Kenya Union Of Commercial, Food And Allied Workers v Uzuri Foods Limited (Golden Harvest Mills); Bakery, Confectionery, Food Manufacturing And Allied Workers Union (K) (Interested Party) (Cause 1974 of 2015) [2022] KEELRC 1466 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1466 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1974 OF 2015

JK GAKERI, J

JUNE 16, 2022

BETWEEN

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

AND

UZURI FOODS LIMITED (GOLDEN HARVEST MILLS) ..... RESPONDENT

AND

BAKERY, CONFECTIONERY, FOOD MANUFACTURING AND ALLIED WORKERS UNION (K) ..... INTERESTED PARTY

JUDGMENT

1. The claimant is a trade union registered under the *Labour Relations Act*, 2007. The respondent on the other hand is a company registered under cap 486, Laws of Kenya whose core business is in flour milling, grain milling, oil milling and farm produce sector.

2. The interested party is a trade union registered under the *Labour Relations Act* to represent employees in the baking and milling sector as more particularly set out in the union's constitution.

3. In its memorandum of claim dated November 5, 2015, the claimant avers that it had recruited a simple majority of the respondent's employees and therefore qualified for recognition.

4. The claimant seeks the following orders:

    a) To recognize the claimant as a properly constituted and representative body and the sole labour union representing labour interests of their employees.

b) To deduct and remit union dues from all unionisable employees who have signed the claimant's check off forms thereby acknowledging membership.

c) Not to victimize, intimidate, harass or coerce or otherwise dismiss or terminate any of the union members as a result of their Trade union activity.

d) To order the respondent to engage the claimant in collective bargaining within thirty (30) days upon signing recognition agreement.

e) To meet the costs of this suit.

Claimant's Case

5. The claimant pleads its case as follows:

6. That in 2013, it recruited 95 out of a total workforce of 176 of the respondent's unionisable employees as its members. That this formed a simple majority required for purposes of recognition. That in 2015, it further recruited 438 out of 550 unionisable employees which formed 79.6% membership required for purposes of recognition.

7. The claimant states that on May 27, 2013, it initiated the process of signing a Recognition Agreement but was met with a response from the respondent on 12th and June 17, 2013 stating that it was already dealing with the interested party. That it was therefore unwilling to engage the claimant.

8. The claimant maintains that it made a number of attempts to have the recognition agreement signed but the respondent declined to do so at every instance. As consequence it referred the dispute to the Ministry of Labour on July 3, 2013.

9. It is further averred that the Ministry appointed a conciliator who convened a number of meetings with both parties. The conciliator, *vide* a letter dated June 10, 2014 reported that his efforts to resolve the dispute were unsuccessful and therefore instructed the parties to refer the matter to the next level of arbitration.

10. The claimant states that the respondent has since terminated the services of several employees who are its members. That these acts are akin to victimisation on account of trade union membership.

11. The claimant maintains that it is the right union to represent the employees of the respondents given that the respondent operates within the claimant's area of representation. In addition, it maintains that it has also satisfied the simple majority rule given that its membership accounts for 79.6%, membership that is far beyond the simple majority required for recognition.

Respondent's Case

12. In its reply to the memorandum of claim, the respondent denies the averments in the memorandum of claim and further contends that the claimant is not the rightful union to represent its unionisable employees. That the Interested Party, being in the food sector and whose constitution allows it to recruit members of this sector is the rightful union to recruit its employees.

13. The respondent also avers that its employees are indeed members of the Interested Party with whom it has executed a recognition agreement as well as its first Collective Bargaining Agreement.

14. It contends that the recruitment by the claimant of someof its unionisable employees is meant to scuttle the existing cordial relationship between itself, employees and the Interested Party.

15. The respondent denies victimizing, harassing, intimidating and/or terminating any of the members of the claimant. It maintains that its unionisable employees' right of association should not override the employer's right to deal with one union as required in the labour relations principles.

16. In its counter-claim, the respondent avers that the claimant, through its officers and/or authorised agents incited its unionisable employees to stage an unlawful and unprotected strike on the 6th and October 7, 2015 which strike lasted for seven days without due regard to the law thereby occasioning heavy losses.

17. It prays for dismissal of the claimant's claim with costs and for:

    a) A declaration that the claimants instigation of the strike of the Union employees at the respondent company from the 6th to October 10, 2016 (sic) was unlawful.

    b) Judgment in its favour in the sum of Kshs 346,555,183.35 with costs and interest. The sum comprises:

Actual loss due to the strike

(i) Additional payment for security staff totalling 890 extra guards employed due to strike resulting in threat to damage to the respondent's property for the period October 8, 2015 to January 12, 2016 Kshs 941,800.00

(ii) Loss incurred due to the sale of bread at half price due to expiry date issues to willing customers due to blockage of gate by striking workers from October 7, 2015 to October 12, 2015 Kshs 159,927.00.

(iii) Actual loss incurred due to low sales as result of the strike from period October 2015 to September 2016 Kshs 22,050,929.47

(iv) Loss incurred as a result of discount given to customers to recover the market loss due to the strike Kshs 5,169,957.41

Expected loss due to strike

(i) Expected loss for the next one year due to loss of sales as a result of the strike (October 2016 – September 2017) Kshs 160,141,749.47

General damages

(i) General damages for distress due to loss of sales Kshs 20,000,000/-

(ii) Interest on loss of revenue for the period October 2015 to September 2016 Kshs 38,090,820/-.

18. In response to the respondent's amended response and counter-claim, the claimant filed a reply dated March 16, 2017. The claimant states that the respondent and the interested party purported to have signed a recognition agreement to take effect from April 13, 2015.

19. That in spite of this, the interested party has done nothing to represent employees in the Branch Division from 2007 to 2015.

20. It also avers that where there is an overlap in the Constitution of two or more unions, it is workers who exercise of their right of freedom of association to choose a union to represent them. That the exercise of

the right to choose which union to join does not amount to scuttling good industrial relations between employers and unions.

21. With regard to the simple majority rule, the claimant maintains that the Interested party only placed before the conciliator check off sheets containing a list of 68 members out of 191. That this did not constitute the 51% simple majority in 2007 and the number was maintained until the inception of the suit. Therefore, any recognition agreement and subsequent Collective Bargaining Agreement signed in the absence of requisite numbers is null and void and does not enjoy the backing of unionisable employees.

22. On the counter claim, the claimant states that it is not aware of any strike action by the respondent's employees. That it neither issued a strike notice calling for the withdrawal of labour at the respondent's premises nor did it cause a general meeting within or outside the respondent's premises for the purpose of planning any strike action.

23. The claimant maintains that other than the quest for recognition which it has pursued legally, it did not have any dealings with the respondent on any other matter. That the respondent should therefore not use its privilege and position in society to place an unfounded claim in an attempt to silence the claimant to abandon its claim for recognition.

Interested Party's Case

24. Through a replying affidavit dated December 2, 2015, the interested party maintains that it recruited employees of the respondent way back in 2007 upon which it pursued the issue of recognition. It subsequently lodged a dispute with the Minister on the matter who made his findings vide a report dated May 3, 2011 directing the respondent to execute a recognition agreement with the respondent.

25. The interested party states that in 2013, the claimant purported to recruit members of the respondent despite the economic activity of the respondent falling within its purview and thereafter lodged a dispute with the minister seeking to be recognised by the respondent.

26. That the Minister, upon the closure of the matter issued a report dated September 2, 2013 declining the plea to be afforded formal recognition by the respondent. Subsequently, the Interested Party and the respondent signed a recognition agreement on April 13, 2015.

27. The interested party contends that the claimant is therefore is in breach of established labour practices and the existing trade union registration regimes and the Industrial Relations Charter by interfering with the interested party's mandate enshrined by its constitution and recruiting employees in economic sectors covered by its constitution.

28. It further avers that the claimant is interfering with the industrial relations between itself and the respondent. That the claimant has no capacity to either recruit or represent unionisable employees at the respondent's enterprise and its actions amount to interference with trade union demarcation under the Industrial Relations Charter which emphasises on the need to avoid overlapping of trade union spheres of activities.

29. The interested party avers that in its unlawful pursuit for recognition, the claimant has created disharmony within the respondent's enterprise and have incited employees who issued an unlawful strike notice under its guidance. That vide a letter dated September 28, 2015, the employees threatened to down their tools if the respondent did not recognise the claimant as a union.

30. It avers that the claimant has made a number of attempts to interfere with its operations and spheres of employee representation prompting numerous interventions by the Registrar of Trade Unions and the Minister.

31. It avers that the claimant is seeking to be recognised by the respondent as an enterprise, a position which it argues the respondent lacks legal capacity to do so. That in addition, permitting conflicting unions to act as bargaining agents in respect of the same employees within the same economic sector would be chaotic.

32. The interested party maintains that the constitutional rights enshrined under articles 36 and 41 are not absolute but are subject to statutory and administrative limitations. That the law imposes a duty on the Registrar of Trade Unions to ensure that the constitutions of individual trade unions do not overlap in respect of union's spheres of activities as is the case herein.

33. The interested party urges the court to uphold sound and cordial industrial relations with the respondent which have already been established and to dismiss the claim with costs.

Claimant Submissions

34. The claimant submits that for a trade union to seek recognition, it must prove that it is a trade union registered within Kenya, it is the relevant sector trade union by virtue of its constitution and rules and that it has recruited a simple majority of employees.

35. It further submits that the enjoyment of workers and trade union rights are rights protected under the Bill of Rights in the *Constitution* of Kenya, 2010 under articles 24, 36 (1) and (2) and 41(2) and section 5(1) and 54(1) of the *Labour Relations Act* and that said rights can never be limited except by law.

36. In addition, the claimant submits that the provisions of section 48(1) of the *Labour Relations Act* allow employers to deduct trade union dues from their employees' salaries. That no deductions were made to the interested party in form of Trade Union dues and that no evidence has been brought before this Court to prove otherwise.

37. As such, the claimant maintains that there was no membership to the interested party by the employees of the respondent.

38. As regards the counter claim, the claimant submits that if there were any losses incurred by the respondent due the alleged strike, the respondent was indeed to blame as it had denied the employees the opportunity to continue working. It maintains that it had neither issued a strike notice nor instigated the strike for it to be accused of the same.

39. In conclusion the claimant urges that whereas trade union constitutions typically define the area of representation, workers have the absolute right to decide where to associate and no amount of conspiracy between the respondent and the interested party should defeat the right of freedom of association. Ultimately, the choice rests with employees and employees alone and not the employer as in this case.

40. That where two union constitutions overlap and cover the same area of trade union representation or where there is any ambiguity in the area of representation, workers need to be given a free hand to exercise their right to freedom of association.

41. The court is urged to allow the prayer sought in the memorandum of claim and dismiss the counter claim by the respondent.

Respondent's Submissions

42. The respondent on the other hand submits that as far as it is concerned, there is a long-standing relationship between itself and the Interested Party. That the recognition of a trade union is determined by the provisions of section 54(1) of the *Labour Relations Act* and the termination of the same is provided for under section 54(5) of the same *Act*.

43. It maintains that it is not in dispute that it has not yet applied for the termination of the Recognition Agreement between itself and the Interested party and therefore the same is still in force and the claimant cannot recruit members from the sector touching on the interested party's constitutional mandate.

44. As to whether the claimant has met the required threshold for recognition, the respondent submits in the negative and argues that the claimant has not met the legal threshold for recognition contemplated under section 54(1) of the *Labour Relations Act*.

45. As regards the counter claim, the respondent maintains that given that its employees participated in an unprotected strike with full support from the claimant, the court ought to hold the claimant responsible for the unlawful action it instigated.

46. The respondent urges the court to dismiss the claim and hold that the claimant is encroaching into the interested party's union sector and that it has not demonstrated that it has attained a simple majority in accordance with the provisions of section 54(1) as read with section 48(6), (7) and (8) of the *Labour Relations Act*. It also urges the court to be guided by the decisions in *Transport Workers Union v Nabico Enterprises* [2022] eKLR and *Kenya Engineering Workers Union v Steel Structures Limited Kenya Building, Construction, Timber & Furniture Industries Employees Union* [2020] eKLR.

Interested Party's Submissions

47. The interested party submits that trade unions derive their right to represent unionisable employees in various sectors from their respective constitutions. That the interested party, as the name suggests is the sole labour organisation representing the interest of workers employed in the food manufacturing and bread sector as listed under clause 3(a)(i) of its constitution.

48. The interested party submits that the recognition agreement and the Collective Bargaining Agreement in place between itself and the respondent prevents the claimant from recruiting employees of the respondent.

49. In addition, it argues that article 11(4) of the Industrial Relations Charter as read together with the legislative intentions under the provisions of section 14 of the *Labour Relations Act* prohibits overlapping representation of trade unions within the same economic sectors in respect of the same collective bargaining unit.

50. It is submitted that admitting the claimant to the respondent as a bargaining unit would therefore be untenable as it lacks mandate to represent the employees of the respondent. In addition, it is urged that although employees have the right to join, form and engage in activities of a trade union of their choice under article 41 of the *Constitution* of Kenya, 2010, such rights can only be exercised in line with the provisions of the Industrial Relations Charter and the *Labour Relations Act* that allow workers to join trade unions which represent their sectors.

51. Reliance is made on the decision in *Kenya Plantation & Agricultural Workers Union (K) v Kenya Chemical & Allied Workers Union & 2 Others* [2018] eKLR. It is maintained that it would be

catastrophic to allow the claimant to interfere with the interested party's domain of representation as it would lead to the existence of two unions within a bargaining unit. That in the interest of fair labour relations, industry harmony and peace that status quo be maintained.

52. It is submitted that the claimant lacks the mandate to seek deduction and remission of trade union dues under the law given that the interested party is the rightful union. That the lack of legal capacity or locus to recruit members renders the ensuing recruitment by the claimant an illegality and by seeking to collect union dues in respect of employees it was not entitled to recruit in the first place would amount to inviting the court to assist in the perpetuation of an illegality.

53. The interested party concludes by urging the court to dismiss the claim with costs.

Analysis and Determination

54. After careful consideration of the pleadings, evidence on record and submissions by Counsel, the issues for determination are:

    (i) Whether the constitutions of the claimant and the interested party permitted them to recruit and represent employees of the respondent;

    (ii) Whether the claimant has attained the threshold for recognition by the respondent;

    (iii) Whether the respondent has established the counter claim;

    (iv) Whether the claimant is entitled to the reliefs sought.

55. As regards the first issue, the starting point is the Industrial Relations Charter followed by the constitutions of the two rival unions. The copy of the Charter on record is dated April 30, 1980, more than 40 years ago and is neither signed by anyone nor dated. The document in the Court's view lack authenticity and is thus unreliable for purposes of this suit.

56. Section 54(8) of the *Labour Relations Act*, 2007, provides that when determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.

57. Rule 3(a) of the interested party's constitution and rules registered on January 21, 2008 provides that membership of the union shall be open to all employees engaged or employed in bakeries, pastry, biscuits, cakes, confectionary making, sweet making factories and any other food manufacturing and related industries including any undertaking or part of an undertaking which consists in the carrying on for gain any of the following activities, that is:

    (i) Manufacture of bakery products.

    (ii) Manufacture of sugar, confectionary, cocoa and chocolate.

    (iii) Manufacture of daily products.

    (iv) Grain mill products.

    (v) Manufacture of prepared animal feeds

    (vi) Manufacture of vegetable and animal oils and fats.

    (vii) Canning and preserving of fruits and vegetables.

    (viii) Slaughtering, preparing and preserving meat.

(ix) Manufacture of food products not elsewhere mentioned.

58. On the other had rule 5 of the claimant's constitution provides that:

> " Membership of the union shall be open to all employees engaged in the following industrial groups provided that such employees are above the apparent age of 16 years.
>
> (a) Distributive and commercial sectors
>
> (i) .....
>
> (ii) Flour, coffee and spice mills.
>
> (iii) All food processing industries.
>
> (iv) Cooking oil refineries
>
> (b) Bottling and brewing sector.
>
> (c) Laundry cleaners and dyer section.
>
> (d) Tobacco trade sector."

59. In its ruling dated April 22, 2016, the Court dealt with the issue of representation exclusively leaving out the issue of recognition, the substratum of the claim. The Judge found that there was potential for overlap and conflict between the two unions by *inter alia*, both carry the word allied in their names which gave room for encroachment.

60. The Judge expressed herself as follows –

> " It is true that the rights under articles 36 and 41 are not absolute. It is my view however, that any limitation must be subjected to the parameters set out under article 24 which provides that a right or fundamental freedom shall not be limited in a manner that derogates from its core or essential content. Specifically on the fundamental freedom of association, I agree with the holding by Rika J in *Dishon Angoya & 6 Others v Registrar of Trade Unions* (Appeal No 10 of 2011), that any limitation must be effected judiciously and fairly. The same principle would apply in the right guaranteed under article 41.
>
> In my opinion, when labour rights were elevated to the Bill of Rights, the whole regime of union representation changed. Trade unions no longer enjoy the benefit of monopoly. Employees now have the constitutional right to choose from a number of unions registered in a certain sector and the existence of a recognition agreement with one union does not extinguish this right. While recognition gives a trade union the benefit of collective bargaining, it does not by itself, lock out all other trade unions.

61. This holding is contrary to the basic submission by the respondent and interested party that the trade union locked out the claimant from recruiting members from employees of the respondent.

62. The Judge expressed the view that owing to market dynamics, employers have diversified their operations to include other business and as such must be ready to contend with the labour consequences therefrom arising.

63. The Judge found that over time the claimant had submitted check off forms to the respondent in respect of some unionisable employees of the respondent. The some unionisable employees of the respondent had switched allegiance.

64. Ultimately, the Judge directed the respondent to commence deduction of union dues from employees whose duly signed check off forms had been received from the claimant and continue doing to until otherwise directed.

65. The court is in agreement with the findings and holding of the court.

66. In *Kenya Plantations & Agricultural Workers Union v Kenya Chemical & Allied Workers Union & 2 others* [2018] eKLR, Onyango J. stated as follows

> "I must start by affirming that employees have a constitutional right to join membership of a union of their choice. However, the trade unions are required to specify in their constitution, the scope of its membership. It is thus restricted to recruit membership only from the sector in which its constitution limits it."

67. The court is in agreement with these sentiments.

68. Although section 14(1) of the *Labour Institutions Act* attempts to avoid overlap, the possibility cannot be overruled and could be problematic where a rival union recruits a simple majority of unionisable employees in a bargaining unit as is the case here.

69. It is the court's view, as along as the trade union is in the particular sector, employees should be free to exercise their freedom of choice.

70. Finally, on representation, the sentiments of Rika J in *Kenya Scientific Research International Technical and Allied Institutions Workers Union v Kenya Agricultural Research Institute & another* [2013] eKLR are worth recapitulating

> "Employees have the right to join and leave trade unions. Recruitment is a continuous process. Even where an employer has formally granted trade union recognition, employees belonging to that recognized trade union are not barred by any law from shifting allegiance to another trade union. Freedom of Association acknowledges the right to associate is co-joined to the right to dissociate; just as much as the right of recognition includes the right of de-recognition. Employees look at the trade union that is best placed to articulate their collective rights and interests of the moment, and do not take a lifelong vow of fidelity, by joining any one trade union...It is in the interest of trade unions to resolve the kind of differences between the claimant and the interested party, at their own level, with the assistance of the Trade Union Centre. Trade Unions must nurture trade union solidarity or perish."

71. The court is guided by these sentiments.

72. From the evidence on record and the authorities cited above, it is the finding of the court that the constitutions of the claimant and the interested party allowed them to recruit and represent employees of the respondent as trade union.

73. As regards attainment of the threshold for recognition, the provisions of the *Labour Relations Act*, 2007 are the home port, specifically section 54 which provides that

> (2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

(3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.

(4) The Minister may, after consultation with the Board, publish a model recognition agreement.

74. In *Kenya Plantations & Agricultural Workers Union v Kenya Chemical & Allied Workers Union & 2 others* (*supra*) the court stated that:

> " There are two factors for consideration under the section. The first is that there must be a majority of members recruited by a union before it can qualify of recognition. The second is that it must be the appropriate union in terms of the sector in which the employer operates as provided in section 54(8)."

75. The claimant submits that in 2015, it recruited members and forwarded check off sheets to the respondent as follows:

September 11, 2015 263 members

September 28, 2015 29 members

October 15, 2015 146 members

76. A total of 471 employees and having recruited another 95 in 2013, it had a total of 566 members translating to about 73% of the unionisable employees of the respondent.

77. The respondent did not deny having received the check off sheets nor did it avail evidence to prove that the numbers were in fact untrue, if it had such evidence. Needles to emphasize, lists of employees' deductions to or remittances to the interested party or copies of pay slips would have disapproved the claimant's allegations.

78. The respondent and the interested party submit that they had a recognition agreement and provided copies signed in 2015. Further, the interested party alleges that it recruited employees of the respondent back in 2007.

79. It is unclear why the respondent and the interested party took almost seven years to have a recognition agreement if it was intended to protect the interests of employees.

80. Relatedly, none of the payslips on record from 2010 to 2015 and from different employees has an entry on union deductions in favour of the interested party.

81. Finally, the respondent provided no evidence of the employees from whom it was making union deductions or the remittances it was making the interested party.

82. More fundamentally, the interested party led no evidence that it had recruited a simple majority of the unionisable employees of the respondent.

83. On the other hand, documents on record show that the claimant commenced recruitment of members in 2015 and an attempt at a recognition agreement with the respondent in May 2013 was opposed by the respondent by letter dated June 12, 2013 and June 17, 2013.

84. The dispute was reported to the Minister on July 3, 2013 and a Conciliator appointed by letter dated July 25, 2013 whose attempts fell through as the letter dated June 10, 2014 attests.

85. Evidently, the claimant made reasonable attempts to have the dispute resolved amicably but to no avail.

86. For unexplained reasons, the respondent did not wish to engage the claimant.

87. The court is guided by the sentiments of Rika J in *Kenya Export, Floriculture, Horticulture And Allied Workers v Kenya Plantation & Agricultural Workers Union & 2 others; Cabinet Secretary for Labour And Social Protection & another (Interested Parties)* [2021] eKLR as follows:

> "Recognition Agreements nonetheless, are not irreversible as held in *Scientific Research International Technical & Allied Workers Union v Kenya Agricultural Research Institute & Another* [2013] e-KLR. They rest on freedom of association. Employees are not prevented from changing union membership. The right to associate is co-joined to the right to dissociate, just as much as the right of a Trade Union to be recognized by an employer, is co-joined to the right of the Employer to de-recognize the Union. Labour is dynamic and volatile, and employees do not stay with one Employer forever. The number of employees subscribed to a Union, does not remain static. Employers also, are not tied to one industry. They may change the nature of business, rendering existing workplace Trade Union, irrelevant. Recognition Agreements are not cast in bronze."

88. In the absence of cogent evidence to contradict the claimant's evidence, that it has recruited more than a simple majority of the respondent's unionisable employees, coupled with the order of this court dated September 22, 2016, the court is satisfied that the claimant has made a case for recognition by the respondent.

89. As regards the counter claim, the respondent avers that its total loss for which it holds the claimant responsible is Kshs 346,555,183.35 for extra guards, reduction of price of bread, low sales, discounts given to customers expected loss and general damages.

90. In determining this issue, the Court is guided by the mantra of the law of evidence encapsulated by the provisions of the *Evidence Act* that he who alleges must prove. It is a principle of law that whoever lays a claim before a court of law against another must prove it. See Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh [2021] eKLR.

91. Section 107 of the *Evidence Act* provides as follows:

    (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

92. Section 108 of the *Evidence Act* provides that:

    The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

93. These provisions have been elaborated and applied in legions of decisions such as *Muriungi Kanoru Jeremiah v Stephen Ungu M'mwirabua* [2015] eKLR.

94. In *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR the Supreme Court stated as follows:

> "It is a timeless rule of the common law tradition, Kenya's juristic heritage, and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the

"balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part."

95. The court is guided by these sentiments.

96. In the instant case, the burden of proof of the counter claim lay on the respondent who avers that the claimant through its officers and/or authorised agents by the name M Kyunuve and Boniface Kavuvi incited its unionisable employees to stage an unlawful and unprotected strike on 6th and October 7, 2015 which lasted for seven days thereby causing the respondent heavy losses.

97. Regrettably, the respondent furnished no evidence of the alleged strike. Particulars of the strike, participants and the happenings during the seven days' period were not canvassed. More fundamentally, the respondent led no evidence of how the two officers of the claimant incited its unionisable employees on behalf of the claimant.

98. Relatedly, particulars of the alleged losses have not been provided. It is unclear for instance when the extra guards were hired and what their wages were, no appointment letters or pay rooster/roll have been furnished.

99. The respondent did not provide records of the number of loafs of bread or crates sold at half price and to who.

100. The respondent has not provided its accounts for the duration of the alleged strike or after, including how the expected loss was computed, justifications and assumptions made.

101. Similarly, the respondent adduced no evidence of the particulars of the discount nor records of the attendant accounting.

102. Finally, without evidence of how the respondent's business was affected by the strike as reflected in its revenue account and the additional costs incurred as well as particulars of the alleged distress, the allegation of losses on account of the alleged strike remain unproved.

103. Be that as it may, the respondent avers that the claimant's unlawful strike is the subject matter of Cause No 1830 of 2015 pending hearing and determination in this court. The respondent has not provided particulars or nature of the claim before the court or the reliefs sought.

104. For the foregoing reasons, it is the finding of the court that the respondent has on a balance of probability failed to establish the counter claim and the same is dismissed.

Reliefs

(a) Having found that the claimant's constitution permitted it to recruit and represent employees of the respondent and did so from 2013 and by 2015, it had attained the threshold prescribed by section 54 of the *Labour Relations Act*, the claimant is properly constituted and capable of representing labour interests of the respondent's employees.

(b) The respondent shall continue deducting and remitting to the claimant union dues from all its unionisable employees who have signed the claimant's check off forms.

(c) The respondent shall not victimise, intimidate, harass or coerce or otherwise dismiss or terminate any of the members of the union on account of their membership or engagement in union activities.

(d) The respondent and the claimant to negotiate and conclude a recognition agreement within 60 days of this judgment.

(e) The respondent's counter claim is dismissed with no order as to costs.

(f) The claimant is awarded costs of this suit assessed at Ksh s60,000/=.

105. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE