Bakery, Confectionery, Food Manufacturing and Allied Workers Union v Tropical Heat Limited (Cause E916 of 2022) [2024] KEELRC 1983 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1983 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E916 OF 2022

JK GAKERI, J

JULY 30, 2024

BETWEEN

BAKERY, CONFECTIONERY, FOOD MANUFACTURING AND ALLIED WORKERS UNION ..... CLAIMANT

AND

TROPICAL HEAT LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant union commenced the instant suit by a Memorandum of Claim filed on 8th November, 2022 but dated 7th December, 2022.

2. It is the Claimant's case that it signed a Recognition Agreement with the Respondent on 13th September, 2016 and negotiated several Collective Agreements on terms and conditions of employment of all unionisable employees of the Respondent.

3. That on 27th May, 2019, the Claimant served on the Respondent a notice of intention to amend the Collective Agreement for the period 1st October, 2017 to 30th September, 2019 and particulars of the proposed amendments were forwarded to the Respondent.

4. That deliberations commenced on 9th August, 2019 and parties agreed on a number of clauses but the Respondent refused to sign the minutes of the meeting held on 28th August, 2019 and before the 3rd meeting, the union received the Respondent's application to the National Labour Board (NLB) to revoke the Recognition Agreement, a request the NLB declined and recommended that outstanding issues be subjected to conciliation.

5. The Claimant avers that the Respondent orchestrated a scheme to persuade members of the Claimant union to quit its membership in contravention of the *ILO Convention* 154 and Article 41 of the *Constitution* of Kenya, 2010.

6. That as a consequence, the Claimant reported a dispute to the Cabinet Secretary, Ministry of Labour and Social Protection, a conciliator was appointed and a conciliation report dated 15th August, 2022 was filed.

7. The Claimant prays for;-

    i. An order compelling the Respondent to conclude negotiations to review and put in place a new Collective Bargaining Agreement to safeguard the welfare of the employees at the enterprise.

    ii. In the alternative, the Claimant be ordered to execute the proposed Collective Bargaining Agreement together with the amendments.

    iii. Permanent order restraining and restricting the Respondent, its servants, agents, and/or employees from victimizing, intimidating, coercing, harassing, terminating, dismissing or disciplining its employees on account of their membership to the Claimant's union.,

    iv. A declaration that the Respondent's action infringe on the Claimant's union constitutional right to fair labour relations and labour practices.

    v. Costs of this suit to the higher scale.

Respondent's Case

8. By a response to the Claim and Counter-claim, the Respondent avers that at the time of entering into a Recognition Agreement, the Claimant union represented a simple majority of the Respondent's unionisable employees but since then, most of the employees had either resigned from the Claimant union or left the Respondent's employment and the Claimant had no member in the Respondent's employment.

9. It admits having concluded the CBA for the period 1st October, 2017 to 31st September, 2019 and the parties negotiated in an endeavour to conclude a fresh CBA but the negotiations fell through and the Claimant union did not have the requisite threshold of members.

10. The Respondent equally admits that it lodged an application with the NLB for revocation of the Recognition Agreement but was unsuccessful.

11. That the NLB recommended that outstanding issues be dealt with by conciliation but did not resolve the question of the Claimant's members.

12. That the Recognition Agreement concluded on 13th September, 2016 became unlawful, null and void and unenforceable.

13. According to the Respondent, its employees voluntarily resigned in exercise of their freedom of association and left at different times and circumstances.

14. That despite negotiations, conciliation failed to settle the dispute between the parties.

15. The Respondent prays for dismissal of the Claimant's suit with costs.

16. Concerning the Counter-claim, the Respondent prays for;

    i. Declaration that the Claimant union does not represent a simple majority of the Respondent's unionisable employees.

ii. Declaration that the recognition agreement dated 13th September, 2016 is invalid, null and void and unenforceable.

iii. Permanent injunction.

iv. Any other relief that this court may deem fit and just to grant.

v. Costs of the Counter-claim.

Claimant's Evidence

17. Mr. Jackson Kisokon Ole Njoroge, confirmed on cross-examination, that he was well versed with the Industrial Relations Charter and the provisions of the Labour Relations Act on the requirement of a simple majority for purposes of a recognition agreement and collective bargaining.

18. It was his testimony that the Respondent and the Claimant union have a Recognition Agreement in force and by 13th September, 2016, the union had 50 members who were employees of the Respondent and negotiated a collective agreement for the period 1st October, 2017 to 30th September, 2019 and as of 30th September, 2019, the union had 31 members.

19. That subsequent negotiations did not yield a CBA and the Respondent sought revocation of the Recognition Agreement.

20. The witness confirmed that as of 2024, the Claimant union has no member employed by the Respondent and further confirmed that by 30th June, 2019, the deductions paid by Cheque No. 021063 related to 6 employees only and the union received the same as its dues and did not complain about it. That COTU acknowledged receipt of contributions and did not complain about it.

21. The witness admitted that the union had not presented a list of its members employed by the Respondent.

22. He also confirmed that members resigned from the union voluntarily after a salary raise by the Respondent and notified the union setting out the reasons for resignation.

23. The witness reiterated that as at the date of the hearing, the Claimant had no member under the Respondent's employment.

24. The witness confirmed that he was aware of a case by one Mr. Baraza on wrongful dismissal but had no evidence to show that the Respondent was dissuading employees from joining the union and would recruit members after the CBA is negotiated.

25. On re-examination, the witness testified that the Recognition Agreement between the parties was still in place and the union could thus negotiate a CBA.

Respondent's Evidence

26. Mr. Claudio O. Otieno confirmed that the Respondent had been notified of the union's intention to negotiate a new CBA and the Recognition Agreement was still in force by the time the suit was filed.

27. That he authored the letter dated 20th July, 2022 but had no Evidence to show that it was served.

28. The witness confirmed that the Respondent did not take part in the Conciliation process or object in writing.

29. That the union's request to negotiate a CBA made in May 2019 was honoured and meetings took place.

30. The witness testified that he did not know why employees resigned from the union though the Respondent forwarded scanned copies of the letters to the union.

31. That the union had a membership of 6 employees only as of August 2019 and it did not raise any issue when the sum of Kshs.2,094/= was forwarded by cheque dated 4th June, 2019.

32. On re-examination, RWI testified that he joined the Respondent on 14th August, 2017 and had engaged the union on the CBA but the union's membership was below the threshold, an issue the Conciliator did not resolve and the union had no member working for the Respondent company.

33. That the list on pages 60 – 61 of the Respondent's Bundle of Document contained unionisable employees of the Respondent 109.

34. That the Claimant union had no members to justify negotiation of a CBA and no list of members had been provided.

35. RWI testified that the Respondent has refused to negotiate a CBA with the Claimant union as it had no members in the Respondent's employment.

36. Counsel for the Claimant submits that as the Recognition Agreement between the parties is still operational and the parties could still engage as recommended by the Conciliator in August 2022.

37. Reliance was made on the sentiments of the court in *Micato Safaris v Kenya Game Hunting & Safaris Workers Union* (2017) eKLR to urge that Respondent was still bound by the provisions of Section 57 of the Labour Relations Act, 2007.

38. Finally, counsel relied on the decisions in *Kenya Petroleum Oil Workers Union v Petro Oil Kenya Ltd* (2023) KEELRC 2558 and *Kenya Tertiary and Schools Workers Union (KETASWU) v Heltz Institute of Advanced Driving* (2020) eKLR to urge that since the resignation letters are worded in the same language, there was some malice from the employer to have the employees leave the union and the Claimant union was entitled to negotiate and review another CBA with the Respondent.

39. As regards the Counter-claim, counsel submits that as the NLB declined to revoke the Recognition Agreement and the Respondent did not challenge the decision in court and thus had no claim for revocation of the Recognition Agreement.

40. Counsel wondered how 9 employees of the Respondent resigned from the union yet the union had only 6 members as of August 2019.

41. That the union has not been denied access to the Respondent's premises to recruit members.

42. The union submits that the court should order secret balloting guided by the CPMU for unionisable employees to cast their votes having cited the sentiments of the court in *Kenya Export, Floriculture, Horticulture and Allied Workers v Kenya Plantation & Agricultural Workers Union & 2 others* (2021) eKLR where unions were competing for members.

43. Counsel urged that court to dismiss the Counter-claim with costs.

Respondent's Submissions

44. As to whether the Counter-claim is merited, counsel submits that the Recognition Agreement is untenable as the Claimant union does not have requisite number of members, in fact, none working for the Respondent as CWI confirmed.

45. Reliance is made on the sentiments of the court in *Kenya Export, Floriculture, Horticulture and Allied Workers v Kenya Plantation & Agricultural Workers Union & 2 others* (*Supra*) on the reversibility of Recognition Agreements, to urge that the employer has the right to de-recognize the union for want of the requisite threshold and cited the provisions of Section 54(1) of the *Labour Relations Act* and the sentiments of the court in Bakery, *Confectionery, Food Manufacturing and Allied Workers Union (Kenya) V Protor & Allan (E.A) Ltd* (2015) eKLR on the import of Section 54(1) of the *Act*.

46. Counsel urges that as the Claimant union had lost the requisite threshold of unionisable employees, and could not purport to represent and bargain for the employees and the Counter-claim has merit.

47. On the reliefs sought, counsel submits that the Claimant lacks the requisite basis for grant of the orders sought.

48. Reliance was made on the decisions in *Kenya Shoe and Leather Workers Union v Crown Industries Ltd & another* (2017) eKLR and *Kenya Chemical & Allied Workers Union v Strategic Industries Ltd* on recognition agreements.

Analysis and Determination

49. It is common ground that the Claimant union and the Respondent have had a long standing relationship and have negotiated and concluded a CBA on terms and conditions of employees having executed a Recognition Agreement on 13th September, 2016.

50. It is also not in dispute that the parties negotiated a CBA for the period 1st October, 2017 to 30th September, 2019 and all appeared rosy until May 2019 when the Claimant union made proposals to amend the CBA as parties met only twice and before the 3rd meeting, the Respondent had already written to the NLB to revoke the Recognition Agreement between the parties for want of the requisite threshold of members.

51. As adverted to elsewhere in this judgment, the NLB declined and referred the matter to conciliation but no solution was found and no CBA was concluded, which explains the instant suit.

52. It is equally not in contest that as of now, the Claimant has no membership in the Respondent's employment.

53. The contestation between the parties is on the Recognition Agreement and CBA negotiations which are intertwined.

54. The issues that commend themselves for determination are;

    i. Whether the Claimant union and the Respondent had a valid Recognition Agreement on 8th November, 2022 when the instant suit was filed.

    ii. Whether the Claimant union is entitled to the reliefs sought.

    iii. Whether the Respondent is entitled to the Counter-claim.

55. As regards the 1st issue, counsel for the parties have adopted contrasting positions with the Claimant urging that the Recognition Agreement was valid and remains valid.

56. Counsel for the Respondent on the other hand urges that the recognition agreement is untenable as the Claimant union does not have the requisite number of members among the unionisable employees of the Respondent.

57. On cross-examination, CWI confirmed that the union had 50 members as at 13th September, 2016 and by 30th September, 2019, the number had reduced to 31.

58. Puzzlingly, CWI had no shred of evidence to corroborate any of the figures cited.

59. Strangely, however, a cheque drawn by the Respondent to the Claimant union in payment of union dues dated 4th June, 2019 reveals that the Claimant union had only 6 members working for the Respondent.

60. COTU's dues were also paid by Cheque No. 021364 of even date, Kshs.900.00 which the organization acknowledged and issued a receipt of even date.

61. As CWI confimred on cross-examination, neither the Claimant union nor COTU contested the amount on the basis of membership or on any other basis.

62. Evidently, CWI's number of union members appear exaggerated and are unsupported by evidence.

63. Finally, CWI confirmed that the union had zero (0) members working for the Respondent.

64. Section 54 of the *Labour Relations Act* provides that:-

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

65. Clearly, Section 54(1) of the *Act* is couched in mandatory tone and is conditional upon the union attaining the requisite threshold of membership.

66. Once the threshold is attained, the employer has no option but to recognize the union for purposes of collective bargaining.

67. It is discernible that the sole purpose of recognition under Section 54(1) of the *Labour Relations Act* is collective bargaining.

68. The foregoing is fortified by the provisions of Section 57(1) of the Labour Relations Act which provides that:

    1. An employer, group of employers or an employer's organization that has recognized a trade union in accordance with the provisions of this part shall conclude a collective agreement with the recognized trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.

69. Section 54(3) of the Act requires the employer and the trade union recognized to conclude a written recognition agreement setting out the terms upon which the employer or employer's organization recognize the trade union.

