REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KISUMU

INDUSTRIAL CAUSE NO. 197 OF 2013

(Formerly Nairobi Industrial Cause No.1536 of 2011)

(Before Hon. Lady Justice Maureen Onyango)

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

MERRYLAND HOTEL LTD.....RESPONDENT

JUDGMENT

The Claimant is a trade union registered to represent unionisable employees in the hospitality industry. It has filed this dispute against the Respondent on two issues being:-

"(a) Refusal by the Respondent to deduct union dues from the Claimant's members and to remit the dues to the Claimant's registered account; and

(b) Refusal by the Respondent to recognize the Claimant to pave way for Collective Bargaining Agreement."

The Memorandum of Claim was filed on 12th September 2011 under Cause No. 1536 of 2011 but was transferred to this Court on 3rd July 2013 upon request by the parties.

The Claimant aver in the claim that it recruited 52 employees of the Respondent between January and February 2010 constituting one hundred percent (100%) of unionisable employees. Following the successful recruitment the Claimant forwarded the original check-off forms duly signed by the recruited employees to the respondent for action in accordance with Section 48 of the Labour Relations Act, 2007.

The Claimant avers that having qualified for recognition within the meaning of Section 54 of the said Act it approached the Respondent to facilitate the signing of a recognition agreement but the Respondent declined, prompting the Claimant to report a trade dispute to the Minister for Labour as provided under Section 62 of the Act. The parties reached a deadlock during conciliation following which the dispute was filed in Court.

It is the Claimant's case that there is no rival union claiming to represent the Respondent's employees

and that the Claimant is the most appropriate union according to its Constitution. The Claimant further avers that it has recruited more than a simple majority of 51% of the Respondent's unionisable employees and is qualified for recognition. The Claimant avers that by refusing to recognize the Claimant the Respondent is in breach of Sections 48 and 54 of the Labour Relations Act.

The Claimant prays for the following orders:-

1. A permanent injunction to restrain the Respondent, either by itself her authorized employees, servants and agents victimizing the members of the Claimant on account of trade union activities or membership.

*2. An **ORDER** be issued to compel the Respondent and the Claimant to sign the Recognition Agreement within the specific shortest time possible to pave way for CBA negotiations.*

*3. **THAT**, an Order be issued compelling the Respondent to comply with **section 48 of The Labour Relations Act, 2007** by way of deducting union dues & remitting the same into the account gazetted by the Minister.*

*4. **THAT** the cost of this suit to be met by the Respondent.*

5. Any other relief which this Honourable Court may deem fit to grant for the ends of justice.

Together with the Memorandum of Claim the Claimant filed a Supporting Affidavit of **JOANES O. OKOTCH,** its General Secretary in which he reiterates the averments in the Memorandum of Claim. The Claimant further filed a copy of its registered Constitution and Rules, two check off forms dated 1st March and 1st April 2010 respectively and containing names, signatures and dates of signing of 52 employees of the Respondent. The Claimant further attached correspondence with the Minister of Labour and conciliation relating to the report of the dispute.

The Respondent filed a Reply to the Memorandum of Claim on 25th October 2012 in which it states that it has never employed 52 employees. It further denied that the Claimant recruited into its membership any employees of the Respondent. It avers that its employees denied ever signing any check off forms. The Respondent further avers that it carried out massive redundancies and had only 6 employees in its employment. It therefore submitted that the claim is unjustified and further, had been overtaken by events.

The case was heard on 11th November 2013 and following oral submissions by Mr. Okotch for Claimant and Mr. Yogo for Respondent, the Court referred the case back to the Labour Officer on account that the pre-court process was not exhausted.

Following further protracted proceedings, the Court ordered the Claimant union to carry out fresh recruitments. On 1st October 2014 the Claimant informed the Court that it had carried out fresh recruitments of 19 members and the list had been filed in Court.

On 14th March 2016 parties were upon request granted leave to proceed by way of written submissions.

Claimant's Submissions

In the written submissions filed by the Claimant on 11th March 2016 it states that the Claimant recruited 20 employees out of 24 unionisable staff between 20th January and 13th February 2010. Between 19th

January and 24th January the Claimant again re-recruited 32 employees. However the Respondent declined to deduct union dues and sign Recognition Agreement prompting the Claimant to report a trade dispute on 24th June 2010 to the Ministry of Labour.

Ministry of Labour Appointed Mr. Joel Omweno of Kisumu Labour Office to conciliate parties. The Conciliator issued certificate to parties to proceed to court after disagreeing on 12th October 2010. The same Conciliator without informing the claimant issued another report 5th December 2013 falsely alleging that the claimant had no members. The Claimant filed Industrial suit No. 1536 of 2011 which culminated into employment and labour relations Cause No. 197 of 2013.

Faced with two conflicting views from the conciliator the court summoned employees to testify in court on their union membership and subsequently the court also ordered for fresh recruitment.

Between 2nd and 4th September 2014 the claimant recruited a further 19 members. On 17th September 2014 the respondent filed a list of 30 employees of Hotel Merryland out of whom three were in management, 27 being unionisable.

The union further submits that it is the proper union and has met the requirements for recognition of simple majority; that there is no rival union that the Respondent has frustrated its efforts by dismissing employees who have joined membership of the union, among them Geoffrey Otieng'no who was dismissed after giving evidence in this matter on 17th September 2014.

The Claimant urged the Court to grant its prayers in the Memorandum of Claim.

Respondent's Submissions

The Respondent filed its written submissions on 2nd May 2016 in which it submits that following the order of the Court on 16th September 2014, it filed a list of its total workforce numbering 30 out of whom only 8 members were willing to join membership of the Claimant. It stated that this contradicted the list filed by the Claimant of 32 recruited members and an even earlier one of recruitment of 52 members.

