REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COUR TOF KENYA AT NAIROBI

CAUE NO.918 OF 2016

KENYA UNION OF HAIR AND BEAUTY SALON WORKERS…….CLAIMANT

VERSUS

STYLE INDUSTRIES LIMITED…… 1st RESPONDENT

GODREJ CONSUMER PRODUCTS …….. 2ND ESPONDENT

RULING

1. The ruling herein relates to the claimants application filed on 17th May, 2016. On 31st May, 2016 the 1st respodnent's advocate attended court when the application was due for hearing but the claimants were absent. The Respondent made application seeking that this suit be consolidated with Cause No.926 of 2016 on the basis that it related to similar parties and matter. The court proceeded to issue directions with a consolidation of both files herein. Parties agreed to address the pending application by way of written submission. However, upon Perusal of the written submissions, both parties have addressed application under this Cause only. I have recalled file in Cause No.926 of 2016 and established that it relates to totally different parties and the matters therein have no link/connection with parties herein – **Abugana Khahuu Khasiani versus Barclays Bank of Kenya Ltd & Another, Cause No.926 of 2016 [formerly Civil Suit No.949 of 2003].**

2. The consolidation of these two files as requested by the respondent's advocates does not serve the intended purpose as it is obvious that the parties and cause of action in both files – Cause No.918 of 2016 and Cause No.926 of 2016 – are totally different.

The two files in Cause No.918 of 2016 and Cause No.926 of 2016 shall be kept separate and the order for consolidation is hereby set aside.

3. On the application filed on 17th May, 2016 the Claimant is seeking for orders that the 1st espondent should be restrained from selling the business to the 2nd espondent before the recognition and deduction of union dues issue is determined by the court; that the 1st espondent be ordered to deduct and remit union dues to the claimant; that the 1st respondet be ordered to sign recognition agreement with the Claimant union; the 1st espondent be ordered to reinstate two union official – William Okoth (Chairman Nairobi Branch) and Sheldon Nyabuto (Vice Secretary – Nairobi Branch); the Respondent be stopped from victimising and harassing union official and workers from exercising their rights outside the working hours; and that Cause No.578 of 2013 between the parties herein be deemed withdrawn to facilitate the hearing of this case.

4. The application is supported by the affidavit of Ms Cecily Mwangi and on the grounds that the Claimant has recruited 3,811 unionisable employees of the 1st espondent out of the possible 6,000 employee and which constitutes 51% as at April to September, 2015 with duly singed check off forms forwarded to the 1st respondent. The 1st respodnetn failed to comply with section 48 of the Labour Relations Act and forced the Claimant to report a dispute with the Minister.

5. Further ground sin support of the application are that the Claimant has met the requirements for recognition by the 1st espondent but they have declined to sign the agreement and also refused to deduct and remit union dues in breach of section 48 and 54 of the Labour Relations Act.

6. A conciliator invited parties for meeting on 28th august, 2015 but no agreement was reached. Following another meeting and with no agreement, a Certificate of Disagreement was issued. Upon such disagreement, the 1st respodnetn started harassing and victimising the members of the Claimant on account of their union activities and o 23rd march, 2015 used the police to arrest the workers representatives on allegation of incitement, William Okoth and Sheldon Nyabuto Bichanga being the Chairman and vice secretary, Nairobi branch respectively. Both employees have since been locked out by the respondent.

7. The Claimant had filed another case Cause No.578 of 2013 where a preliminary objection was raised on the grounds that the Claimant had not attained 51% simple majority. In the cause the Claimant was also seeking access to the workplace but the employees have since joined the Claimant union.

8. That in 2010 the 1st espondent was sued by the Kenya Union of Chemical and Allied Workers which was decided in favour of the union to be accorded recognition in Cause No.879 of 2010. The Respondent then changed the name and they are in the process of doing the same by first selling shares to the 2nd respondent.

9. In response, the Respondent filed Replying Affidavit of Margaret Geno, the Head human Resource – East Africa of the 1st espondent and avers that the 1st respodnetn is a limited liability company incorporated under the Companies Act and manufactures and sells a wide range of cosmetic products and has over 6,000 employees in Nairobi.

10. Ms Geno avers that the Claimant has not been able to recruit 3,811 employees into its membership and the check off forms filed herein only came to the knowledge of the 1st espondent when a dispute was filed with the minister. Upon verification of the check off forms by the conciliator and in the presence of the parties herein it was established that the union had not met the minimum requirements of the law for recognition per the findings of the conciliator on 14th December, 2015.

11. Upon checking the check off forms the 1st espondent noted that of the listed persons only 2,670 are their employees whereas 1,204 are persons unknown to them. The Claimant has not recruited sufficient number of employee so as to claim recognition by the 1st respondent. There is no violation of section 54(1) of the Labour Relations Act.

12. By 30th June, 2016 a total of 224 employees had left the Respondent making the total number of unionised employees at 2,446. From the list of 2,446 some employees have since died or left the 1st respodnetn employment and cannot have singed the check off forms as alleged by the claimant.

13. The check off forms has never been submitted to the 1st espondent so as to effect union dues deductions and remittance to the claimant. The demand for deductions and recognition is not based on any justifiable cause and such demands are not warranted.

14. No employee has been victimised or harassed and the 1st respodnetn has allowed its employees to join the union. On the case of William Okoth and Sheldon Bichanga, the Respondent exercised its managerial prerogative to carry out disciplinary action against its employees for illegally inciting other employees to engage in a strike. On 18th march, 2016 the two employees went to Likoni branch of the Respondent and incited workers to go on strike chanting “no William no work”. On 21st march, 2016 the same incitement was repeated and the police intercepted them with an arrest. The Respondent was not involved in the arrest as the police addressed criminal conduct and since, these persons are not the employees of the respondent.

15. The Respondent was not aware that William Okoth and Sheldon Bichanga were union officials until 20th April, 2016 when a letter was served to this effect. These persons had already been dismissed for gross misconduct and the 1st espondent shall rely on proceedings in Cause No.926 of 2016[1] with regard to the claims by these persons.

16. With regard to averments in Cause No.578 of 2013, the matter is spent and the same was ruled in favour of the 1st respondent.

17. The orders sought should not issue as the activities of the Claimant union have already caused the 1st respodnetn massive losses. This cause is filed in reaction to Cause No.926 of 2016 so as to mar the dispute and issue herein.

18. There is no sale of the Respondent business sand no evidence to such averments has been submitted. Application has no merit and should be dismissed.

Submissions

19. Both parties filed written submissions on 17th October and on 24th January, 2017 for the Claimant and Respondent respectively.

20. The Claimant submits that they have met the requisite requirements for recognition by the 1st respodnetn but they have refused to sign the agreement. The Claimant admits that before the dispute was reported to the Minister they had not served the check off forms as they were suspicious that the Respondent would use the list to intimidate and sack its members. On 7th septmber, 2015 the check off forms/lists were forwarded to the Respondent through the conciliator. The 1st respodentn has refused to comply with section 48 of the Labour Relations Act.

21. A conciliator was appointed and the parties did not agree.

22. The 1st respodnetn has terminated the Claimant members due to union activities and they should be reinstated.

23. The respondents submit that the Claimant is not properly represented in court as Mr Harun Mwaura appearing for the Claimant is not an official of the Claimant union and has no credentials to represent the union and lacks *locus standi.* The claim should be dismissed as it has been filed by an incompetent person.

24. The 1st espondent is not selling its company and no evidence is submitted of such sale. This allegation should be dismissed.

25. The 1st espondent also submits that they have not refused to comply with provisions of section 48 of

the Labour Relations Act as no check off forms has been served upon them. There is no evidence of service.

26. The Claimant has not complied with section 54(1) of the Labour Relations Act on the 50% plus 1% rule for recognition. A trade dispute was reported but the parties could not agree. The persons named as William Okoth and Sheldon Nyabuto has since been dismissed for gross misconduct due to criminal behaviour.

27. The application is not merited and should be dismissed with costs.

Determination

28. The application by the Claimant I set out and seeking a plethora of orders. I start with the challenge to the standing of the person who filed the application and Memorandum of Claim. The Respondent has submitted that the application and claim are filed by Mr Harun Mwaura. The claim and application dated 18th may, 2016 are singed by the claimant's secretary general Cecily N Mwangi. The supporting Affidavit to the Notice of Motion is deponed by Cecily Mwangi and who avers that she is the General Secretary of the Claimant union. I take it that based on these averments under oath, Cecily Mwangi is the recognised officer under the Labour Relations Act to represent the Claimant union in proceedings such as these.

29. The order sought with regard to the alleged sale of the 1st espondent business to the 2nd respondent, though there is a newspaper extract attached to support such a claim, media reports are not the same as a sale agreement or a transfer of a business. I find no sufficient cause to allow such an order.

30. Section 48 of the Labour Relations Act is clear with regard to deduction and remittance of trade union dues. As section 48(2) it provides;

A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to –

31. The provision is to have an employer who has more than 5 employees who have joined a union to deduct and remit the same to their union. Such is a right under article 41 of the constitution.

32. However, for the union to enjoy such rights they have a duty and responsibility set out under section 48 of the Labour Relations Act requirements and to submit check off forms in accordance with the schedules to the Labour Relations Act, signed and acknowledged by the employees who have joined the union with the employer. The employer is then to abide by the list setting out the unionisable employees who have indicated that they have joined a union of choice.

33. The Claimant in their submissions have admitted that they never signed the check off forms upon the 1st respodnetn on the ground that they feared their members listed in the check off forms would be victimised and terminated. Such forms were then served upon the 1st Respondent when the dispute was reported to the minister and the parties attended before the conciliator. However, Service of check off forms should not be through the conciliator but should be directly to the employer who should acknowledge such service. To report a dispute to the minister and then seek to serve critical forms and information that should have essentially been placed with the employer before a dispute is reported, I find to be engaging in unfair labour practices. Such should not receive the sanction of this court.

34. Where the Claimant has admitted that check off forms have not been served upon the respondent,

it becomes apparent that the 1st respodnetn cannot be bound to comply with section 48 and 54 of the Labour Relations Act as they are not aware of which employees who have joined the Claimant union and further, recognition cannot be assumed before the employer such as the 1st respodnetn has confirmed that all listed employees in the check off are ins service and form a simple majority of all its unionisable employees.

35. The 1st espondent has however in the Replying Affidavit of Ms Geno sworn on 26th July, 2016 at paragraph 7 admitted that the Claimant had recruited 2,670 employees. A list of such employees is attached as appendix 1. That since, some employees, 224 have left and some died. On average there are about 2,000 plus employee of the Respondent who have signed the check off forms. With this knowledge, the 1st respodnetn is bound by the provisions of section 48 of the Labour Relations Act. Where the Respondent has *more than 5 employees belonging to the union* and such union is identified as the claimant, deductions and remittance of union dues should follow. Where the 1st espondent fails to attend as required, the sanction is to have the due deductions from their own accounts without putting the employee members of the Claimant into the expense of owing dues that were never deducted and emitted to their union.

36. I take it that since the matter was reported to the Minister and a conciliator appointed, the parties herein have engaged in litigation. The Claimant has not set out how much in union dues is owing to them from the claimant. This is telling as either the Claimant is not aware of the exact number of its members still at the Respondent or the membership numbers have been oscillating and not constant.

37. The Claimant should not just stand back and wait for their union dues. Union dues are remitted to a union so as to have the union attend to the needs of its members. The Claimant union should know and at all times be aware of their members within any establishment as otherwise, the purpose of employees joining a trade union is lost.

38. With these proceedings and admissions of the Respondent of the employees who are unionised, the check off should commence not later than March, 2017. Such deductions should be remitted to the Claimant as required in terms of section 48(3) read together with section 50(1) of the Labour Relations Act.

39. The question of recognition of the Claimant by the Respondent is a matter that should be gone into in a full hearing. With the contested numbers of membership of the Claimant in the employment of the respondent, to decide the issues on the basis of material at hand would be to lose the essence of the claim for recognition.

40. The Claimant is seeking the reinstatement of its officials William Okoth and Sheldon Nyabuto. Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules requires the court to consider the remedy of reinstatement as a final order. The provisions of section 49 of the Employment Act are also available to the Claimant upon the court hearing both parties on merit. The Respondent is reply has set out that William Okoth and Sheldon Nyabuto were summarily dismissed on 20th April, 2016 and there is a different suit in this regard. To therefore proceed as the Claimant has is to engage in multiple litigation over the same matter in different forums. Ultimately, the order of reinstatement being final in nature, such shall not issue in the interim.

41. The Claimant is also seeking to have Cause No.578 of 2013 withdrawn. However such suit is not consolidated herein and nothing stops the Claimant from moving the court with regard to the withdrawal of Cause No.578 of 2013 within the same suit and not herein. The Respondent has submitted that the suit has since been spent and I find no challenge to these submissions. I will not issue any order with

regard to Cause No.578 of 2013 as that suit should follow its own path to conclusion.

Ultimately, I find no merit in the claimant's application dated 18th May, 2016 and file don 17th May, 2016. The orders sought shall not issues save that where the Respondent has more than 5 employees who are members of the Claimant and are served with the check off forms, deductions and remittance of trade union dues should abide section 50(1) of the Labour Relations Act.

The two files in Cause No.918 of 2016 and Cause No.926 of 2016 shall be kept separate and the order for consolidation is hereby set aside.

Costs in the cause.

Read in open court at Nairobi and dated this 16th February, 2017.

M. MBARU

JUDGE

In the presence of:

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[1] Cause No.926 of 2016 – **Abungana Bhanuu Khasiani versus Barclays Bank of Kenya Ltd & Reli Cooperative Savings & Credit Society Ltd.**