Kenya Aviation Workers Union v KLM Royal Dutch Airlines / Air France; Transport Workers Union Kenya (Interested Party) (Cause 45 of 2020) [2024] KEELRC 1434 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1434 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 45 OF 2020

J RIKA, J

JUNE 14, 2024

BETWEEN

KENYA AVIATION WORKERS UNION ..... CLAIMANT

AND

KLM ROYAL DUTCH AIRLINES / AIR FRANCE ..... RESPONDENT

AND

TRANSPORT WORKERS UNION KENYA ..... INTERESTED PARTY

JUDGMENT

1. The Claimant is a registered trade union, representing Employees in the aviation industry.
2. The Respondent is a registered Company involved in aviation.
3. The Interested Party is a Trade Union representing Employees in the wider transport industry, including air transportation.
4. The Respondent and the Interested Party have a Recognition Agreement [RA], executed way back on 28th November 2003. It is currently, by virtue of this RA, the sole collective bargaining agent recognized by the Respondent, with whom the Respondent has executed a subsisting Collective Bargaining Agreement [CBA].
5. The dispute arose when the Claimant, alleged to have recruited Employees of the Respondent, and demanded that the Respondent executes a new RA, granting the Claimant recognition, and therefore supplanting the Interested Party, as the sole collective bargaining agent.
6. In its Statement of Claim dated 28th January 2020, the Claimant prays for 3 orders: that the Respondent is permanently restrained from interfering with the Claimant's recruitment of its

Employees; the Respondent is compelled to recognize the Claimant; and the Respondent is compelled to collectively bargain with the Claimant.

7. The Respondent's position is that it has a RA with the Interested Party. It recognizes the Interested Party as ''the sole labour organization representing the interests of workers who are in the employment of the company.'' The RA remains in force. The Respondent states further that it has executed CBA with the Interested Party, defining the terms and conditions of service, of the Respondent's Unionisable Employees. The CBA was registered in Court on 16th June 2017. It was implemented. The Respondent received the Claimant's demands, and responded, informing the Claimant that it was not averse to deducting and remitting any trade union dues on account of any of its Employees who was shown to have joined the Claimant. It was not however possible, to grant the Claimant Union recognition, in light of the subsisting RA, between the Respondent and the Interested Party.

8. The Interested Party's Statement of Interest, is that indeed it is duly recognized by the Respondent, as the sole collective bargaining agent. It corroborated the position of the Respondent, on execution of the RA, and the subsequent negotiation, execution and registration of the CBA. It states that in any event, the Employees claimed by the Claimant to be its members, belong to the Interested Party. The Interested Party holds that it is the right Trade Union to represent the Respondent's Employees, and has done so over the past 20 years. The Interested Party has not been served notice from the National Labour Board, dissolving the subsisting RA.

9. It is proposed by the Respondent and the Interested Party, that the Claim is dismissed, with costs.

10. The dispute was taken before a Conciliator appointed by the Cabinet Secretary for Labour, who upon hearing the Parties, recommended that '' the Employees of KLM/ Air France be allowed to exercise their freedom of association as enshrined in Article 41 [1] [c] of our *Constitution* and as stipulated in Section 54 [1] of the *Labour Relations Act*, 2007.'' Without making any reference to the existing RA between the Respondent and the Interested Party, the Conciliator further recommended that, ''the Management of KLM / Air France should accord recognition to the Kenya Aviation Workers Union, since it has recruited a simple majority of the Unionisable Employees...''

11. The recommendation did not resolve the dispute, paving way for presentation of this Claim.

12. Evidence was recorded from Moses Ndiema, the General Secretary of the Claimant, on 14th December 2022 and 27th September 2023. Regional Manager of the Respondent, Manisha Mehta, gave evidence on 27th September 2023 and 8th February 2024. The Interested Party's General Secretary Dan Mihadi, gave evidence on 8th February 2024, closing the hearing. The Claim was last mentioned on 4th April 2024, when Parties confirmed filing and exchange of their closing arguments.

