



**Kenya Union of Commercial Food and Allied Workers v Worldwide Movers (K) Limited (Cause E539 of 2022) [2023] KEELRC 1293 (KLR) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1293 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E539 OF 2022  
NJ ABUODHA, J  
MAY 19, 2023**

**BETWEEN**  
**KENYA UNION OF COMMERCIAL FOOD AND ALLIED  
WORKERS ..... CLAIMANT**  
**AND**  
**WORLDWIDE MOVERS (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant brought this claim on August 1, 2022 through a notice of motion and statement of claim.
2. The Respondent filed their response October 27, 2022. On March 28, 2023 the Hon Court directed that the matter be canvassed by way of written submissions.
3. The issue in this dispute seems to be over the recognition of the Claimant union by the Respondent.
4. According to the Claimant, they sought to be recognized by the Respondent in May, 2021 after recruiting 12 out of 15 unionisable employees of the Respondent thus attaining the required simple majority threshold under Section 54 of the *Labour Relations Act*.
5. The Respondent however highlighted the names of employees who they alleged were non-unionisable. These employees were Kitungulu Peter Lumunya, Felix Onyango, Vitalis Mulama Omondi, Kiemu Nyamai and Silas Njeru. According to the Respondent the named employees were non-unionisable based on their titles and supervisors and that Vitalis Omondi was non-unionisable based on his title as team leader/surveyor.
6. According to the Claimant, the Industrial Relations Charter mainly distinguishes between unionisable employees and non-unionisable employees based on their roles, powers, authority conferred upon them and functions they perform in one entity. The Claimant contended that the title of a supervisor



- does not automatically include on employee in the non-unionisable cadre or exclude them from trade union representation. Further the Industrial Relations Charter does not categorize supervisors and surveyors as non-unionisable employees.
7. Mr Macharia for the Claimant stated further that looking at the documents provided by the Respondent, work and titles allocated to the said employees, no role fall within the categories in the Industrial Charter. The said employees did not have the power/authority to make any decision on behalf of the company. They could not fire, hire, suspend, promote or reward employees. They were not in charge of operations, they were not managers and did not hold any confidential position. In this regard Mr Macharia submitted the case of *Kenya Chemical And Allied Workers Union v Tata Chemical Magadi Limited* [2016] eKLR where it was held that the onus is on the employer to demonstrate that the employees who have been recruited by the union are excluded by the fact of their positions from joining the union in terms of their employment contracts and the responsibilities assigned to the said employees in their particular contract of employment.
  8. Mr Macharia contended that labeling employees with names and titles does not automatically qualify team as non-unionisable or management staff. The Court has the responsibility to closely examine and interrogate the roles and powers conferred upon such an employee to avoid a situation where employers give titles to employees to circumvent trade union representation.
  9. Regarding Silas Njeru Kiringa, Mr Macharia submitted that the said employee joined the Claimant union on March 10, 2022 and acknowledged the same by signing check off forms. By that time Silas was an employee of the Respondent. Silas was transferred from the Respondent's employment to Priority Logistics through a letter dated July 18, 2022 and the transfer took effect from September 1, 2022. In this regard Mr Macharia sought reliance of the case of *Civicon Limited v Amalgamated Union of Kenya Metal Workers* [2015] eKLR where it was held that the trial Court is only concerned with the numbers as at the time the claim was made.
  10. The Claimant conceded that Kimeu Nyamai ought not be included in the list of members because by the time the Claimant sought to be recognize, he had retired from employment. Thus the number of members that the Claimant had stood at 11 members out of 15 unionisable employees which translated to 73.3% membership which was above the simple majority threshold required by Section 54 of *Labour Relations Act*.
  11. The Respondent on the other hand submitted that the check off forms allegedly signed by 13 of the Respondent's employees did not attain the simple majority since five individuals in the list were not eligible to join the Union as expressed in the witness statement of Neena. According to Mr Omondi for the Respondent, out of a unionisable workforce of 15, only seven had signed the checkoff forms giving a percentage of 46%. That the trade union must recruit a simple majority of the employer's unionisable workforce before it can be accorded recognition.
  12. On the issue whether the Claimant union can recruit management staff, it was submitted that clause II, appendix 6 of the Industrial Relations Charter excluded persons in charge of operations in an area and their deputies from joining trade unions.
  13. The three employees being in management would pose huge conflict of interferes in the event they were to join the union and engage in negotiations that the same time.
  14. Recognition of a trade union is mandatory under Section 54 of the *Labour Relations Act*. The only requirement is that the union concerned recruits the simple majority of unionisable employees in an organization.



15. The Claimant herein has submitted that it recruited 11 out of 15 unionisable employees of the Respondent constituting 73.3% membership.
16. The Respondent on the other hand contends that three out of the alleged eleven recruited by the Claimant were management employees and that they were excluded by clause 11 appendix C of the Industrial Charter which excludes from joining the union, employees in management. The Claimant has however refuted this allegation stating that the titles conferred on the three are unknown to the Industrial Charter and further the three had no power to hire, fire, warn or promote staff. They were further never in charge of their alleged areas of operation.
17. As was stated in the case of *Kenya Chemical and Allied Workers Union v Tata Chemical* the burden of proof was on the employer to demonstrate that the employees who have been recruited by the union are excluded by virtue of the positions in the organization to join the union.
18. The Respondent relied on the sole witness statement of one Neena. This, in the Court's view did not adequately discharge this evidentiary burden. The Respondent offered no explanation why the three alleged to be in management did not record statements to vouch for the allegations that they were management staff. Perhaps if they did record and file statements, the allegation that they were management staff would have been not true.
19. The Court in conclusion finds and holds that the Claimant Union has proved its case against the Respondent and hereby orders that the Respondent to recognize the Claimant union and both parties enter into recognition agreement within 30 days of this judgment and thereafter the parties do embark on collective bargaining within 60 days of the signing of the recognition agreement.
20. Each party shall bear their own costs of the suit.
21. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF MAY 2023**

**ABUODHA J. N.**

**JUDGE**

**In the presence of:-**

**Muunda for the Claimant**

**Omondi for the Respondent**