The Respondent submitted that this casts doubt on the evidence submitted by the Claimant as the number of employees willing to join the union. It is submitted by the Respondent that having recruited only 8 out of 30 employees the Claimant did not have a simple majority.

The Respondent further submitted that the list ordered by the court was filed way back in 2014 and most of the employees have now left the employment of the Respondent. The Respondent submitted that the Claim had been overtaken by events. It submitted that the Claimant has not moved to carry out a recent recruitment.

Relying on the case of **KUDHEIHA V. BRITISH ARM TRAINING UNIT [2015]eKLR** the Respondent submitted that the Claimant does not have a simple majority and is not entitled to recognition.

On the second issue of deduction and remittance of union dues, the Respondent submitted that it will commence deduction of union dues if there are at least 5 members of the union, relying on Section 48 of the Act.

Determination

The court takes cognizance of the long time that this issue has been pending, the first recruitment by the

union having been done in 2010 and the case filed in 2011.

The court further takes cognizance that although the case was filed based on check off forms sent to the Respondent on 1st March and 1st April 2011, the court ordered fresh recruitment and subsequent check-off forms dated 4th October 2014 were filed in court and form the basis of the submissions especially by the Respondent. I say this because the usual practice is to assess whether the trade union was qualified for recognition on the date on which it sought recognition from the employer and not the date of filing suit or hearing. The reason for this is that employment is dynamic and numbers keep changing with new employees coming on board and others leaving employment, while at the same time union recruitment is continuous. Basing the decision on any other dates may not give the true picture at the time the dispute arose.

Taking into account the foregoing, the issue in dispute is whether the Claimant was entitled to recognition based on the check off forms filed in court on 16th October 2014 pursuant to the court order of 16th June 2014. The documents contain both the members recruited by the Claimant on 2nd to 4th September 2014 and the list from the Respondent dated 11th September 2014. The list was served on the Respondent by letter dated 19th June 2015.

Based on that list there are 30 employees on the Respondent's list while there are 19 names on the Claimant's check-off form. Out of the 19 names in the check-off form, all except 3 are in the Respondent's list. The names of **ADHIAMBO STEPHEN, JOHN OBANDA OBASO** and **ELIJAH NYAGOWA RAPEMO** do not appear in the Respondent's list.

From the Respondent's list, the following names appear in the Claimant's list:-

1. Samuel Ouma Nanga

2. John Odhiambo Obonyo

3. Constant Imodoi Oboo

4. Noah Awuori Skomeri

5. Geoffrey Akomo Atiengno

6. Peter Ondiek Opany

7. Bonfas Ekada Ochidi

8. Evans Otieno Otiengno

9. Patrick Odangala Opaelo

10. Harrison Ochieng Obiero

11. Charles Yongo Wambita

12. Joseph Ochieng Ngeso

13. Daniel Ochudi

14. Mourice Ochieng

15. Maurice O. Akatch

16. Gordon Anyanga

This means that out of the Respondent's list of 30 employees, a total of 16 employees had been recruited by the union as at 4th September 2014. This represents 53.33% and therefore more than a simple majority of 50% + 1 that is provided for under Section 54 of the Act for purposes of recognition.

The Respondent's argument that the case is overtaken by events is not valid as the right to membership of a union is a Constitutional right of every worker and cannot lapse. The argument that the numbers referred to in the union's list is no longer the reality on the ground is also not valid as the material time for consideration is the actual time when the list was presented for recognition as explained above. Further, recruitment of members is a continuous exercise and numbers of union membership in an organization is not expected to be constant.

The Respondent did not comment on the contention by the Claimant that the list of 30 submitted by the Respondent contained a number of non-unionisable employees hence it is possible that the percentage of union membership among unionisable staff is higher. This is confirmed by the conciliators report which states that out of the list of 30 produced by the Respondent only 27 were unionisable.

With reference to the report of the conciliator filed in Court on 17th September 2014, the Court notes that at the time of carrying out the exercise only 8 unionisable staff were present and all the 8 of them expressed the wish to join the union. The Respondent has not stated where the rest of the 27 unionisable employees were at the time and why they were not present. The report is therefore unreliable as a measure of the membership of the union. In any event the Act provides for membership, and not intentions or willingness to join and the union presented a list of actual members.

I must also point out that the Claimant complained of frustration of its efforts at recruitment by among other unlawful acts, harassing and/or terminating the employment of unionisable employees. The Respondent did not deny the accusation.

In its defence the Respondent states at paragraph 8 that it carried out massive retrenchment programmes and was left with only 6 employees, a possible indicator of frustration alluded to by the Claimant. Suffice to state that no evidence of the retrenchment was produced by the Respondent.

Section 54 of the Labour Relations Act provides that an employer shall recognize a trade union for purposes of collective bargaining if the trade union represents a simple majority of unionisabe employees employed by the employer. The words used are mandatory in nature.

Having found that the Claimant had recruited a simple majority of employees of the Respondent at 53.33%, this court is obligated to order the Respondent to recognize the Claimant for purposes of collective bargaining. I therefore order the Respondent to sign a recognition agreement with the Claimant within 45 days from the date of Judgment. The case will be fixed for mention in 60 days for parties to confirm having signed the recognition agreement.

The Claimant further prayed for an order compelling the Respondent to deduct and remit union dues from the wages of its members to its designated account. The Respondent did not give any reasons why it has to date never complied with the instructions in the check-off forms even with respect to the

employees whose membership to the union it does not contest.

The Respondent is hereby ordered to deduct and remit union dues to the Claimant's designated account with effect from February 2017.

DATED SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE