REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmuttut, J.,

J.M. Kilonzo & A.K. Kerich, Members.)

CAUSE NO.64 OF 2002.

KENYA SHIPPING, CLEARING & WAREHOUSES WORKERS' UNION………Claimants.

v.

EAST AFRICAN GROWERS LTD..Respondents.

and

KENYA PLANTATION & AGRICULTURAL WORKERS' UNION............Interested Party.

Issue in Dispute:-

"Recognition Agreement."

J.O. Tongi, Assistant General Secretary, for the Claimants (hereinafter called the first Union).

J.N. Namasake, Principal Executive Officer – F.K.E., for the Respondents (hereinafter called the Company).

F.K. Waweru, Deputy General Secretary, for the Interested Party (hereinafter called the second Union).

A W A R D.

The Notification of Dispute, Form 'A', dated 11th March, 2002, together with the statutory certificates from the Labour Commissioner and the Minister for Labour under Section 14, subsections (7) and (9)(e) and (f) of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act), were received by the Court on 15th July, 2002, and the dispute was listed for mention on 29th July, 2002. On this occasion, Messrs. J.O. Tongi, L.W. Kariuki and F.K. Waweru, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on 30th July, 30th August and 30th September, 2002, and the dispute was fixed for hearing on 5th February, 2003. The first Union submitted its memorandum on 31st July, 2002, and the second Union belatedly filed its reply statement on 10th January, 2003, while the Company presented its rejoinder on 21st January, 2003. On 5th February, 2003, Messrs. Tongi and Waweru appeared for the first and the second Unions respectively, but there was no appearance for the Company. Under the circumstances, the dispute was rescheduled for hearing, and was indeed heard, on 22nd April, 2003.

The Company is a limited liability concern, incorporated in Kenya on 24th November, 1966, under the Companies Act, Cap. 486, Laws of Kenya, and its registered office is situated at the Jomo Kenyatta International Airport, where it has a pack house for receiving and packaging horticultural produce. According to Mr. Tongi for the first Union, the Company has a warehouse at the Jomo Kenyatta International Airport in which horticultural produce is stored, graded and packaged for overseas and local markets. Therefore, its employees rightfully fall under Rule 3(a) of the first Union's Constitution, which states as follows:-

"RULE NO.3: MEMBERSHIP.

(a) Membership of the Union shall be open to all employees engaged in "SHIPPING INDUSTRY, and to all employees engaged in IMPORT, EXPORT, CLEARING AND FORWARDING, WAREHOUSES AND WAREHOUSING OF GOODS FOR IMPORT AND EXPORT COMPANIES…………..
……………………………………………………………………………………."

But Mr. Namasake contended, on the contrary, that the Company engages mainly in extensive horticultural farming, and has farming units, viz, Jessy, Woodland and Nikki, in Mweiga area of Nyeri District. It also leases farms for this purpose and employees 102 in Nairobi and over 1,500 workers in the said farming units, whose produce is sold to the local and overseas markets, and none of the employees are or were members of the first Union. This view of the matter was strongly supported by Mr. Waweru for the second Union, who argued that the Company is a member of Agricultural Employers Association (hereinafter called the Association) with which the second Union has had a valid recognition agreement, and has also reported a trade dispute to the Minister for Labour and Human Resource Development on demarcation between the two Unions (second Union Apps. I and 2).

On 2nd April, 2001, Mr. Tongi wrote to the Managing Director of the Company, seeking recognition of the first Union, but Mr. Namasake averred that there was absolutely no proof that the said Union was the right one to represent the employees of the Company and that it (first Union) had recruited a simple majority, i.e. 51%, of the Company's unionisable employees as its members in accordance with the following legal provision or requirement of Section 5(2) of the Act:-

"5 (1) …………………………………………………………………………

(2) Where a trade dispute involves an issue concerning a recognition agreement or the recognition of a trade union by an employer or organisation of employers, the Minister, after being satisfied that a trade union has in its membership a simple majority of employees eligible by virtue of the union's constitution to join that particular union in a particular undertaking or a group of undertakings and that there is no rival trade union claiming to represent such employees, may order in writing the employer or organisation of employers, as the case may be, to accord recognition to that union for negotiating and collective bargaining purposes:

……………………………………………………………………………………"

On 5th July, 2001, the first Union reported a trade dispute to the Minister for Labour and Human Resource Development. The Minister accepted the dispute and appointed Mr. J. N. Kiraguri of Ministry of Labour Headquarters to act as the Investigator; and in his investigation report, which was released to the parties on 23rd January, 2002, the Minister found and recommended as follows:-

"FINDINGS

…………………. that Kenya Shipping, Clearing Warehouses Workers Union has a constitutional mandate to represent the workers of East African Growers Limited.

…………………… that the union recruited a total of 260 employees who accordingly signed a check off list out of the 305 unionisable employees at the time. Thus attaining the simple majority rule for recognition to be attained.

Finally, though the management claimed there is a rival union (KUCFAW) no dispute has been reported on the issue of

demarcation or recognition …………………… it is only legal and reasonable to accord the claimant union recognition as it has fulfilled the legal requirements pre-requisite to granting recognition.

RECOMMENDATION

………………….. I recommend that the union be accorded formal recognition to pave way for negotiations of a Collective Bargaining Agreement".

Finally, the Minister appealed to the parties to accept the recommendation as a basis of settlement of this dispute. The first Union accepted the recommendation, but the Company rejected it on the ground that it was inadequate, shoddy and inconclusive (first Union Anns. A-1, A-5, A-6 and A-7). Hence, this dispute for consideration and determination.

Mr. Tongi submitted that the Company did not disclose, during its meetings with the first Union, that it had signed a recognition agreement with the second Union, until after the findings and recommendation were released to the parties; and even if there was a recognition agreement between them, the second Union did not recruit any members from among the unionisable employees of the Company. He vehemently denied that the main or core activity of the Company was horticultural in nature, but that of warehousing wherein agricultural produce or any other goods are handled or stored, graded and packaged for export. In the circumstances, Mr. Tongi prayed that the first Union be accorded formal recognition by the Company.

Mr. Namasake strenuously opposed the demand by the first Union for recognition on the following grounds:-

(a) that the main activity of the Company is horticultural farming and processing, and has a pack house for grading and packaging of the produce which is dispatched to the market everyday; and since these goods are perishable, they do not require warehousing;

(b) that the first Union has never had the mandatory simple majority, i.e. 51% membership of the Company's unionisable employees; and none of the persons who appeared on the check-off list submitted by it (first Union) on 12th December, 2001, were employees of the Company, otherwise some of them were casual workers who were engaged on daily basis, depending on the seasonal nature of the farming activity, climatic or weather conditions and the fluctuating overseas market demands;

(c) that the Investigator failed to establish the main activity and the total workforce of the Company and also a percentage of those who had joined the first Union as its members, and

(d) that the second Union is the right or appropriate union to represent the industrial interests of the unionisable employees in the Company's establishment.

For the foregoing reasons, Mr. Namasake prayed that the demand by the first Union for recognition be dismissed or rejected.

In his submission, Mr. Waweru fully supported the stand taken by Mr. Namasake, and urged the Court to find that the unionisable employees in the Company's establishment fall under Rule 3(a) of the second Union's Constitution, which states as follows:-

"RULE 3: MEMBERSHIP.

(a) Members of the Union shall be open to all employees engaged in the following industrial groups:-

(i) The Tea Plantation Industry and Tea Processing Factories.

(ii) The Coffee Plantation Industry and Coffee Processing Factories.

(iii) The Sisal Plantation Industry and Sisal Processing Factories.

(iv) General Agriculture, including Mixed Farming Dairying Livestock rearing, cereals, vegetable and fruit growing nursery market gardening and general Agriculture processing factories.

(v) Rice plantations and rice mills, cotton plantation and ginneries, co-operative societies of tea plantation and tea processing factories, Coffee plantations, coffee processing factories and sisal processing factories, flowers plantations and pyrethrum growers.

(vi) Parastatal Agricultural undertakings, that is, all parastatal organizations which undertakes the growing of Agricultural produce and Agricultural produce processing factories and farm/estates owned by missionaries and agricultural institutions provided such employee is above the apparent age of sixteen years".

If, therefore, he said, the demand by the first Union for recognition is allowed, it will create confusion and industrial instability. Accordingly, Mr. Waweru prayed that the matter may be referred to a demarcation committee for determination.

The crucial point in this case with which we are concerned is whether the first Union can represent the unionisable employees of the Company and that it is competent to raise a trade dispute on their behalf with the Company. Unfortunately, the first Union has made no effort worth the name to establish its representative capacity as the second Union has rigorously challenged its competency in view of the fact that it (second union) has had a valid recognition agreement with the Association and has maintained that it is the sole and exclusive representative of the Company's unionisable employees.

In his letter, Ref: AEA/NKU/EAG/128/1/02, dated 7th March, 2002, to the General Secretary of the first Union, (first Union Ann.A-I), the Labour Relations Officer of the Association, Mr. Apollo N. Kiarii, observed as follows:-

"M/s East African Growers is a member of this Association wherein the Association has a valid Recognition Agreement on behalf of all its members with KPAWU.

That M/s East African Growers undertakes expansive agricultural activities under its farms, namely:-

Shalimar Flowers, Disa Farm and Wilham Farm and use the Embakasi depot to pack its produce for export in the same manner like Oserian Development Co. Ltd. and Homegrown (K) Ltd who are members of this Association and who deal with KPAWU on all labour issues.

That the Industrial relations charter is quite explicit in that Trade Unionism in Kenya is industrial-based and not craft-oriented and the core activity of East African Growers is Agriculture, hence the right Union to represent its employees is KPAWU.

It is imperative that the above facts were not properly presented to the investigator of the dispute hence the recommendation that will definitely promote multiple trade unionism within one employer and which the employer is reluctant to accept".

It is, therefore, clear that the main or core activity of the Company is agricultural, i.e., horticultural, in nature and the packaging of its produce in its depot at the Jomo Kenyatta International Airport for export is a secondary or incidental activity. The first Union might have recruited a simple majority of the unionisable employees as its members for purposes of recognition by the Company, but my view is that a majority of membership alone is not indeed the criterion on which recognition disputes can be decided. In rejecting the Claimants' demand for recognition in *Cause No.70 of 1989*, between *Kenya Union of Employees of Voluntary Associations, Trade Unions* & *Allied Organisations* and *Kenya Union of Printing, Publishing, Paper Manufacturers & Allied Workers*, this Court observed at page 6 therein as follows:-

"……………. a majority of membership alone ……………. is not indeed the criteria on which recognition disputes can be decided. The Court has also consistently upheld the system of industrial trade unionism that has developed over the years in Kenya ……. and boasts of a negotiating machinery which conforms very closely with the industrial trade unionism.

………. although the workers in Kenya are guaranteed freedom of association, such freedom has got to be exercised in accordance with the established industrial relations system prevailing in this country".

This being the case, I take great exception to the Minister's findings and recommendation, and find that the first Union is not the right or appropriate union to represent the interests of the unionisable employees of the Company, and its competency to raise a dispute on their behalf is, therefore, gravely in doubt. The demand for recognition by the first Union is, therefore, rejected as incompetent.

On consultation, the Members of the Court concurred with this decision.

DATED and delivered at Nairobi this 12th day of November, 2003.

Charles P. Chemmuttut,

JUDGE.