Bakery Confectionery Food Manufacturing and Allied Workers Union (K) v Brava Food Industries Limited (Cause E899 of 2022) [2023] KEELRC 854 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 854 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E899 OF 2022

L NDOLO, J

APRIL 13, 2023

BETWEEN

BAKERY CONFECTIONERY FOOD MANUFACTURING AND ALLIED WORKERS UNION (K) ..... CLAIMANT

AND

BRAVA FOOD INDUSTRIES LIMITED ..... RESPONDENT

RULING

1. The application before the Court is the Claimant's Notice of Motion dated December 2, 2022, seeking an order to restrain the Respondent from victimising, harassing, coercing, and/or terminating the employment of any of the Claimant's members for their involvement and/or participation in trade union activities.

2. The application is supported by two affidavits sworn by the Claimant's General Secretary, Danchael Mwangure and is based on the following grounds:

    a. That the Respondent has deliberately delayed the negotiations of the Collective Bargaining Agreement (CBA) from the date of the first meeting on June 29, 2021, culminating into a trade dispute lodged with the Minister for Labour and a certificate issued warranting the presentation of the CBA dispute to this Court for adjudication;

    b. That in the meantime, the Respondent, through the actions of its General Manager, Oman Salat and Production Manager, Hastings Shikuku, continues to intimidate and coerce the Claimant's members to relinquish their union membership;

    c. That the Claimant's members who have maintained their union membership have been issued with a 15-day ultimatum from November 21, 2022, to resign and/or recant their union membership or lose their employment with the Respondent;

d. That the Respondent has in the past, dismissed the Claimant's union officials under the guise of redundancy under similar circumstances, and the Claimant is apprehensive that it will continue to unlawfully lose its membership within the Respondent hence the need for protective orders;

e. That the Respondent's actions are meant to defeat the ongoing unionisation process as well as the CBA negotiations in place, by obliterating any form of trade union activities within its enterprise, and unless the orders sought are granted, the Claimant's members will continue to suffer prejudice and great violation of their constitutional rights to associate with the Claimant and to participate in legitimate trade union activities, as protected under Article 36 as read with Article 41 of the *Constitution* of Kenya;

f. That it is necessary that an order of injunction do issue restraining the Respondent from terminating, victimising, coercing any employee or in any other manner prejudicing the Claimant's members on account of their affiliation and participation in trade union activities.

3. The Respondent's response is by way of a replying affidavit sworn by its General Manager, Osman Abdi Salat on February 1, 2023.

4. Salat depones that the parties executed a recognition agreement dated June 23, 2020, pursuant to judgment delivered on May 20, 2020 in Cause No 431 of 2019: Bakery Confectionery Food Manufacturing & Allied Workers Union (K) v Brava Food Industries Limited.

5. He further depones that at the time of delivery of the judgment in Cause No 431 of 2019, the Claimant had lost simple majority of the unionisable employees within the Respondent's workforce, thus necessitating the Respondent to take the necessary steps to revoke the recognition agreement. He points out that the matter of termination of the recognition agreement was pending before the National Labour Board.

6. Salat adds that none of the Respondent's employees is currently a member of the Claimant Union.

7. He states that on December 22, 2022, the Respondent reorganised its organisational structure, which affected a number of employees, including some members of the Union, who were promoted on account of their excellent performance and as such, the Claimant does not have a single member within the Respondent's workforce.

8. Salat states that none of the Respondent's employees had been victimised and/or intimidated on account of their union membership.

9. The order sought by the Claimant in its application is in the nature of an interlocutory injunction and the conditions under which such an order may be granted were set in the tested decision in *Giella v Cassman Brown Co Ltd [1973] EA 358* as follows:

a. That the applicant has established a prima facie case with a probability of success;

b. That if the orders sought are not granted, the applicant stands to suffer irreparable harm, which cannot be compensated by an award of damages; and

c. If the court is in doubt, it will determine the application on the balance of convenience.

10. The first question to ask is whether the Claimant has set out a prima facie case. In its decision in *Mrao v First American Bank Kenya Limited & 2 others [2003] KLR, 123* the Court of Appeal pronounced the following definition of a prima facie case:

> " A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

11. In the more recent decision in *Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR* the Appellate Court stated the following:

> " ...We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case...The standard of proof of that prima facie case is on a balance of or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

12. The Claimant accuses the Respondent of engaging in unfair labour practices with the aim of locking out union activities within its enterprise. In particular, the Claimant cites the Respondent for diluting union membership through unwarranted termination of employment and cosmetic promotions. These are serious allegations which call for inquiry by the Court.

13. Significantly, the Respondent does not deny having promoted the Claimant's members and it is therefore not unreasonable for the Claimant to conclude that it is being systematically locked out of the Respondent's enterprise.

14. Further, it is on record that soon after execution of the Recognition Agreement, the Respondent made an application to the National Labour Board for revocation of the Recognition Agreement, on the ground that the Claimant had lost its simple majority strength for collective bargaining.

15. While it is true that a trade union which has acquired recognition must maintain the simple majority status to earn its place on the collective bargaining table, it is a rule of thumb that parties to a recognition agreement must act in good faith.

16. The Respondent has been accused of breaching that good faith and its hurried actions to promote the Claimant's members to managerial positions has not been explained.

17. On the whole and without going into the merits of the main claim at this interlocutory stage, I find and hold that the Claimant has made out a prima facie case against the Respondent.

18. Regarding the question whether the Claimant stands to suffer irreparable harm if the order sought is not granted, my finding is that the Claimant has demonstrated a real threat of an onslaught against trade union presence in the Respondent's enterprise. As a result, I agree with the Claimant that it will suffer irreparable harm if the Respondent is not stopped.

19. The third segment in the conditions for grant of interlocutory injunctive relief has to do with balance of convenience, which was unpacked in *Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR* as follows:

> " The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendant if an injunction is granted but the suit is ultimately dismissed."

20. In the circumstances of this case and in light of the foregoing findings, I find and hold that the balance of convenience tilts in favour of the Claimant.

21. In the result, I issue an order of injunction, restraining the Respondent from engaging in any activity that may reasonably be construed as victimisation, harassment or coercion of any of the Claimant's members on account of their involvement and/or participation in trade union activities.

22. The costs of the application will be in the cause.

23. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF APRIL 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Amalemba for the Claimant

Mr. Aluku for the Respondent