70. Counsel for the parties relied upon persuasive authorities in support of their respective cases.

71. While the decision in *Micato Safaris v Kenya Game Hunting & Safari Workers Union* (Supra) appear to suggest that the fact that the number of employees has fallen below a simple majority does not automatically render the recognition agreement inoperational, as reinforced by the recent decision in K*enya Petroleum Oil Workers Union v Petro Oil Kenya Ltd* (*Supra*), the decision in *Kenya Export, Floriculture, Horticulture & Allied Workers v Kenya Plantation & Agricultural Workers Union & 2 others* (*Supra*) and *Kenya Electrical Traders & Allied Workers Union v Kenya Electricity Transmissions Company Ltd* (2021) eKLR would appear to suggest otherwise.

72. However, the decision in *Aviation & Allied Workers Union v Air Kenya Express Ltd & another* (2013) eKLR is categorical that;

> ". . . a trade union may loose an accrued recognition if its members drop below the simple majority threshold".

73. The court has not come across a decision for the proposition that a recognition agreement looses validity when the number of employees in the union's membership falls below the requisite threshold of simple majority.

74. Under Section 54(5) of the *Labour Relations Act*, 2007;

> An employer, group of employers or employer's association may apply to the board to terminate or revoke a recognition agreement.

75. Since the recognition agreement is an agreement between the parties, it is arguable that the parties thereto are free to terminate the relationship if they are of the opinion that it is proper to do so and neither of the parties can terminate the relationship unilaterally without compliance with the prescribed procedure.

76. Section 54(5) of the *Labour Relations Act* is clear on how a recognition agreement may be brought to an end failing which conciliation process kicks in and if no solution is found, the court becomes the last option.

77. In this case, by letter dated 5th September, 2019, the Respondent intimated to the NLB its desire to have the recognition agreement with the Claimant union terminated or revoked on the ground that Claimant union had only (1) member out of 109 unionisable employees and did not have a simple majority.

78. By letter dated 16th December, 2021, the Ministry of Labour communicated the decision of the NLB that it had declined to revoke the agreement.

79. Regrettably, the Ministry's letter is reticent on why the National Labour Board declined the application.

80. Could it be because there was one employee who was a member of the union?

81. The Ministry referred the dispute to conciliation.

82. Strangely, the Respondent reported the dispute to the Cabinet Secretary vide letter dated 2nd March, 2022, more than $2^{1}/2$ years later.

83. By letter dated 27th June, 2022, the Chief Industrial Relations Officer asked the Respondent to comply with the provisions of the Labour Relations Act, 2007.

84. According to the Chief Industrial Relations Officer, only the trade union can refer a dispute under Section 54(5) for conciliation and the union had no complaint on the recognition agreement and could not invoke Section 54(6) of the *Act*.

85. The implication of the foregoing is that the Respondent ought to have filed a suit before this court for determination of its complaint, a step it did not take and the Claimant union seized the opportunity.

86. Contrary to the Respondent counsel's submissions that the Respondent has the right to de-recognize the Claimant union, it cannot as a subsisting recognition agreement can only be terminated by the parties thereto or as provided by law. A unilateral de-recognition would amount to a breach of contract.

87. The upshot of the foregoing is that the recognition agreement between the Claimant union and the Respondent was valid as at the commencement of the instant suit as the decision of the NLB to decline the termination or revocation was not challenged or the issue resolved differently.

88. Closely related to the foregoing is the question whether the recognition agreement dated 13th September, 2016 is a sufficient basis for the Claimant union to negotiate and conclude a CBA with the Respondent as it opines, bearing in mind that the Claimant union has no member working for the Respondent.

89. A cursory examination of Section 54(1) of the *Labour Relations Act* creates the impression that for a trade union to be recognized for purposes of collective bargaining, it must represent a simple majority of unionisable employees and although the Claimant union had the requisite threshold of members when it was recognized by the employee, currently it has none and it is unclear on what basis it shall be negotiating CBA.

90. Although the law does not appear to insist that the number of members must be maintained, perhaps owing to unforeseen occurrences, the provision does not envision a situation where the trade union has no members which would render the requirement of a recognition agreement a temporary requirement.

91. In the court's view, and having regard to the circumstances of this case notwithstanding the foregoing finding that the recognition agreement between the parties subsists, it cannot be relied upon for purposes of collective bargaining as the Respondent has no relationship with the Claimant but for the recognition agreement itself as it lacks a foundation, namely union membership of employees of the Respondent.

92. In the court's view, the Claimant union has no basis on which it can negotiate a CBA with the Respondent employer.

Appropriate relief

i. Order compelling the Respondent to conclude negotiations to review and put in place a new CBA

93. The Claimant desires the court to order the employer to conclude negotiations and put in place a new CBA.

94. Section 2 of the *Labour Institutions Act*, 2007 defines a Collective Agreement as;

> " a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organization of employers".

95. Section 2 of *Employment Act*, 2007 defines Collective Agreement as;

> " a registered agreement concerning any terms and conditions of employment made in writing between a trade union and an employer, group of employers or employers' organization".

96. The foregoing definitions leave no doubt that a Collective Agreement is a consensually concluded agreement between the parties thereto and a court of law has no role to play in its conclusion.

97. Parties negotiate CBAs willingly, not by compulsion of court orders and if a court compelled a trade union and an employer or group of employers and others to conclude a CBA, the outcome would not be an agreement but a court mandated document.

98. There is sufficient judicial authority for the proposition that courts of law seldom interfere with CBA negotiations even in cases of deadlock, reconciliation is still the best way out.

99. Needless to emphasize, CBA negotiations is an arena the courts do not fit in and ought not be involved.

100. Having found elsewhere in this judgment that the Claimant lacks a basis to negotiate a CBA with the Respondent and having further held that it is not the court's mandate to compel parties to negotiate CBAs, it is decipherable that the Order sought by the Claimant union is unavailable and declined.

ii. In the alternative, the Claimant be ordered to execute the proposed CBA together with amendments

101. The alternative Order sought by the Claimant does not fundamentally differ from compelling the Respondent to negotiate and conclude a CBA.

102. It requires no belabouring that the Claimant cannot conclude a CBA unilaterally, nor can this court order that a one party document is an agreement, moreso, a CBA.

103. It is not legally possible to have a one party contract or agreement.

104. The order sought is declined.

iii. Permanent injunction to restrain the Respondent from victimizing, intimidating, coercing, harassing, terminating, disciplining or dismissing employees on account of union membership

105. Significantly, the Claimant adduced no scintilla of evidence to show that the Respondent committed or engaged in any of the acts or commissions which sought to be restrained.

106. Indeed, CWI confirmed, on cross-examination that he had no evidence that the Respondent company dissuaded employees from joining the union.

107. Secondly, granted that the Claimant has no members working for Respondent, who will Order sought serve?

108. In other words, what is the usefulness of the Order?

109. In the court's view, the Order sought lacks practicability and is declined.

iv. A declaration that the Respondent's actions infringe on the Claimant Union's constitutional right to fair labour relations and practices

110. It is unclear to the court what actions the Respondent is being accused of and how the Claimant union rights were infringed.

111. Patently, the Respondent's application to the NLB to terminate or revoke the recognition agreement between the Claimant and the Respondent is neither an infringement of a constitutional right nor fair labour practice.

112. Similarly, withdrawal from CBA negotiations does not qualify as a violation of a constitutional right.

113. The Claimant has failed to prove entitlement to the order sought and it is accordingly declined.

114. Flowing from the foregoing, it is decipherable that the Claimant's suit against the Respondent is for dismissal and it is accordingly dismissed with no orders as to costs.

Counter-claim

i. A declaration that the Respondent to the Counter-claim does not represent a simple majority of the Claimant to the Counter-claims unionisable employees to enable recognition for purposes of collective agreement

115. The declaration sought is a factual situation admitted by the Claimant union. It requires no declaration and is declined.

ii. A declaration that the recognition agreement entered into between the Claimant to the Counter-claim and the Respondent to the Counter-claim on 13th September, 2016 is invalid, null and void and unenforceable

116. Having found that the recognition agreement between the Claimant union and the Respondent subsists and is indeed a valid agreement, the declaration sought is unavailable and it is dismissed.

iii. Permanent injunction to restrain the Claimant, agents representations, servants, employees and others from initiating, negotiating, discussing, bargaining, engaging, resolving and/or entering into any recognition agreement with the Respondent as long as the Claimant does not represent a simple majority of the Respondent's unionisable employees for recognition

117. The injunction sought is unproven and thus unavailable and it is dismissed.

118. Notably, the court has reproduced number (i) and (ii) of the Counter-claim verbatim to underline the inelegant framing of the orders sought and which would have effectively captured in very few words.

119. In the end, the Respondent's Counter-claim is dismissed in its entirety with no orders as to costs.

120. In the upshot, the Claimant's suit against the Respondent and the Respondent's Counter-claim are unmerited and are accordingly dismissed.

121. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF JULY 2024.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty

of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE