**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI.**

**(Before: Charles P. Chemmuttut, J.,**

**H.B.N. Gicheru & A.K. Kerich, Members.)**

**CAUSE NO.20 OF 2000.**

**KENYA BUILDING, CONSTRUCTION, TIMBER, FURNITURE &**

**ALLIED INDUSTRIES EMPLOYEES' UNION.....Claimants.**

**- v -**

**HAYER BISHAN SINGH & SONS LTD.....Respondents.**

# Issue in Dispute:-

**"Recognition".**

**W.D. Wambua for the Claimants (hereinafter called the Union).**

**B.M. Eboso, Advocate, of Eboso & Wandago, Advocates, for the Respondents (hereinafter called the Company).**

**A W A R D.**

The Company, whose Headquarters are situated at Kisumu, was incorporated on 23rd January 1992, and are a registered contractors engaged in civil and structural engineering. In this case, the Union are seeking recognition from the Company on the following grounds:-

(i) that they had recruited more than a simple majority of the unionisable employees as its members;

(ii) that there is no rival trade union claiming recognition or representation, and

(iii) that they are the sole and appropriate union to represent the unionisable employees of the Company as enshrined under Article 80 of the Constitution of Kenya on matters pertaining to terms and conditions of employment.

But the Company denied that the Union had secured or achieved a simple majority of their unionisable employees as members and had also failed to produce or supply to them (Company) a duly signed check-off list thereof.

In his opening submission, Mr. Wambua stated that the Company were formerly a firm, styled and known as Hayer Bishan Singh & Sons, with which the Union had a valid recognition agreement and had also entered into some collective agreements. But during the revision of their last collective agreement, the parties disagreed, and a dispute was reported, processed, and registered by the Court as *Cause No.15 of 1992.* However, before the said dispute was considered and determined by the Court, the firm was incorporated as aforestated. In the circumstances, the Court ruled that the Union should seek a fresh recognition agreement from the Company on attainment of a simple majority of the unionisable employees as their members. Mr. Wambua pointed out further that when the Union approached the Company for a new recognition agreement, the latter procrastinated in order to deny the employees union representation with a view to exploiting them. On 26th June, 1996, the Union reported a formal trade dispute to the Minister for Labour pursuant to Section 4 of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act). The Minister accepted the dispute and appointed Mr. A.N. Kiarie of Kisumu Labour Office to act as the Investigator. Consequently, the Minister released his report to the parties on 27th February, 1998, in which he found and recommended as follows:-

"FINDINGS.

…….. that ……. Union is the appropriate union constituted to represent the interests of the employees of the Company and that there is no rival union seeking recognition.

…….. that on 17th September, 1996, 503 employees out of a labour force of 742 employees, were coerced to sign a document
to the effect that they are joining Habi Sacco Society Limited and that they are not interested to join any other union or organisation …….. that Habi Sacco Society Ltd. is not a registered trade union and cannot purport to propagate the rights of the workers.

Finally, …….. that the management's action amounts to denial of the workers rights which is a bad precedent in the furtherance of industrial peace and harmony. It is also evident that the union has recruited more than 68% of the labour force.

RECOMMENDATION.

……. it is recommended that the union should be accorded recognition with immediate effect".

The Minister finally appealed to the parties to accept the recommendation as a basis of settlement of the dispute. The Union accepted the recommendation, and accordingly forwarded a model recognition agreement to the Company for their counter-signature. The Company declined to counter-sign the same on the grounds that the Minister's report neither sated
the precise number of the Company's employees who were found to be unionisable out of the labour force of 742, nor did it give the precise number of those who were found to be in management. The report did not also state the precise number of employees whom the Union had recruited. Hence this dispute for

consideration and determination (see Union Apps.I, 2, and 3).

As the Company declined to countersign the model recognition agreement and also refused to sign Form 'A', the Minister for Labour invoked his powers vested in him by Section 8 of the Act and referred this dispute to the Court on 1st February, 2000, for consideration and determination. The Minister's reference, together with the statutory certificate from the Labour Commissioner under Section 14(9)(e) of the Act, were received by the Court on 7th February, 2000, and the dispute was listed for mention on 23rd February, 2000. On this occasion, Messrs. W.D. Wambua and L.W. Kariuki, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 17th March and 20th April, 2002, and the dispute was fixed for hearing on 10th May, 2000. The Union submitted their memorandum on 23rd March 2000, but the Company did not file their reply statement as directed. However, by a letter, dated 4th May, 2000, duly signed by Mr. R.S. Sante, on behalf of the
Company, and Messrs. F. Murage and J. Maina, on behalf of the Union, and witnessed by R.M. Muthanga, for the Federation of Kenya Employers (F.K.E.), the parties applied that the matter be stood over upto June, 2000, to give them an opportunity to explore the possibility of an amicable settlement. Therefore, on 10th May, 2000, the matter was stood over as requested, but the parties did not revert to the Court until 2nd October, 2000, when the case was listed for further orders or directions on 18th October, 2000. On this date, Messrs. J. Maina and R.M. Muthanga appeared for the parties respectively, but Mr. B.M. Eboso, Advocate, who was in attendance, intimated that he would appear for the Company. The Company were, however, granted an extension to file their reply statement on or before 18th December, 2000, and the dispute was fixed for hearing on 6th February, 2001. They belatedly filed the same on 11th January, 2001, and the dispute was heard as aforestated, i.e. on 6th February, 2001.

Mr. Wambua submitted further that prior to the incorporation of the Company during the life or existence of *Cause No.15 of 1992*, the question of a simple majority did not arise, and the intention of the management of the firm in incorporating it into a limited liability Company, was to deny the employees union representation in order to have a free hand in exploiting them. He maintained that the Union still enjoys a simple majority membership of the unionisable employees; and in the circumstances, prayed that the Company accord a formal recognition to the Union.

In reply, Mr. Eboso, the learned counsel for the Company strongly opposed the demand mainly on the ground that, contrary to the provisions of Sections, 5, 7, 8, 45, 46 and 49 of the Act, the Union failed to supply or furnish the Minister and the Company with duly signed check-off forms to prove that they have recruited a simple majority of the Company's employees as Union members. This was, he said, a clear demonstration of the Union's determination, through threats of industrial action, to circumvent the laid down procedure in seeking to obtain recognition without complying with the requisite conditions precedent to recognition. Mr. Eboso, therefore, contended that the Union has at no time recruited a simple majority of the Company's unionisable employees as their members to warrant recognition by the Company.

Mr. Eboso submitted further that the Minister's findings and the recommendation that the Union had achieved 68% union membership "of
the labour force" was unfounded, baseless, incorrect and misleading. In any case, he argued, the incorporation of the Company, set up a completely
new and distinct legal entity with a separate legal personality, which was not and cannot be bound by any previous arrangements or dealings and obligations with the firm of Hayer Bishan Singh & Sons, and that the assumption by the Union that the Company has an obligation to accord
it recognition, based on the previous recognition agreement with the said firm, is completely misplaced and without legal foundation.

For the foregoing reasons, the learned counsel urged the Court to find that the Union have failed to establish a case for recognition by the Company; and, therefore, prayed that the demand for recognition be rejected.

In the background of the present case, Hayer Bishan Singh & Sons was a firm with which the Union had a valid collective agreement and had also entered into some collective agreements. But during the revision of their last collective agreement a dispute arose between them which was duly reported, processed and registered by the Court as *Cause No. 15 of 1992.* During the proceedings of the said dispute, however, the firm was incorporated into a limited liability company, styled and known as Hayer Bishan Singh & Sons Ltd. In the circumstances, the Court ruled that the Union should seek a fresh recognition agreement from the Company on achieving or attainment of a simple majority of the unionisable employees as their members. The Union approached the company for a new recognition agreement but the latter rejected the demand. Hence this dispute for consideration and determination.

There is no dispute that the Union have satisfied grounds (ii) and (iii) set out at the outset of this award, and the only question for consideration and determination is whether they have satisfied ground (i) as well. In their submission to the Investigator, the Company's only reason for their refusal to recognise the Union was that, out of a labour force of 742, "503 employees have declined to become union members but opted to be members of Habi Sacco Society Limited" and "that since the Union has no members, their demand should be dismissed accordingly". Therefore, the question of failure by the Union to supply or furnish the Minister and the Company with duly signed check-off forms to prove that they had recruited a simple majority of the Company's unionisable employees as Union members was not raised by the Company during the investigation proceedings until the matter came before the Court. Regarding the question of lack of a simple majority, the Court has no doubt in its mind that this is a blatant case of unfair labour practice adopted by the Company in order to bring to an end any relationship between them and the Union, and with a cynical indifference to its effects on the peace and harmony within their industry. In our view, the management of the Company incorporated the firm into a limited liability concern while the proceedings in *Cause No.15 of 1992* were alive and in progress in this Court so as to deny their employees Union representation, and their said action was taken in bad faith or *mala fide*. In *Cause No.30 of 1991: Tailors & Textiles Workers' Union v. Bedi Investments Ltd.,* I observed at pages 8 to 9 as follows:

"For the benefit of the employers and the employees in general, one of the functions of this Court is to protect legitimate trade union activities; and the State which holds the balance between the employers and the employees has a duty to preserve peace within the industry. On the one hand, it must discourage strikes by the employees, and on the other, put down any acts of victimisation or unfair labour practices by the employers, which are a fruitful cause of industrial strife. The employees regard trade unions as essential to their welfare as without them they are not in a position to bargain collectively with the employers. They resist any attempt by the employers to weaken their unions and fight to win the right of collective bargaining through the unions. To-day the policy of our Government is, on the one hand, to prevent industrial strife between the employers and the employees,

and on the other, to secure economic justice for the employees. Section 80 of our Constitution holds out a promise to any person of freedom of assembly and association, and in particular freedom 'to form or belong to trade unions or other associations for the protection of his interests'.

It is, therefore, a necessary corollary of this twin policy of industrial peace and economic justice that the Court shall discourage any attempt by an employer to undermine the strength of a trade union which enables the employees to negotiate with the employer from a position of equal strength. Without the trade unions there can be no collective bargaining or settlement of industrial disputes by conciliation or arbitration. In a national crisis, as in Great Britain during the last World War, a strong trade union commanding the loyalty of the employees can be a pillar of strength for the nation. Thus, it is against the public interest and provisions of the Trade Disputes Act (Cap.234) to permit any employer to harrass, mistreat or undermine the trade unions which form a part of the most effective instruments of the Government policy of industrial peace through representative negotiations between them and the employers; and any systematic attempt by an employer to use his powers of management to disrupt the trade union of his employees will be condemned by this Court".

From the arguments addressed to this Court by the parties, it appears that the management of this Company are short-sighted enough and that they can do anything they like in the industry under their

control regardless of any code of fairness and equity. But they must realize that they are fighting a battle that they cannot win, and the sooner they recognise this Union the better, otherwise they will continue to have trouble on their hands.

In the result and on the balance of probabilities, the Court is satisfied that
this is a fit case for recognition of the Union by the Company; and given a chance, all or almost all of the Company's employees will join the Union as members. Accordingly, I uphold the Minister's recommendation and award that the Company accord formal recognition to the Union, and the parties must sign a recognition agreement within *two (2) months* from the date of this award.

Both members of the Court are in full agreement with this decision.

DATED and delivered at Nairobi this 6th day of march, 2003.

Charles P. Chemmuttut,

JUDGE.