. Atela submitted that the letters were not dated while those which were dated were dated after the Union had instituted the present Cause.

### **Respondent's case**

12. The Respondent's case was contained in a 7 paragraph Memorandum of Defence. According to the Respondent, the Union had not met the requirements of the law to entitle it to recognition or to deduction and remittance of monthly union subscriptions.
13. In the Replying Affidavit, it was deposed that the Respondent had 150 workers and that some of the workers who had been recruited had already left its employment. Further, other workers had resigned leaving only 3 workers as members of the Union and thus the Union did not represent a simple majority of the employees.
14. The Respondent further denied victimizing its employees who had joined the Union and pleaded that it only dismissed employees whose conduct had contravened the provisions of the Employment Act.

### **Evaluation**

#### ***Deduction of union subscriptions***

15. The primary statutory provision providing for deduction of trade union dues from employees is section 48 of the Labour Relations Act. Under the section, the first step that a trade union seeking that an employer to deduct dues from its members is to put in a request to the Minister for Labour if an employer employs more than 5 members belonging to the union.
16. Secondly, once the Minister has issued an order under the section, an employer should commence deduction of union subscriptions within 30 days.
17. In the case at hand, the Minister issued an order under Gazette Notice No. 11887 of 7 December 2007. The check-off forms sent to the Respondent, and which fact was not denied, clearly stated that an order had been made through Kenya Gazette Notice No. 11887 and 7315 of 7 December 2007. The forms also had more than 5 employees of the Respondent.
18. Further, section 19 (1)(f) of the Employment Act, 2007 places a statutory obligation upon an employer to deduct from an employee's wages such amount as may be authorised by a written law. Section 19(1) (g) of the same Act, in fact obligates an employer to deduct any such amounts from an employee's wages as the employee may request in writing.
19. The import of section 19(1) (g) of the Employment Act, 2007 is that an employee is free to dispose of his wages in whichever way he may wish. Once an employee has given the request in writing, an employer has to comply but subject to such other statutory provisions.
20. In signing the Form S (check-off forms), the Respondent's employees were unequivocally directing the Respondent to abide by the law and deduct and remit the monthly union subscriptions to the Union. And by failing to commence the deductions after 30 days, the Respondent was in clear breach of both sections 48 of the Labour Relations Act and section 19 of the Employment Act, 2007.

#### **Recognition agreement**

21. The Union anchored its quest for recognition on section 54 of the Labour Relations Act. The prerequisites which are given in the section are that, a union represents a simple majority of the unionisable employees and the Union is relevant to the sector the employer is involved in.
22. On the face of the numbers given, the Union had recruited 56% of the Respondent's unionisable employees and the names were transmitted to the Respondent on or around 31 January 2012.

23. But the Respondent urges that out of the 84 employees, some had left employment before signing the Form S, while some withdrew from the Union in writing between July and August 2012. Others had been terminated.
24. To rebut the position taken by the Respondent, the Union countered that some of the employees had been forced to withdraw from the Union.
25. A perusal of the letters suggests that the Union's submissions in this regard may have merit. Some of the withdrawal letters are not dated as submitted by the Union. Some are addressed to the Respondent but not copied to the Union. The withdrawal letters addressed to the Respondent suggest that the employees were asked to withdraw from the Union. A few of the letters will suffice and these are the letters by Kibor Timothy Chebus, Veronica Kiptumo, Douglas Otworu Nyabuti, and Lydia Jepkoech Keitany.
26. In my view, the Union has placed sufficient material before Court to establish that it represented more than a simple majority of the Respondent's unionisable employees as of March 2012. The withdrawals only came in a flood between July August 2012.
27. This therefore begs the question, what is the material time for determining whether a union represents a simple majority of an employer's workers.
28. Two statutory provisions give pointers suggesting the answer to the question. Firstly, under section 48(3) of the Labour Relations Act, an employer is expected to commence deductions of union subscriptions within 30 days after receiving the Form S. During the 30 day period an employer should be able to verify and authenticate the names and commence deductions.
29. Secondly, under section 54(7) and 74 of the Labour Relations Act, disputes concerning recognition agreements may be referred to Court as a matter of urgency.
30. The principle which the Court can deduce from the two aforesaid statutory provisions is that the material time for determining whether a Union has achieved simple majority should be as close as possible to the time a Union transmits to an employer Form S. In this case that time should be around March 2012.
31. In the case under consideration, there was a flurry of withdrawals from the Union from July to August 2012, some 4 or 5 months after the Union had commenced legal proceedings to be granted recognition. These withdrawals must have been instigated by the Respondent.
32. The Respondent did not suggest that there is a rival union or that the Constitution of the Union does not allow it to represent its employees.
33. Before concluding, the Court wishes to observe that it is undesirable for parties to opt to proceed on the basis of the record and submissions where there are disputed facts. Further, parties to disputes such as this should always endeavour to attempt conciliation as required under the Labour Relations Act and the Industrial Court Act.

### **Conclusion and Orders**

34. From the foregoing, the Court finds and holds that by failing to commence deduction of union subscriptions 30 days after receiving Form S, the Respondent was in breach of the law, and further that the Union had achieved more than a simple majority representation of the Respondent's unionisable employees at the material time and was entitled to recognition by the Respondent.
35. The Court therefore orders as follows
  - i. The Respondent to grant recognition to the Kenya Union of Commercial, Food & Allied Workers within 21 days from the date herein.
  - ii. The Respondent to commence deductions of monthly union subscriptions of such employees who are members of the Kenya Union of Commercial, Food & Allied Workers and remit the said deductions to the account designated by the Cabinet Secretary for Labour with effect from 1 November 2014.
  - iii. The Respondent not to victimize or discriminate against employees for participation in collective organisation or union activities.
36. Each party to bear its own costs because of the anticipated social partnership and ongoing relationship between the parties.

**Delivered, dated and signed in open Court at Nakuru on this 10<sup>th</sup> day of October 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Mr. Atela, Assistant Secretary General, Kenya Union of Commercial, Food & Allied Workers

For Respondent Ms. Mafutu, instructed by Manani, Lilan & Co. Advocates