13. Ndiema adopted the Claimant's 64 documents on record, as exhibits 1-64, and his witness statement, as his evidence-in-chief. He emphasized that out of 39 Unionisable Employees, the Claimant recruited 25, over and above a simple majority. By the time of giving evidence, Ndiema told the Court that the Claimant had 30 members, still above a simple majority. The Interested Party, according to him, alleged to have 36 members. Of these, 12 were members of the Claimant. The Claimant relied on the payroll, which was validated by the Respondent. Ndiema told the Court that the Conciliator recommended that Employees are allowed to exercise their freedom of association. He asked the Court to allow the Claim.

14. Cross-examined by the Advocate for the Respondent, he told the Court that he had not exhibited the Claimant's register of members. The payroll list different from the list filed by the Claimant in July 2022. Membership was not static. He was not able to confirm if Employees Brian, Patrick, Jackson,

had left employment or joined Management. The Employees themselves would confirm. There was no communication to the Claimant that any Employee, had resigned from the Claimant.

15. He told the Court that the Respondent's documents showed it had 39 Unionisable Employees as of 2nd September 2022. The Claimant was shown to have 25 members while the Interested Party had 19. 7 of the Employees were indicated to belong to both Unions. Ndiema was not aware if the law prohibited dual membership. He was aware of the RA subsisting between the Respondent and the Interested Party. He agreed that the RA was binding between the Respondent and the Interested Party.

16. Cross-examined by the Interested Party's Advocate, Ndiema told the Court that he did not have an updated members' list. The Claimant started recruiting Employees from the Respondent, in 2019. He was not able to tell whether they were already members of the Interested Party. Those who were members resigned from the Interested Party. Ndiema was not at the time, aware of the RA and CBA executed between the Respondent and the Interested Party.

17. Redirected, he told the Court that the Claimant was registered as an offshoot of the Interested Party. There are no members who are common to both Unions. Recognition is granted upon satisfaction of the simple majority rule. The Claimant satisfied this.

18. Manisha Mehta relied on her witness statements dated 24th August 2021 and 31st August 2021, and exhibited 7 documents filed in two bundles, dated 25th August 2022 and 2nd September 2022 respectively, in her evidence-in-chief. She agreed with Ndiema, that numbers are not static. Employees come and leave employment on various grounds. Some Employees wrote directly to the Respondent, resigning their membership of the Claimant.

19. Cross-examined by the Advocate for the Claimant, Mehta reiterated that numbers were not static. The Respondent could not recognize the Claimant because it had recognized the Interested Party. It had executed CBA with the Interested Party. There were Employees who were indicated to belong to both Unions.

20. Cross-examined by the Interested Party's Advocate, Mehta stated that majority of the Respondent's Employees, were members of the Interested Party. Even as the Claimant recruited Employees, the Respondent had a subsisting RA with the Interested Party. The numbers changed through promotions, termination, retirement, or resignation. Employees come in and leave employment over time. Mehta did not know if Employees are allowed by the law to have dual membership. There were Employees who paid union subscription fees to both Unions. They did not resign from the Interested Party.

21. Dan Mihadi relied on his witness statement and 9 documents filed by the Interested Party, in his evidence –in-chief.

22. Cross-examined by the Claimant's Advocate, he told the Court the RA between the Interested Party and the Respondent is not registered in Court. It is not legally required to be registered. The Respondent and the Interested Party, have executed CBAs. There were Employees claimed by both Unions. The Interested Party did not appeal against the findings and recommendations of the Conciliator. There was no legal provision for such an appeal.

23. Cross-examined by the Advocate for the Respondent, Mihadi restated that it is possible there were Employees who subscribed to both Unions. The RA gave the Interested Party exclusive agency rights.

24. Redirected, he affirmed that the RA has not been revoked. Revocation has to be pursued with the National Labour Board. No CBA concluded between the Interested Party and the Respondent, has been challenged in Court.

25. The issues are whether the Claimant merits recognition by the Respondent in view of recognition already granted to the Interested Party; whether the Respondent should be compelled to collectively bargain with the Claimant; and whether the Respondent should be permanently restrained, from interfering with the Claimant's recruitment of its Employees.

The Court Finds: -

26. Beginning with the last issue, there is no evidence on record, to show that the Respondent prevented the Claimant from recruiting any of its Employees. There is nothing done by the Respondent against the Claimant, that would amount to anti-union activity, warranting the order of permanent injunction as sought by the Claimant. Not a single Employee was presented before the Court by the Claimant, to attest to any ant-union activity by the Respondent against the Claimant, that would warrant an order of permanent injunction, restraining the Respondent from interfering with the Claimant's membership recruitment drive. The evidence by all the Parties is that the Unions have recruited Employees from the Respondent, some who retain membership of both Unions. The Respondent testified that it is not averse to deducting and remitting trade union subscription fees, from the salary of any of its Employee, who is a member of either Trade Union. The Court has no evidential material to justify grant of an order of permanent injunction, against the Respondent.

27. The second and third issues are related. The third, depends on the resolution of the second. If recognition is merited, it would follow that the Respondent has an obligation under Section 54 [1], of the *Labour Relations Act*, to engage the Claimant, in collective bargaining.

28. Recognition, is governed by Section 54 of the *Labour Relations Act*. A Trade Union is granted recognition, for purposes of collective bargaining, if it represents a simple majority of the Unionisable Employees.

29. Section 54[5] grants an Employer or group of Employers, the right to apply to the National Labour Board, to terminate a RA. The right does appear to be extended to Trade Unions who claim recognition, in place of other Trade Unions already recognized. The Interested Party is incorrect to submit that the Claimant should have first applied to the National Labour Board for revocation of the RA between the Respondent and the Interested Party.

30. Parties are required to submit disputes on recognition for conciliation to the Ministry of Labour. If there is no settlement, they are allowed under Section 54 [7[to approach this Court under Certificate of Urgency, the procedure which the Claimant invokes.

31. The Court, in resolving the dispute, does not only look at the numbers; it is required under Section 54 [8] to look at the sector in which the Employer operates.

32. The Claimant and the Interested Party are in the transportation sector. Aviation is an industry within the transportation sector, and the Claimant has its origins, in the Interested Party. It is a specific industry Trade Union, which sprung from the Interested Party. The Interested Party falls in a category Courts have characterized as generalist Trade Unions, straddling the whole transportation sector like a colossus. Generalist Trade Unions have in the past monopolized whole sectors, even when our labour movement was defined by the principle of one union, one industry [industrial trade unionism].

33. If the Court was dealing with recognition dispute on an unrepresented transport subsector / industry; if the Respondent has not already granted recognition to the Interested Party; the most relevant Union in aviation industry, would appear to be the Claimant. It specifically represents aviation industry, and the Respondent is an aviation business. The complexity of the matter is that, the Respondent already

recognizes the Interested Party, whose area of representation, legally and historically, is the broader transportation sector. Recognition is longstanding, with accrued rights and obligations.

34. The Claimant focused on the numbers it alleges to have recruited, but paid little regard to the subsistence of the RA between the Respondent and the Interested Party. Principally, it was lost on the Claimant that RAs confer on recognized Trade Unions, exclusive collective bargaining agency rights.

35. The RA concluded between the Respondent and Interested Party has not been revoked by the National Labour Board.

36. Even assuming that the Claimant does not have the legal capacity to move the National Labour Board for de-recognition of the Interested Party by the Respondent, the Claimant has not asked the Court to revoke the subsisting RA, before moving on to establish that it is the right Trade Union to take over representation of the Respondent's Unionisable Employees, from the Interested Party.

37. It was the wrong approach for the Claimant to move the Court, as though there is no existing Trade Union in the industry, with a RA and validly registered CBA concluded with the Respondent. It was wrong to treat the pursuit of recognition, as though it was recognition in relation to a fresh Employer, with no existing contractual recognition and collective bargaining rights and obligations.

