Kenya Plantation & Agricultural Workers Union v Solio Ranch Limited (Cause 7A of 2019) [2024] KEELRC 1622 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1622 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE 7A OF 2019

DN NDERITU, J

JUNE 26, 2024

BETWEEN

KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT

AND

SOLIO RANCH LIMITED .... RESPONDENT

JUDGMENT

I. Introduction

1. The claimant, a duly registered trade union, commenced this cause by way of a memorandum of claim dated 12th February, 2019 filed in court on 13th February, 2019. As it is the procedure, the memorandum of claim is accompanied with a verifying affidavit, sworn on even date by Thomas Kipkemboi, the deputy secretary general of the claimant, a witness statement by the same official, a list of documents, and a bundle of copies of the listed documents.

2. The claimant is seeking for judgment against the respondent for the following orders –

    1. A declaration that the actions by the respondent amount to unfair labour practices.
    2. An order compelling the respondent to conclude a recognition agreement with the claimant within fourteen (14) days from the date of judgment.
    3. Costs of this cause.
    4. Any other relief that this Honourable Court may deem fit and just to grant.

3. The respondent, a duly incorporated and registered limited liability company, through Kaplan & Stratton Advocates, entered appearance and filed a memorandum of defence on 18th April, 2019. The respondent prays that the entire claim by the claimant be dismissed with costs for lack of merits.

4. After a prolonged period of dormancy and a series of mentions in the hope and promise of an out of court settlement, on 29th March, 2023 counsel for both parties, Miss Omwaka for the claimant and Miss Onyango for the respondent, holding brief for Dr Ojiambo, consented that the matter be heard and disposed of by way of written submissions, based on the pleadings and materials filed and presented by the parties to court. For the record, other than the memorandum of appearance and the defence, the respondent did not file any other pleadings or documents on record.

5. Counsel for the claimant filed her written submissions on 18th April, 2023 while counsel for the respondent filed on 10th May, 2023.

II. The Claimant's Case

6. The claimant's case is expressed in the statement of claim, the annexures thereto, and the written submissions by counsel.

7. In the memorandum of claim, the claimant avers that on 8th March, 2014 it conducted a membership recruitment exercise in the premises of the respondent whereby 62 employees of the respondent signed up for membership with the claimant and authorized the respondent to deduct union dues from their emoluments and to submit the same to the claimant. This was done by the said employees signing a Form S copies whereof are annexed to the memorandum of claim.

8. It is pleaded that on 30th April, 2018 the claimant served the respondent with a recognition agreement in triplicate for execution in formalization of the process towards entering into a collective bargaining agreement (CBA) but the respondent allegedly failed, refused, and or neglected to execute the same or give reasons for not executing the same, and thereafter adamantly and deliberately refused to engage the claimant on the process.

9. It is further pleaded that vide letters of 7th August, 2018 and 11th January, 2019 the claimant reminded the respondent of the need to engage and conclude the above process but again the respondent ignored the overtures.

10. It is pleaded that the deliberate and adamant refusal by the respondent to engage the claimant in legally formalizing the process and executing the necessary documents has disadvantaged the 62 employees who elected to exercise their constitutional right in joining the claimant as a trade union of their choice and that the conduct by the respondent amounts to unfair labour practice.

11. It is further pleaded that the number of 62 employees by far exceeds the legal simple majority threshold for the signing of a recognition agreement and entering into negotiations for a binding CBA between the claimant and the respondent.

12. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in its favour as prayed in the memorandum of claim.

III. The Respondent's Case

13. The respondent's case is contained in the memorandum of defence and the written submissions by its counsel.

14. In its memorandum of defence, the respondent denies that it was served with copies of draft recognition agreement as alleged by the claimant. Further, it is pleaded that the alleged 62 persons named by the claimant are not employees of the respondent, and further that even if they were they did not comprise simple majority of the respondent's workforce so as to meet the minimum threshold for the parties to enter into a recognition agreement, let alone entering into negotiations for a CBA.

15. It is pleaded that no demand notice was issued to the respondent before action.

16. The jurisdiction of this court is admitted but the claimant is put to strict proof of all the allegations in the memorandum of claim.

17. It is on the basis of the foregoing that the respondent prays that the claimant's cause be dismissed with costs. The submissions by counsel for the respondent shall be considered in the succeeding part of this judgment alongside those for the claimant.

IV. Submissions By Counsel

18. On the one hand, the claimant's counsel identified the issue for determination as - Whether the respondent should be ordered to sign the recognition agreement and continue deducting union dues from the emoluments of the employees who have signed into union membership and pay arrears of unremitted union dues since January, 2019.

19. Counsel submitted that the 62 members recruited by the claimant meet the threshold set by Section 54(1) of the *Labour Relations Act* (the Act) which provides that – "An employer, including an employer in the public sector, shall recognize a trade union for the purposes of collective bargaining if that trade union represents the simple majority of unionisable employees."

20. It is submitted that until December, 2018 the respondent deducted and submitted union dues in regard to the 62 employees as per the records filed in court and as such the respondent is estopped from claiming otherwise. It is submitted that no reason or explanation was offered or proffered by the respondent in stopping making the deductions and submission of union dues as alluded to above. The court is urged to look into and scrutinize the contributions/deductions list filed in court for the month of December, 2018 which bears the official stamp of the respondent indicating its postal address as P.O BOX 2, Naro Moru, and thereby make the inevitable finding and conclusion that by sending all the correspondences through that postal address the claimant properly and lawfully served the respondent with all the documents including the draft recognition agreement.

21. It is submitted that by making the union deductions and remitting the same for the period up to December, 2018 the respondent clearly admitted that the 62 members were its employees and admitted that they formed at least a simple majority of its workforce. It is submitted that by operation of the law the respondent is estopped from claiming otherwise.

22. Citing Kenya *Long Distance Truck Drivers & Allied Workers Union V Ms. Kyoga Hauliers Limited* (2013) eKLR counsel for the claimant submitted that the claimant complied with Section 54 of the *Labour Relations Act* cited above and that the respondent on its part complied by commencing deductions of union dues and remitting the same as alluded to above, only to stop doing so from January, 2019 without any notice, explanation, or legal basis.

23. On the other hand, counsel for the respondent identified three issues for determination by the court – Whether the people listed in the claimant's statement of claim are the employees of the respondent as alleged; Whether if the said people are employees of the respondent they make up a simple majority of the respondent's employees; and, Whether the respondent should be compelled to sign the recognition agreement.

24. Counsel has cited Sections 107, 108, & 109 of the Evidence and submitted that the burden of proof of the cause was squarely in the hands of the claimant based on the elementary and trite law that he who alleges shall prove. That burden in this cause, a civil claim, is on a balance of probabilities for each and every allegation made, it is so submitted. Counsel cited *Charterhouse Bank Limited (Under*

statutory management) V Frank N. Kamau (2016) eKLR and *Daniel Kenga Katana & 4 Others V Dzitu Toto Bokole & 3 Others* (2022) eKLR to the effect that even where a respondent fails to file or offer any evidence in defence the claimant is still obliged to prove the case to the required standard.

25. It is submitted that the evidence presented by the claimant does not prove that the 62 named persons are employees of the respondent and as such there is no factual basis upon which the court may grant and issue the orders sought by the claimant.

26. It is further submitted that the cause is premature for the claimant's failure to comply with Sections 62 & 74 of the *Labour Relations Act* before filing the cause in court and as such violating the doctrine of exhaustion. Counsel has cited several decisions in firming-up this position, including *Geoffrey Muthiga Kabiru & 2 Others V Samuel Munga Henry & 1756 Others* (2015) eKLR wherein it was held that where an alternative dispute resolution mechanism is provided for in the law, it is imperative that parties exhaust such mechanism before approaching a court of law for a judicial remedy.

27. Counsel insists that the claimant failed to demonstrate and prove that the named persons are employees of the respondent and yet that is the basis upon which the court has been asked to order the respondent to execute a recognition agreement. It is submitted that prima facie the claimant has failed to establish a case against the respondent and as such the court is urged to dismiss the cause with costs.

V. Issues For Determination

28. The court has carefully and dutifully gone through the pleadings filed, the documentary evidence availed by the claimant, and the written submissions by counsel for both parties. The court identifies the following issues for determination -

    a. Has the claimant proved its cause to the required standard – balance of probabilities – so as to deserve the remedies sought?

    b. Who meets the costs of the cause?

VI. Has The Claimant Proved Its Cause?

29. Section 54 of the Act enables a trade union who has recruited a simple majority of employees to approach an employer for recognition and thereafter for purposes of collective bargaining. The evidence on record from the claimant is that it recruited 62 employees of the respondent allegedly constituting a simple majority of the employees of the respondent and subsequently approached the respondent for recognition.

30. Further, the evidence presented is that the respondent commenced deduction of union dues from the 62 named employees and a list bearing the official stamp of the respondent has been availed for the deductions made in the month of December, 2018. It is stated that the respondent thereafter failed and or refused to make the deductions and to execute a recognition agreement and as such the process towards a CBA was derailed.

31. Sections 10 & 74 of the *Employment Act* obligate an employer to keep and maintain records of employment. It is the respondent who knows and keeps records of its employees and hence once the claimant alleged that the 62 named persons are employees of the respondent and that they constitute a simple majority thereof, the burden to prove otherwise shifted to the respondent. It was the duty and indeed an obligation for the respondent to dislodge that claim by availing records of its employees confirming that the said 62 persons are not its employees and or that indeed they did not constitute as simple majority. Holding otherwise would be an absurdity as there is no way the claimant should be expected to keep such records of employment.

32. It is cynical and hypocritical for the respondent to allege that the said 62 named persons are not its employees and or that they do not constitute a simple majority of its workforce, yet at the same time fail to produce records in its possession which the law obligates it to keep and maintain and indeed avail the same in court or to a labour office for inspection and scrutiny.

33. Moreover, the claimant availed records duly stamped by the respondent for union deductions and remittances for the month of December, 2018. If the said persons are not employees of the respondent and or do not constitute a simple majority of its workforce, on what basis then did the respondent make the deductions and remittances? The court takes the view and holds that the respondent deliberately, unreasonably, and unlawfully failed and or refused to engage and execute the recognition agreement.

34. The evidence on record is that the claimant sent the recognition agreement to the respondent for execution and thereafter sent reminders to the respondent but the latter failed, refused, and or neglected to act. That of itself amounts to unfair labour practices under Article 41 of *the Constitution*.

35. Section 74 of *the Ac*t allows a trade union to file a cause such as this one in court under a certificate of urgency and that is what the claimant did although the cause has been pending in court for a while now. In my opinion, and I so hold, the claimant did not and has not violated the doctrine of exhaustion as the above law allows a trade union to approach the court as the claimant did.

36. Prior to the parties consenting in court that the matter be heard and disposed of through written submissions, the parties engaged in lengthy attempts towards an out of court settlement. The address of the respondent on the correspondences between it and the claimant, and the address in its rubber stamp is the same – P.O BOX 2, Naro Moru-10105 – and as such there is no way that the respondent may claim that it did not receive the recognition agreement and the subsequent reminders from the claimant. In any event, if the respondent did not receive the said correspondences from the claimant, on what basis then did it engage the claimant for so long after the cause was filed in court and before the hearing as stated above?

37. The court finds and holds that on a balance of probabilities, the claimant has proved its cause and the respondent has unfairly, unreasonably, unjustly, and unlawfully failed and or refused to execute a recognition agreement which is a pre-requisite for negotiations for a CBA. This is unfair labour practice which has had the effect of denying the 62 employees and many others of the benefits that may have accrued from the conclusion of a CBA.

VII. Reliefs

38. The court has said enough in demonstrating that through its unfair and unlawful conduct the respondent has engaged in unfair labour practices by unreasonably and unlawfully failing and refusing to engage and execute a recognition agreement with the claimant and a declaration is hereby proclaimed and issued to that effect.

39. The other prayer is for the court to order the respondent to execute a recognition agreement with the claimant within 14 days of this judgment. To facilitate smooth verification and proper documentation, the respondent is hereby ordered to execute a recognition agreement with the claimant within 30 days of this judgment.

VIII. Costs

40. The claimant is awarded the costs of the cause.

IX. Disposal

41. In the disposal of this cause, the court issues the following orders in favour of the claimant -

    a. A declaration be and is hereby issued that by failing, refusing, and or neglecting to execute a recognition agreement with the claimant, the respondent has engaged in unfair labour practices.

    b. An order be and is hereby issued directing the respondent to engage and execute a recognition agreement with the claimant within 30 days of this judgment.

    c. Costs of the cause to the claimant.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 26TH DAY OF JUNE, 2024.

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DAVID NDERITU

JUDGE