



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & OUKO, J.J.A)

CIVIL APPEAL NO. 22 OF 2016.

BETWEEN

RAILWAYS AND ALLIED WORKERS UNION..... APPELLANT

AND

RIFT VALLEY RAILWAYS WORKERS UNION (K).....1STRESPONDENT

RIFT VALLEY RAILWAYS (KENYA) LIMITED.....2ND RESPONDENT

(Being an appeal from the Ruling and Order of the Industrial Court of Kenya at Nairobi (Linnet Ndolo, J.) dated 25th September, 2014

in

Industrial Cause No. 587 of 2013.)

JUDGMENT OF THE COURT

There had been a simmering dispute between the appellant and the 1st respondent regarding who between them represents the unionisable employees of the 2nd respondent. Both unions claimed to represent the said employees though the appellant as opposed to the 1st respondent already had in place a recognition agreement with the 2nd respondent as well as a Collective Bargaining Agreement.

Consequently, in a span of one month, between 31st March 2013 and 25th April 2013, the 1st respondent filed several claims in the Industrial Court being 116, 241 and 587 all of 2013. The first claim was against the 2nd respondent and the appellant in which it sought to stop the retrenchment programme commenced on 31st December, 2012 by the 2nd respondent and an order that the 2nd respondent be compelled to engage it in a proper and structured negotiations that would culminate in the 2nd respondent's unionisable employees getting their rightful dues.

In the second claim which was against the 2nd respondent alone, the 1st respondent sought a declaration that it was a union duly registered to represent the interests of the workers in the Railways sector; an order directing the 2nd respondent to issue a cheque from its own revenue towards union dues that it was obligated by law to have remitted by the employees who are members of the 1st respondent to enable it

serve the members effectively; and lastly, an order compelling the 2nd respondent to recognize it as its employees' representative and engage it in a recognition agreement.

The last claim was against both the appellant and the 2nd respondent. It prayed that the intended unlawful act by both the appellant and 2nd respondent to deduct Kshs. 300 from the salaries of the 1st respondent's members to the benefit of the appellant be declared null and void; and or be stayed until the substance of the claim is heard and determined.

It would appear that both the appellant and 2nd respondent rebuffed the 1st respondent's entreaties, leaving the claims to proceed to trial. Since the three claims were closely related and involved the same parties and dispute, an order of consolidation was made. The claims were then placed before **Ndolo, J.** for resolution. As the elephant in the room was who between the appellant and the 1st respondent should ideally represent the unionisable employees of the 2nd respondent, Ndolo, J opted to confront it first.

To guide her in resolving the dispute, the learned Judge sought the services of a conciliator, one **Mr R. J. Twanga**. Having listened to representations from both the appellant and 1st respondent, Mr Twanga filed his report with the court. The report indicated that the 2nd respondent had a total of 1219 unionisable employees out of which the appellant had 618 subscribing members whereas the 1st respondent claimed 458 members. That out of 458 employees which the 1st respondent claimed as its members, 332 were, according to the report, in fact active members of the appellant, one was deceased, six had been dismissed, one had retired, forty seven had been retrenched, four had been terminated, thirty three were in management and four were contract staff. To the conciliator therefore, the 1st respondent had a membership of only thirty employees and had thus not attained the threshold for recognition by the 2nd respondent for purposes of Collective Bargaining Agreement, pursuant to section 54(1) of the Labour Relations Act. He indeed recommended that the 1st respondent remains with its 30 members while the appellant retains its 618 contributing members. In a nutshell the conciliator ruled that the 1st respondent had not attained the necessary membership to be recognised as a union to represent the employees of the 2nd respondent. That role was left to the appellant as before.