38. The Claimant prays the Court to direct the Respondent to recognize it, and compel the Respondent to collectively bargain, without explaining to the Court, what happens to the RA and CBA, subsisting between the Respondent and the Interested Party.

39. The law does not countenance the presence of two different RAs, representing the same collective bargaining unit. To grant recognition to two Trade Unions, would negate the grant of exclusive collective bargaining agency rights, made in favour of one Trade Union, at the time recognition.

40. Such double recognition would open the workplace to different CBAs, negotiated between the same Employer but different Trade Unions, a fertile seedbed for industrial chaos, instability and disharmony.

41. Recognition of two Trade Unions by the Respondent simultaneously, would only happen, if the subsisting RA is revoked, or amended to allow different cadres of the Respondent's workforce, separate representation. The sole collective bargaining agency, would have to be changed to shared agency. There could be, for instance, separate representation of cabin crew and ground crew. For such to happen, the Claimant would have to be more tactful, less antagonistic, and engage both the Respondent and the Interested Party. Many Trade Unions hunger for a full loaf, while a slice could just be sufficient.

42. The Claimant acknowledges that it is an offshoot of the Interested Party. It has the right to recruit Employees from the Respondent.

43. This right is not doubted. But to demand recognition upon recruitment of a simple majority of the Unionisable Employees, as though there is no other Trade Union representing the sector, is too simplistic a perception of the law on recognition and collective bargaining. There are accrued rights and obligations imposed on the Respondent and the Interested Party, which can only come to an end, through revocation of the RA executed on 28th November 2003.

44. The Claimant is demanding enjoyment of rights, which are restricted to the currently recognized legitimate partners. It cannot do so, during the subsistence of the relationship between the Respondent and the Interested Party. The Claimant would have to wait for dissolution of the partnership between the Respondent and the Interested Party, to have any reasonable prospect, of partaking in the enjoyment of these rights.

45. The Court does not think that the number of Employees recruited by the Claimant, is conclusive for grant of recognition. Even if it was established by the Claimant that it has recruited a simple majority of the Respondent's Unionisable Employees [evidence by the Claimant has not established this], it would not follow that the Claimant is granted recognition and allowed to collectively bargain with the Respondent.

46. In this Court's decision, *Kenya Export, Floriculture, Horticulture and Allied Workers Union v Kenya Plantation and Agricultural Workers Union; Cabinet Secretary for Labour and Social Protection and Another [Interested Parties]* [2021] eKLR, similar issues were in dispute.

47. The Export Union, was registered as a Trade Union in the flower and horticulture industry, pursuant to orders of the Court. The Plantation Union previously enjoyed the monopoly of representation in the broader agricultural sector.

48. The Export Union approached the Court, asking for orders barring the Plantation Union from entering into further CBAs with the Agricultural Employers Association, an umbrella Employers' Organization, with whom the Plantation Union has a longstanding RA, and multiple CBAs. In other words, the Export Union asked the Court to effectively undo the longstanding RA and CBAs subsequently concluded, between the Plantation Union and the Agricultural Employers Association.

49. In dismissing the Export Union's case, the Court observed that there is a catena of judicial authorities, protective of existing RAs. There was no judicial precedent where an existing RA, has been revoked by the Courts in favour of newcomer Trade Unions. Whereas Courts readily grant registration to new Trade Unions, they are averse to endorsing attempts by these Trade Unions, at supplanting existing Trade Unions, and interfering with accrued recognition rights and obligations. There is no instance where the National Labour Board has successfully been moved, to de-recognize an already recognized Trade Union. Our law is largely pro status quo, mostly expressed in such terms as the need to maintain industrial peace and harmony.

50. Offshoot Trade Unions seem not satisfied with grant or registration alone, and are in a rush to completely displace existing Trade Unions from which they sprouted, in representing Employees long represented by the existing Unions. They desire to have a monopoly of representation, which they were running away from, when they broke away from existing Trade Unions. Rather than look for unrepresented Employees from the industry, they choose to tempt providence, by imposing themselves on Employers who are already in engagement with existing Trade Unions, particularly those Employers they perceive to be fertile cash cows.

51. As stated by the Claimant's witness when he was asked on cross-examination whether certain Employees were still in employment, the best placed persons to answer the question on their union membership, and employment status, would be the Employees themselves. Employees are normally the best witnesses in recognition disputes, yet, in most disputes, Parties do not endeavour to bring them before the Court, preferring to bombard the Court instead, with faded, moth-eaten, and of-times inconclusive check-off lists.

52. In this dispute, even when it was claimed that there are Employees who are members of both Unions, not a single Employee was presented before the Court, to conclusively say, where his or her loyalty lies. The Court was presented with various figures on membership of either Union, which were as changeful as the sea, figures that were constantly intractable, and which could never be reconciled, to found a claim for recognition.

53. In *Scientific Research International Technical and Allied Workers Union v Kenya Agricultural Research Institute and Another* [[2013] eKLR, the Court acknowledged that RAs are not cast in bronze. They

are not irreversible. The right to associate is twinned with the right to dissociate. The right to recognize is twinned with the right to de-recognize. Labour is as volatile, as it is dynamic. Employees do not remain in the same place, be it the in Trade Union or Employment place. They move in, and out frequently. This is the beauty of freedom of association.

54. This Court strongly held the view, in its earlier decisions, that the best placed persons to resolve recognition disputes between Trade Unions, claiming the right to represent them, are the Employees themselves. The Court would call for balloting by the Employees, in exercise of their democratic right, and freedom of association, where the Employees themselves would express which of the competing Trade Unions they belonged to. The Labour Office which was seized of conciliation, would have reached a more satisfactory and sustainable outcome, if a Labour Officer had conducted balloting at the Respondent, where the Employees themselves, not payrolls and check-off lists, would speak on their union membership. Issues such as dual membership would have been resolved at the ballot. Unfortunately, the Conciliator relied on competing documents forwarded by the Parties, to conclude, without giving specific figures, that the Respondent must recognize the Claimant Union.

55. The Court of Appeal in *Mombasa Maize Millers v Bakery, Confectionery, Food Manufacturing and Allied Workers Union and Another* [2018] eKLR, overturned the position of this Court, arguing that there was no need for Employees to ballot. It held that there is always a presumption that an existing RA is valid, and that presumption can only be rebutted by cogent evidence from the Employees such as their resignation notices. It is noted that even resignation notices are frequently contested. The best approach would be a shop floor balloting. There is presently a high standard of proof required, in establishing that a recognized Trade Union has ceased to have the mandate to continue enjoying the sole collective bargaining agency rights.

56. The Claimant Union herein has not rebutted the presumption of validity of the existing RA between the Respondent and the Interested Party. As observed elsewhere, the Claimant does not even seek the Court to rule on the validity of the subsisting RA, simply asking for recognition and the compelling of the Respondent, to commence CBA negotiations with the Claimant.

57. The Court is satisfied that the Respondent and the Interested Party have a valid RA, and have executed binding CBAs. There is a current CBA defining the terms and conditions of service, of all the Unionisable Employees of the Respondent. To grant the orders sought by the Claimant, would create industrial incoherence.

58. The Claimant Union should be satisfied with the offer by the Respondent to continue deducting and remitting trade union dues, from the salaries of Employees who acknowledge membership of the Claimant Union. The Employees cannot be prevented from dual membership, or the constant shifting of loyalties. The bottom line however, is that there can only be one recognized Trade Union, one RA and undivided collective bargaining agency rights, at a time.

59. The Court cannot grant the orders for recognition, and collective bargaining sought by the Claimant.

It Is Ordered : -

a. The Claim is declined.

b. Costs to the Respondent and the Interested Party, to be borne by the Claimant.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE