



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 79 OF 2016

BETWEEN

MOMBASA MAIZE MILLERS LIMITED.....APPELLANT

AND

BAKERY, CONFECTIONERY,

FOOD MANUFACTURING AND

ALLIED WORKERS UNION.....1ST RESPONDENT

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS.....2ND RESPONDENT

(An appeal from the award of the Industrial Court at Mombasa (Rika, J.) dated 17th March, 2016

in

I.C. Cause No. 279 of 2014.)

JUDGMENT OF THE COURT

1. A recognition agreement as defined under **Section 2** of the **Labour Relations Act (LRA)** is a written agreement between a trade union and an employer or group of employers or employers' organization, regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organisation. Such recognition is what empowers a trade union to negotiate with an employer the terms and conditions of employment which are reflected in a Collective Bargaining Agreement (CBA). In other words, it is what legitimizes a particular trade union as opposed to any other, as a mouth piece of the unionisable employees who are its members.

2. It is for that reason that the legislator saw it fit to place an obligation on an employer to recognize a trade union under **Section 54(1)** of the **LRA**. The provision stipulates:-

“An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.”

The appeal before us revolves around the aforementioned recognition.

3. A brief background will suffice to place the matter in perspective. By a letter dated 7th October, 2008 the 1st respondent informed the appellant that it had recruited a simple majority of its employees and sought recognition. It also served the appellant with a notice to deduct and remit union dues of the employees reflected in check off lists attached thereto. In response, the 1st respondent indicated that majority of the persons appearing in the said lists were not in its employment. In any event, it had entered into a recognition agreement dated 17th March, 2003 with the Kenya Union of Commercial Food and Allied Workers (KUCFAW). On the strength of the recognition agreement several

CBA's had been negotiated and at the material time the then current CBA was still in force. More specifically, the 1st respondent in its letter dated 28th January, 2009 expressed in part:-

“We kindly wish to state as follows:-

i. Some of the names in the check off list work within our company's premises but under the payroll of a contracted outsourcing company called READY CONSULTANCY

SERVICES...

ii. Some of the names in the same check off list, the owners left employment as long as 2 years ago.

iii. Some of the employees' names were repeatedly written more than once with different signatures.

iv. The workers who are present under the contracted company confirmed that they never participated in such dealings and the signatures are not theirs.

v. Mombasa Maize Millers Ltd. recognized KUCFAW Union long time (sic) and the parties have CBA in place for the unionisable employees. It is also important to note that the law does not cater for multiplicity of Unions within an establishment. Workers reaffirmed their membership with KUCFAW only.

vi. Last but not least the number does not account for 51% simple majority...”

4. For those reasons, the appellant refused to sign the recognition agreement that had been prepared by the 1st respondent. Consequently, the 1st respondent reported the same as a trade dispute to the then Minister of Labour pursuant to **Section 62** of the **LRA**. However, the issue was not resolved culminating in the 1st respondent filing suit in the Industrial Court (now known as the Employment and Labour Relations Court (ELRC)). The 1st respondent's claim was that the appellant had for no justifiable reason declined to execute a recognition agreement in its favour contrary to the wishes of its employees. The appellant's conduct was tantamount to infringing on its employees right to join a union of their choice. Therefore, the 1st respondent in its memorandum of claim sought the following:-

i. Order directing the respondent (appellant herein) to sign the Recognition Agreement sent to it on 26th November, 2008 by the claimant immediately for negotiating and collective bargaining processes, and that, the effective date of the formal recognition to be 9th December, 2008 being the date the agreement ought to have been mutually signed.

ii. Order directing the respondent to pay from its kitty, all the money it would have, except for its refusal/failure and/or negligence, deducted from its employees' wages and remitted to the claimant as trade union dues since the date the remittance became due after the employees first joined the claimant.

iii. Order directing the respondent to comply in full with the provisions of Section 48 of the Labour Relations Act, 2007 with regard to deduction of the trade union dues.

iv. Order containing a Penal Notice to punish for contempt any contemnor to the Award reached, by civil jail or fine.

v. Interest on (ii) at the prevailing commercial rates to be paid to the claimant forthright.

5. The appellant maintained its position which was supported by the 2nd respondent, who was subsequently joined as an interested party. According to the 2nd respondent, it was best suited to represent the appellant's unionisable employees as opposed to the 1st respondent.

6. After considering the evidence and arguments put forth on behalf of the parties, the learned Judge (Rika, J.) in an award dated 17th March, 2016 found that the 1st respondent had recruited a simple majority of the appellant's employees. Nonetheless, in light of the existing recognition agreement in favour of the 2nd respondent, the learned Judge deemed it necessary for the employees' wishes with respect of representation to be ascertained through balloting. In the end, he issued orders in the following manner:-

a) Balloting shall be conducted in all of the 3 respondent's businesses at Mombasa, Nairobi and Kisumu.

b) Unionisable employees to elect which between the two unions, they wish to be represented by.

c) The exercise to be overseen by the respective County Labour Officers.

d) Returns and accompanying reports by the Labour Officers shall be filed with the Court within 90 days of this order.

e) The County Labour Office Mombasa to coordinate balloting.

f) Parties to move the Court for further orders at the end of the exercise.

7. It is that decision that provoked the appeal before us which is premised on the grounds that the learned Judge erred in law and fact by:-

- a. Finding that the 1st respondent had recruited a substantial number of the appellant's unionisable employees when there was no evidence that the alleged recruited members were indeed the appellant's employees.**
- b. Directing the appellant's employees to elect between the respondents through balloting yet such a prayer had not been sought.**
- c. Basing his decision on speculation rather than evidence adduced.**
- d. Failing to exercise his discretion judiciously.**

8. Mr. Wafula appeared for the appellant while Mr. Thuo appeared for the 1st respondent. The appeal was disposed by written submissions which were on record.

9. In the appellant's view, the 1st respondent was required under **Section 54** of the **LRA** not only to prove it had recruited a simple majority of the unionisable employees but also that the alleged employees were in the appellant's employment. The appellant had objected to the check off lists for the reason that the persons set out thereunder were not its employees. In point of fact, the appellant had established that they were employees of an outsourcing company. The appellant went as far as providing a list of its employees in support of its contention. All in all, the appellant had not established its claim as required under **Sections 107(1), 109 & 112** of the **Evidence Act**.

10. Buttressing that line of argument, the appellant made reference to the House of Lords decision in **Re B(children) (FC) UKHL 35** wherein Lord Hoffman observed that:-

"If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule than one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

11. The learned Judge was faulted for erroneously shifting the burden of proof to the appellant by expressing the following sentiments:-

"The Court has examined the check off lists submitted to the respondent by the claimant. There is no indication from the lists or other documents exchanged between parties, that the employees who enlisted as members of the claimant union, were employees of any other company or companies other than the respondent herein. No out sourcing company has given evidence claiming to have employed the recruited employees."

12. In addition, the learned Judge was criticized for delving into issues which were not before him. As far as the appellant was concerned, the learned Judge had no basis for directing that the appellant's employees engage in a balloting process since the same was never sought in the pleadings. To that extent, the appellant placed reliance on the often cited case of **National Bank of Kenya Ltd vs. Pipe Plastic Samkolt (K) & Another [2001] KLR 112** laying emphasis that a party is bound by its pleadings. It is on those grounds that we were urged to allow the appeal.

13. In agitating that it is the right of the relevant union to represent the appellant's employees, the 2nd respondent argued that the appellant engages in food processing which is one of the areas covered in its constitution. Furthermore, the 2nd respondent had entered into a recognition agreement with the grain milling sector way back on 4th December, 1963. The 1st respondent only amended its constitution in the year 1985 to include food processing as one of its areas of representation solely for the purpose of encroaching into the 2nd respondent's sphere.

14. Moreover, the recognition agreement between the appellant and the 2nd respondent gives the 2nd respondent the legal authority to represent the appellant's employees. There is no lacuna in representation of the appellant's employees. Even so, the 1st respondent had not established that it had recruited a simple majority of the appellant's employees.

15. In opposing the appeal, the 1st respondent submitted that it had established recruitment of a simple majority of the appellant's employees, through the statutory check off lists signed by the said employees acknowledging their membership. Allegations that they were not the appellant's employees did not hold water because the recruitment took place at the appellant's establishment.

16. Further, according to the 1st respondent, the issue as to whether the employees were outsourced, the onus lay with the appellant to prove the same. More so, because it is the appellant, as an employer, who is obligated to maintain employment records and to prove terms of employment under **Sections 74 and 10(7)** of the **Employment Act**. The 1st respondent went on to contend that the list provided by the appellant of its employees registered with the National Social Security Fund (NSSF) had no evidentiary basis, simply because it related to the year 2010 while the recruitment took place in the year 2009.

17. Finally, notwithstanding, the recognition agreement in favour of the 2nd respondent, the employees chose to overwhelmingly join the 1st respondent in exercise of their constitutional rights under **Articles 36 & 41(2)** of the **Constitution**. In the 1st respondent's opinion, the mere existence of a recognition agreement does not give rise to a *prima facie* presumption that the 2nd respondent maintained a simple majority of the employees. Accordingly, the learned Judge correctly appreciated that the only way the numbers of employees in each union could be

established was through balloting.

18. We have considered the record, submissions made on behalf of the parties and the law. This being a first appeal, we are cognizant that our primary role is namely, to re-evaluate, re-assess and re-analyze the evidence before the trial court and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way. See *Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212.*

19. Under **Section 8** of the **LRA** a trade union has the freedom to determine its own constitution and rules as well as plan its administrative and legal activities. This is exactly what the respondents did in terms of setting out the scope of their representation in the concerned sector. However, for a trade union to receive the recognition envisaged under **Section 54** of the **LRA** it has to establish first, that it has recruited a simple majority of unionisable employees and secondly, that the said employees are in the employment of the employer it seeks recognition from. It is only then that a recognition agreement to that effect can be executed between the employer and the trade union.

20. It is not enough for a trade union to say it represents the simple majority of an employer's unionisable employees, it must lead evidence to that effect. Linnet Ndolo, J. in *Kenya Shoe and Leather Workers Union v Crown Industries Limited & Another [2017] eKLR* succinctly appreciated as much when she observed that:-

“Attainment of a simple majority for purposes of recognition is a matter of evidence...”

It follows therefore that a trade union pursuing recognition must lay before the Court documentary evidence that it has recruited a simple majority of the unionisable employees in the employment of the employer from which it seeks recognition.”

Similarly, the learned Judge in *Kenya Chemical & Allied Workers Union vs. Strategic Industries Limited [2016] eKLR* reiterated this position thus:-

“Recognition is a matter of verifiable numbers and in the absence of tangible evidence of recruitment of a simple majority the Court has no basis to order recognition.”

21. Did the 1st respondent establish that it had recruited a simple majority of the unionisable employees? We think not. We cannot help but note that apart from the check off lists containing the alleged names of the recruited employees, there was no other evidence adduced by the 1st respondent. We are not saying that such check off lists cannot be adequate evidence of recruitment of a simple majority in appropriate circumstances. In this case, more was needed taking into account the objections which were raised by the appellant in the letter dated 28th January, 2009 set out herein above.

22. As rightly appreciated by the learned Judge an employee has the right to join a trade union of his/her choice as well as leave the said union. See **Article 41** of the **Constitution** and **Section 4** of the **LRA**. This freedom has been aptly set out in a number of decisions of the ELRC for instance in *Scientific Research International Technical & Allied Workers Union vs. Kenya Agricultural Research Institute & Another [2013] e-KLR*, the Court stated:-

“Recognition of Trade Unions rests on freedom of association. Employees have the right to join and leave Trade Unions. Recruitment is a continuous process. Even where an Employer has formally granted Trade Union recognition, Employees belonging to that recognized Trade Union are not barred by any law from shifting allegiance to another Trade Union. Freedom of Association acknowledges the right to associate is co-joined to the right to dissociate; just as the right of recognition includes the right of de-recognition. Employees look at the Trade Union that is best placed to articulate their collective rights and interests of the moment, and do not take a lifelong vow of fidelity, by joining any one Trade Union.”

23. Further, in *Aviation & Allied Workers Union vs. Air Kenya Express Limited & Another [2013] eKLR* wherein it was observed:-

“Freedom of Association within the trade union is regulated under Section 4 of the Labour Relations Act. It is enshrined in the Constitution of Kenya. This mobility of labour raises the possibility that even where a trade union has satisfied the requirements for recognition, and is granted recognition, there may arise a situation where reversal of recognition is necessary. The employees who gave the trade union simple majority leading to recognition, may opt to leave the trade union for another trade union, or the nature of the employer's business may change and not fall within the recognized trade union's area of coverage.”

24. This means that even where a recognition agreement is in existence, the trade union's membership may drop below a simple majority on account of the reasons set out in the aforementioned cases. Be that as it may, we find that where there is such a recognition agreement, a rebuttable presumption that the trade union subject of the said agreement represents a simple majority of unionisable employees arises. The position we have taken is fortified by the case of *Railways and Allied Workers Union vs. Rift Valley Railways Workers Union (K) & Another [2017] eKLR* wherein this Court in its own words expressed:-

“Accordingly, and as correctly submitted, the appellant was not in need of recognition agreement with the 2nd respondent. The fact that it already had a recognition agreement and a Collective Bargaining Agreement with the 2nd respondent was proof enough that it had attained the threshold required to be recognized as the union representing the unionisable employees of the 2nd respondent.”

25. The presumption can only be rebutted by cogent evidence which may be through notices of resignation from the union by the employees, revocation of such agreements by the National Labour Board and/or recruitment of simple majority of the employees by another trade union as delineated under **Sections 48(6), 54(5) & 54** of the **LRA** respectively. Equally, we find that the 1st respondent did not rebut the presumption that the 2nd respondent represented the simple majority of the appellant's employees.

26. As for the balloting process, this Court in **Railways and Allied Workers Union v Rift Valley Railways Workers Union (K) & Another (supra)** was faced with a similar situation. The Court therein held:-

“It appears to us that the order for balloting was to determine preference of the appellant or the 1st respondent by the unionisable employees of the 2nd respondent. That cannot be the function or mandate of court.

...

Accordingly we have no hesitation in agreeing with the submissions by counsel for the 2nd respondent that in making the order for balloting, the learned judge did not exercise her discretion properly and that balloting pursuant to section 56(1) (d) of the Labour Relations Act was meant to determine disputes within the Unions and not between the Unions. It was therefore not up to the court to direct members to use the procedure as a means of resolving the stalemate between the appellant and the 1st respondent as to who between them should represent the unionisable employees of the 2nd respondent.

...

Is it possible that by the court taking upon itself to ask the unionisable employees of the 2nd respondent to choose between the appellant and the 1st respondent who should represent them was indirectly violating the provisions of sections 4(1) and 5(1) of the Labour Relations Act, Article 41 of the Constitution as well as ILO Convention 87 on the Freedom of Association and Protection of the Right to Organise Convention, 1948. These provisions of the law reiterate and emphasis the right of the workers, employees and employers to establish or join unions or organisations of their choice without let or hindrance. Indeed the ILO Convention goes further to provide that such association does not require prior authorisation.

It does appear to us that by the court acting on its own motion as aforesaid it was actually infringing on the right of the unionisable employees of the 2nd respondent to join a union of their choice. In a way it was as though it was authorizing such membership.”

We could not agree more with those sentiments. We find that the learned Judge did err in directing the appellant's employees to participate in the balloting process.

27. We think we have said enough to demonstrate that this appeal has merit and is hereby allowed. We set aside the award dated 17th March, 2016 and substitute the same with an order dismissing the 1st respondent's claim with costs. The appellant and 2nd respondent shall also have costs of this appeal.

Dated and delivered at Mombasa this 19th day of April, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR