



IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmutut, J.,

S.M. Maithya & A.K. Kerich, Members.)

CAUSE NO. 38 OF 1999.

KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS.....Claimants.

- v -

NATIONAL WATER CONSERVATION AND PIPELINE CORPORATION.....Respondents.

Issue in Dispute:-

“Recognition Agreement”.

Agapio Muriuki, Assistant Secretary General, for the Claimants (hereinafter called the Union).

Gideon Solonka, Advocate, of Solonka & Co., Advocates, for the Respondents (hereinafter called the Corporation).

A W A R D.

The Minister for Labour referred this dispute to the Court for consideration and determination on 11th May, 1999, under powers vested in him by Section 8 of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act); and his reference, together with the statutory certificate from the Labour Commissioner under Section 14, subsection (9) (e) of the Act, were received by the Court on 17th May, 1999. The dispute was then listed for mention on 9th June, 1999, when Messrs. N. Ayieza and Gideon Solonka, Advocate, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 9th July and 6th August, 1999, and the dispute was fixed for hearing on 11th August, 1999. The Union submitted its memorandum on 12th July, 1999 but the Corporation did not file its reply statement until 28th September, 1999. Several adjournments were taken by the parties thereafter, and consequently the dispute was heard on 9th March, and 9th November, 2000.

The Corporation was established on 24th June, 1988 by Legal Notice No.270, under the State Corporation Act, Cap.446, Laws of Kenya, to manage and develop water projects, secure an adequate supply of water, and specifically to supply water in bulk or otherwise to such water undertakers and persons or class of persons, formulate and execute a national water development policy, e.t.c.

Mr. Muriuki submitted that between 30th April 1992 and April 1999, 1,636 employees of the Corporation, comprising of 861 seconded civil servants and 775 directly engaged employees, joined the Union as members (C.App.I). Accordingly, the Union forwarded check-off forms for deduction of Union dues, to the Corporation but the latter was reluctant to comply on the ground that all or majority of the employees were civil servants (C.App.2).

On 15th March, 1993, the Union reported a formal trade dispute to the Minister for Labour in accordance with Section 4 of the Act. The Minister accepted the dispute and, under Section 7 of the Act, appointed Mr. A.M. Migwi of Industrial Area Labour Office, Nairobi, to act as the Investigator; but his appointment was withdrawn and Mr. S.M. Mbae of Nyayo House Labour Office was appointed as such. Consequently, the Minister released his report to the parties on 20th August, 1997, in which he found and recommended as follows:-

“ FINDINGS.

.....indeed Kenya Union of Commercial, Food and Allied Workers is the right union to represent the interests of the National Water Conservation and Pipeline Corporation.....

..... there is no rival union contesting for representation of these employees.

.....out of the 861 civil servants seconded from the Ministry of Land Reclamation Regional and Water Development, 628 were members of the union. This gives the union representation of 71.938%.

The union has also managed to recruit 652 out of 775 who are directly employed by the Corporation. This represents 84.129% of the group.

In both cases the union has surpassed the required 51% simple majority mark. In fact when both are lumped together, the union obtains an impressive 78.23% representation of the employees: 1280 employees out of 1636 are members of the union.

The management’s argument that the seconded employees from the Ministry are not Corporation employees is a fallacy and should be disregarded.

Their argument is not tenable due to the following two facts: first, these employees have been given corporation personal numbers. Secondly, these employees are paid their salaries/wages by the exchequer through the Treasury. They are in the Corporation’s payroll.

A letter from the Permanent Secretary/Directorate of Personnel Management addressed to the Permanent Secretary of the Ministry of Land Reclamation, Regional and Water Development of even reference C.SRS/40/1/WD/1/Vol.II/(167) dated 13th November, 1995 signed by Mr. C.L.M. Nzioka of the Civil Service Reform Secretariat attests to this fact.

Mr. Nzioka was replying to the letter from the same employees who had written to both the Directorate of Personnel Management and the Ministry of Land Reclamation, Water and Regional Development asking to be retired on the Voluntary Early Retirement Scheme.

The Permanent Secretary’s letter was clear and explicit on the issue. They were informed that it was not possible to retire them on the civil service Early Retirement Scheme because of two facts: firstly the seconded employees to the Corporation are not in the payroll of the Ministry and more so because they do not have new personal numbers. Secondly, the salary structures of the Corporation employees (including those seconded) are different from those of the civil service.

.....it is apparent that the 861 employees formerly working in the Ministry and now with the Corporation ceased to be civil servants and are in all aspects employees of the Corporation.

RECOMMENDATION.

.....it is my opinion that the union has fulfilled the statutory requirement of 51% simple majority.

I herein recommend that the Corporation accords and signs a formal recognition with the union to facilitate immediate negotiation of the parties’ Collective Bargaining Agreement”.

The Minister finally appealed to the parties to accept the recommendation as a basis of resolving this dispute. The Union

accepted the recommendation but the Corporation rejected it (C.Apps.4 to 9). Hence, this dispute for consideration and determination.

Mr. Muriuki contended that the Corporation constantly harassed some of the employees, forcing them to revoke their Union membership; and asserted that the employees were and are not civil servants in view of the fact that their names are not in the payroll of, and were denied voluntary early retirement by, the parent Ministry (C.Apps. 10 to 13). In his final submission, Mr. Muriuki tabled a list of the Union members, comprising of 532 directly employed and 269 seconded employees, making a total of 801 Union members.

Mr. Muriuki, therefore, prayed that the Union be accorded formal recognition by the Corporation on the following grounds:-

- (i) that the Union has achieved more than a simple majority of the unionisable employees as its members.
- (ii) that there is no rival union claiming representation or recognition, and
- (iii) that it is the sole and rightful or appropriate Union to represent the employees of the Corporation on matters pertaining to terms and conditions of employment.

In reply, the learned counsel for the Corporation, Mr. Solonka, vehemently resisted the demand on the ground that the Corporation has a combined workforce of 1530, comprising of 796 seconded and 734 direct employees; and out of the 734 direct employees, 182 are in the management cadre and are non-unionisable (R.Apps 1 to 4). He submitted that the seconded employees are and at all material times have been “civil servants”, and are not and have never been the employees of the Corporation because:-

- (i) they have no letters of appointment from and no contract of service with the Corporation;
- (ii) whilst working for the Corporation, they were and are subject to the disciplinary control of the parent Ministry, and accordingly the Corporation has no power to directly dismiss any of them from the service (R.App.5);
- (iii) those who retire from service do so under the Civil Service Retirement Scheme (R.App. 6(a) & (b));
- (iv) they have, at their own option, the right to secure re-employment with the parent Ministry (R. App. 7), and
- (v) their salaries are determined and fixed by the parent Ministry.

Mr. Solonka contended further that the seconded employees, being civil servants, are prohibited by law from joining any union, and as such are non-unionisable. Therefore, the unionisable employees fall short of the 51% simple majority mark required by the law. He denied or disputed the correctness and authenticity of the check-off forms (U.App.I); and on the contrary, averred that neither the 861 seconded civil servants nor the 775 directly engaged employees of the Corporation have voluntarily joined the Union as alleged. Mr. Solonka also challenged the reference by the Minister for Labour as incurably defective, misconceived, bad in law and in violation of the provisions of the Act. He said that a large number of the alleged 532 members of the Union were in fact seconded employees while others were not in the employment of the Corporation.

In the circumstances, the learned counsel prayed that the demand for recognition by the Union be rejected for lack of a simple majority.

The conditions precedent for recognition of a union by an employer under Section 5, subsection (2) of the Act are:-

- (a) that the trade union has in its membership simple majority of the employees eligible by virtue of the union’s constitution to join that particular union in a particular undertaking or a group of undertakings, and
- (b) that there is no rival union claiming to represent such employees.

In this case, there is no rival union claiming to represent the unionisable employees of the Corporation and the question for consideration is whether the Union has achieved a simple majority of the unionisable employees as its members and that it is the rightful or appropriate Union to represent them. The Minister’s findings show that out of the 861 “civil servants” seconded to the Corporation by the parent Ministry, 628 were members of the Union, i.e. 72.938%; and out of the 775 directly engaged employees, the Union has also recruited 652, or 84.129%. When both are put together, it would show that the Union has achieved 78.23% representation. In the circumstances, Mr. Muriuki for the Union contended that not all civil servants can be said to be, or can be covered by the phrase, “employed in the administration of the State”. But the learned counsel for the Corporation, Mr. Solonka, contended that as the majority of the members of the Union were “civil servants”, they were deemed to be “employed in the administration of the State”, and as such they were hit by Section 3 of the Act. In *Cause No.76 of 2000: Kenya Union of Commerical, Food & Allied Workers v. Kenya National Library Services*, at pages 8 and 9, I observed as follows:-

‘.....it would be inappropriate in industrial adjudication to apply the cloak of the Government, which usually protects her departments and other bodies, to commercial public corporations or bodies. Even if they are controlled by the Government, these corporations or bodies are in law separate entities which, subject to any provisions in each controlling statute, engage their employees on the same conditions as any other commercial undertaking as far as the law is concerned.....
.....

.....In my view, the functions and activities of the Board, except in so far as what may be described as regal functions of the Government that might have been delegated to it and which could be undertaken either by private citizens or corporations, whether the underlying motive is profit-making or rendering services, are covered by the connotation of the word “industry”.....’.

It is difficult to define as to what are the regal functions of the Government. Some assistance, however, can be derived from the observation of *Isaacs, J.* in *The Federated State School Teachers Association of Australia v. The State of Victoria, (1928-29) 41 C.L. R.569*. It runs as under:-

“Regal functions are unescapable and inalienable. Such are the Legislature power, the administration of laws, the exercise of the judicial power. Non-regal functions may be assumed by means of legislative power. But when they are assumed the State acts simply as a huge corporation with its legislation as the charter. Its action under the legislation, so far as it is not regal execution of law, is merely analogous to that of a private company similarly authorised”.

In the instant case, the members of the Union for whom the Union are seeking recognition are low-paid employees like plumbers, tube-well operators, fitters, electricians, foremen, clerks, helpers, e.t.c. connected with water supply and sewerage. Such employees, by no stretch of imagination, can be deemed to be persons “employed in the administration of the State”, and therefore, they are not hit by the provisions of Section 3 of the Act, which states as follows:-

“3. This Act shall not apply to any person in respect of his employment or service –

(a) in the armed forces, or in any reserve force thereof;

(b) in a police force, administrative police force or prison service, or in the National Youth Services or in any reserve force or service thereof”.

The definition of “employee” as given under Section 2 of the Act, means, subject to Section 3 –

“ (a) any person who has entered into or works under a contract with an employer, whether the contract is for manual labour, clerical work or otherwise, is expressed or implied, is entered into orally or in writing, and whether it is a contract of service or apprenticeship or learnership, or a contract personally to execute any work or labour; and

(b) any person who has entered the employment of or is employed by the Government or any public or local government authority”.

Therefore, the only persons who are not covered by the definition of the word “employee” are those who are employed in Armed Forces, Police, Administrative Police Force, Prison Service and National Youth Service persons, or in any reserve force or service. The intention of the Legislature to frame this enactment was to confer the benefits of the Labour Laws on as many persons as possible who would be covered by the definition of “employee”, but at the same time to safeguard strikes and lock-outs by persons in the services essential to the State and also persons employed in the administration of the State.

The conclusion, therefore, is that the employees of the Corporation, whether seconded or directly employed, are not excluded from the application of, or the benefits provided under, the Act. Accordingly, I uphold the Minister’s recommendation and AWARD and ORDER that the Corporation accord formal recognition to the Union forthwith, and the parties must sign a recognition agreement within two (2) months from to-day for purposes of collective bargaining agreement.

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

DATED and delivered at Nairobi this 8th day of November, 2002.

Charles P. Chemmutut,

JUDGE.