The 1st respondent discounted the authenticity of the documents relied on by the conciliator in arriving at the decision but the appellant and the 2nd respondent were quite happy with the outcome. Ruling on the matter, Ndolo J held as follows:

“The court has looked at the documents filed by the parties in this matter and having taken note of the conciliator’s observation that the authenticity of the signatures on the documents submitted by the claimant and the 2nd respondent could not be verified, makes the following orders:

- (a) The 1st respondent shall facilitate a balloting exercise for all its unionisable employees in all its work stations within the next sixty days from the date of this ruling;***
- (b) During the balloting exercise, the claimant and the 2nd respondent shall be represented by two agents at each work station;***
- (c) The Labour Commissioner shall appoint respective Labour Officers to supervise and oversee the balloting in all the work stations;***
- (d) The Labour Commissioner shall file returns of the balloting exercise within 7 days from the date of completion of the balloting exercise;***
- (e) Each party will bear their own costs.”***

This decision did not sit well with the appellant. Consequently on 30th September 2014 it filed a notice of

appeal which was followed by the substantive appeal, the subject of this judgment. The appellant advanced three grounds upon which he hoped to impugn the judgment; that the learned judge erred in law and fact in holding that all unionisable employees of the 2nd respondent ought to engage in the balloting process contrary to Article 41 of the Constitution of Kenya and ILO Convention No. 87 of 1948; in failing to find that the appellant was not in need of recognition and had the simple majority of the unionisable employees of the 2nd respondent and therefore ordering balloting was contrary to section 54 of the Labour Relations Act; and lastly in failing to find that credible evidence was tendered by the appellant through check-off forms and membership in accordance with sections 48 and 50 of the Labour Relations Act.

The appeal was orally prosecuted. **Mr. Ongegu**, learned counsel for the appellant submitted that the court did not appreciate the purport of Article 41 of the Constitution and also the 1948 ILO Convention, that the judge's decision ran counter to the right of a party to join a union of his choice contrary to sections 4(1) 5(1) and 5(r) of the Labour Relations Act. That the court erred in not finding that the majority of the unionisable employees were the appellant's members. By ordering balloting, the judge violated section 54 of the Labour Relations Act. It was further submitted by the appellant that the judge failed to appreciate that the appellant's list of members together with the check-off system was credible evidence which should have found favour with the judge.

Opposing the appeal, **Mr Munayi**, learned counsel for the 1st respondent submitted that the conciliator was wrong in his findings. Accordingly, the court was not bound by his recommendations. The court therefore did not err when it opted for balloting. The balloting was to assist in determining which member belonged to which union. It was the respondent's further submissions that the members overwhelmingly affirmed their membership of the 1st respondent but the 2nd respondent in cahoots with the appellant were frustrating them by refusing to deduct and remit the check-off money to the 1st respondent.

Mr Mwenesi, learned counsel for the 2nd respondent on his part in supporting the appeal submitted that there was already in place a Collective Bargaining Agreement between the appellant and 2nd respondent which ought to be respected. The court, according to counsel did not exercise its discretion properly in ordering balloting. That once an employer or court asks a conciliator to compile a report, under section 68 of the Labour Relations Act, the report is binding on the court unless the court finds that it is contrary to law; that the question before court was about membership of the 1st respondent; that it was not true that the 1st respondent submitted a list of over 800 members. The 1st respondent did not submit a members' register as required in law. As a parting shot counsel submitted that in any event balloting is used to determine disputes within a union. It was not up to the court to direct members to choose the union of their choice.

As we see it, the dispute here is fairly simple and straightforward. It is about a scramble for membership of two competing unions, the appellant and the 1st respondent. In a bid to resolve the dispute, the judge invoked the expertise of the conciliator. This was in pursuit of section 15 of the Employment and Labour Relations Act which encourages alternative dispute resolution. It is worded thus:

“ 15. Alternative dispute resolution

(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanism in accordance with Article 159(2) (c) of the Constitution”

The appointed conciliator in his report filed in court on 21st May 2014 made the following recommendations which we reproduce verbatim:

“ After listening and perusing check off lists submitted by Railways and Allied Workers Union, Rift Valley Railways Workers Union and Rift Valley Railways (K) Ltd, I found out that:

- . *Rift Valley Railways (K) Ltd has 1219 employees*
- . *Railways and Allied Workers Union has got 618 members subscribing to union dues.*
- . *Railways and Allied Workers union submitted a list of 618 members to this office for perusal*
- . *Rift Valley Railways Workers Union submitted to this office a list of 458 members for perusal*
- . *Out of 458 list of employees submitted by RVRWU, 332 are active members of RAWU, one is deceased and six are dismissed, one retired, forty seven retrenched, four terminated, thirty three are management active staff and four are contract staff. Note that the above numbers placed according to the categories as mentioned above leaves a balance of thirty employees who are contributing members of RVRWU.*

The other issue to note are that no employees out of 322 has made any written complain either to the employer or to the union that his salary has been deducted for union dues and deposited to the account of the wrong union. Accordingly, the union is not the one earning the salary from which the union dues are being deducted

In addition both unions submitted lists duly signed by their alleged members, however, the crucial question here is on authenticity of the signatures since the two parties are struggling in competition to earn union dues they are likely to forge signatures and even include those of the deceased, terminated, dismissed, retired, resigned and retrenched.

Something of value here is that the records are prepared and maintained by the employer who is supposed to produce them for inspection by the authorised officer on demand and as provided for under section 74(2) of Employment Act 2007. Although the employer has been enjoined in this suit he remains the only party that serves both unions.

Therefore the records produced by the employer should be more reliable since there are no other records maintained for Wages and Statutory and other deductions. The only aspect that could help in this matter, to state otherwise, was employees' complaint for wrongful deductions and the same documented so as to exhibit in court for evidence of the claim.

In conclusion, I recommend that RVRWU to remain with 30 contributing members while RAWU remains with 618 contributing members”

In other words the conciliator found that the 1st respondent had not attained the desired threshold so as to be recognised as a union by the 2nd respondent pursuant to section 54(1) of the Labour Relations Act which is in these terms:

“.....An employer, including an employer in the public sector, shall

recognise a trade union for purposes of Collective Bargaining if the trade union represents the simple majority of the unionisable employees.”

It is evident, going by the observations of the conciliator that the 1st respondent had not attained the required simple majority that would have entitled it to recognition by the 2nd respondent. It is also self evident that it is only the appellant who has a membership of more than fifty plus and therefore entitled to recognition by the 2nd respondent for purposes of Collective Bargaining Agreement. As a matter of fact it is instructive to note that the appellant already has in place a recognition agreement and a concluded Collective Bargaining Agreement with the 2nd respondent. 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. It did not require to participate in the balloting therefor. The order for balloting was obviously arbitrary and, we dare say, prejudicial to the appellant, given its standing with the 1st respondent.

Having opted to pursue alternative dispute resolution mechanism, it was hoped that the learned judge would be guided by the recommendations of the conciliator. However for reasons that cannot stand scrutiny, the learned judge opted to discard the recommendations. It appears to us that the learned judge misread and misapprehended the conciliator's observation that because the 1st respondent and the appellant were competing for membership of the 2nd respondent's unionisable employees, they were likely to falsify the records. However that fear was put to rest in the next two paragraphs of the report when the conciliator recommended that reliance should instead be placed on the records kept by the employer, the 2nd respondent. Indeed it was on the basis of those that the conciliator made the recommendation that the 1st respondent remains with the 30 contributing members while the appellant retains the 618 contributing members.

Whether or not the conditions laid out in section 54(1) of the Labour Relations Act regarding recognition of trade union have been met are matters of evidence. In reaching his recommendations, the conciliator heavily relied on the records kept by the 2nd respondent regarding its employees. Neither the appellant nor the 1st respondent disputed or discounted those records. To our mind, the judge did not appreciate the fact that the same records kept by the 2nd respondent would still be required to verify those participating in the ballot, if ever it came to pass. 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. In any event and as we have already demonstrated, this was absolutely unnecessary given the evidence in the possession of the conciliator and his findings in the report presented to court. Further, none of the parties has claimed that the recommendations by the conciliator were contrary to law.

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. Reading through the said provisions of the law, the submission of the 2nd respondent becomes irresistible to accept. To that extent again the trial court erred.

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 is in these terms:

“Article 2 Workers and employees, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous 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 authorising such membership. Kenya is a signatory to the said convention.

In the end it must be obvious that this appeal is for allowing. In the premises the appeal is allowed and the order of the Honourable Judge of the Employment and Labour Relations court that all the unionisable employees of the 2nd respondent be engaged in the balloting exercise is hereby set aside. In lieu thereof, we order that the 1st respondent's claims in these regards be and are hereby dismissed.

Each party to this appeal shall bear its own costs.

Dated and delivered at Nairobi this 22nd day of September, 2017.

P.N. WAKI

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JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR