



Kenya Shipping, Clearing, Freight Logistics and Warehouses Workers Union v Bollore Transport and Logistics (K) Ltd; Kenya Aviation Workers Union (Interested Party) (Cause 229 of 2023) [2023] KEELRC 1790 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1790 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

CAUSE 229 OF 2023

B ONGAYA, J

JULY 24, 2023

BETWEEN

KENYA SHIPPING, CLEARING, FREIGHT LOGISTICS AND WAREHOUSES WORKERS UNION CLAIMANT

AND

BOLLORE TRANSPORT AND LOGISTICS (K) LTD RESPONDENT

AND

KENYA AVIATION WORKERS UNION INTERESTED PARTY

RULING

1. The applicant union filed the application by the notice of motion dated March 15, 2023 signed by Samson O Ongera, Organizing Secretary of the claimant. The application was under section 3, 12 of the *Employment and Labour Relations Court Act*, 2011, Sections 4,54(1)(2)&(3), 73,74 of *Labour Relations Act*, 2007, Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, Articles 36, 41& 159(2) (c) of the Kenya *Constitution* and all other enabling provisions of laws.
2. The applicant prayed for orders as follows:
 - a. (spent).
 - b. That pending the inter-parties hearing and determination of the application or claim and further orders, a temporary order of injunction be issued to restrain respondent whether jointly or severally and or by itself, its officers, agents, servants or any person under their instructions in any manner to attempt to negotiate or and enter into negotiations of the collective bargain agreement with any other trade union.



- c. That pending the inter-parties and determination of the application or claim or further orders, a temporary order of injunction be, and is hereby issued to restrain the respondent whether jointly or severally or by itself, its officers, agents, servants or any other person under their instruction from interfering with the claimant's membership as at January 1, 2022.
 - d. That pending the inter-parties and determination of this application or claim or further orders, a temporary order of injunction be, and is hereby issued to restrain the respondent whether jointly or severally and or by itself, its officers, agents, servants or any person under their instructions from taking side in any of two rival trade unions either by asking our members to resign and re-join the rival trade union as it happened in previous year 2018.
 - e. That after the hearing of the claimant's application, an order be issued and is hereby issued, directing respondents to revoke the existing recognition agreement and sign recognition agreement between the applicant union respondents.
 - f. Any other order the Honourable Court may deem fit to grant for the ends of justice to be met.
 - g. Costs be provided for.
3. The application was based on the affidavit of Samson O Ongera and upon the following grounds:
- a. The claimant (applicant) is a trade union registered pursuant to *Labour Relations Act*, 2007. The claimant is a proper and relevant union with capacity to represent unionisable employees engaged by the respondent in terms of its registered constitution.
 - b. The applicant union has lawfully and successfully recruited majority of unionisable employees engaged by respondent into its membership pool to the extent that it is eligible for recognition by respondent pursuant to section 54(1)(2)(3) of *Labour Relations Act*, 2007.
 - c. All forms (check-offs) duly signed were forwarded to respondent for deduction of union dues pursuant to section 48 of *Labour Relations Act*, 2007. Indeed, the respondent complied accordingly, to date, there is no dispute over deduction of union dues.
 - d. As at December 2021, the applicant had recruited 111 out of 197 of unionisable employees engaged by the respondent and attained the numbers required by section 54(1) of *Labour Relations Act*, 2007, for grant of recognition.
 - e. Vide letter dated December 3, 2021, the applicant union forwarded a draft recognition. That action triggered the respondent to respondent vide letter dated December 21, 2021.
 - f. When it became apparent that the respondent was not ready or willing to recognize the applicant union, the applicant reported a trade dispute to Cabinet Secretary for labour and Social Protection vide a letter dated January 24, 2022. The Cabinet Secretary accepted the reported trade dispute and appointed a conciliator. The applicant union submitted its submissions to the conciliator.
 - g. When the respondent realized that claimant union has reported a trade dispute, it commenced joint meetings with the union over the signing of a recognition agreement. The process did not materialize as the rival trade union moved to court and frustrated the processes aimed at recognizing the claimant union.
 - h. In applying to sign the recognition agreement with the respondent, the applicant union strictly followed the due process provided by law and in terms of the provisions of section 54(1)(2) & (3) of the Act.



- i. The applicant is apprehensive that respondent is not in any way ready or willing to respect worker's rights and decisions to the extent that it has refused to recognize a union with majority in representation contrary to the express law under section 54(1) of the Act.
 - j. The aspect of recognition of a trade union is both statutory and factual. The question of representation and membership in a bargain unit is a matter of evidence. The respondent must terminate the existing recognition agreement (with the interested party) and recognize the applicant since it is the union with majority in representation within the respondent's bargain unit.
 - k. From the foregoing, the matter is so urgent to the extent that if the same is not heard and orders sought granted, then, the applicant union and its members will not benefit from the fruits of effective and real representation as enshrined in Article 36 and 41 of the constitution.
 - l. The claimant's instant application is of great significance to the advancement of rule of law, fair and sound labour practice, constitutional principles and values of democracy and it is imperative that remedies or orders sought be granted.
 - m. The claimant (applicant) union has moved the Honourable Court in real time and without undue delay. Unless the Honourable Court urgently intervenes and grants remedies and orders sought, then the integrity of the Constitution, the rule of law, and, effective representation shall remain negated and challenged.
 - n. If this honourable court does not grant remedies and orders sought and suspend any purported CBA negotiations and signing which might be happening between the respondents and another union trading in the name of Kenya Aviation Workers Union, then, an illegality will be committed, as a minority union will remain recognized in a bargain unit, as such, the principles of representative authority, employees' fundamental rights to effective representation shall remain compromised, defeated and seriously infringed - whereas, respondent shall have no prejudice to suffer or damage at all.
 - o. The claimant has presented a "prima facie" case with very high chances of success whereby the balance of convenience is to grant the orders as prayed. If the orders in the application are not granted, it would be to the prejudice of the claimant as the respondent shall not suffer any irreparable harm.
 - p. It is for the interest of fair labour practices, natural justice and equity and conscience that the court allows this application in its entirety.
4. The respondent opposed the application by filing the replying affidavit of Mary Chemas, the Human Resources Manager of the Respondent drawn by Mulanya & Maondo Advocates. The affidavit states that the gist of the application before Court is that the respondent has declined to recognize the applicant which claims to have achieved the simple majority of the unionisable members of the respondent's work force. On that basis the applicant seeks to have the existing recognition agreement revoked and for the court to compel the signing of an agreement with the applicant.
5. By consent of the parties Kenya Aviation Workers Union was enjoined in the suit as an interested party. The Kenya Aviation Workers Union filed the replying affidavit by Moss K. Ndiema, the Secretary General of the interested party sworn on June 23, 2023 as drawn by Litoro & Omwebu Advocates. The interested party stated and urged as follows:
- a. The interested party is a duly registered union to represent employees in the sector of land transport and aviation industry. It has concluded recognition and collective bargaining



agreements with many employers in the sector. At all material time during the pending of the instant suit the interested party has on January 15, 2015 signed a recognition agreement with the respondent under the trade name Ballore Africa Logistics Kenya and a collective bargaining agreement (CBA) with the respondent was signed and registered by the Court on November 12, 2018.

- b. The claimant's application dated 15.03.2023 lacks merit, is vexatious, frivolous, and an abuse of Court process. The application and the suit is res judicata because the interested party filed ELRC Cause No E253/2022 against the respondent challenging the respondents purported termination of a recognition agreement with the claimant contrary to section 54(5) of the Labour Relations Act, 2007 and prayed for orders to restrain the respondent from terminating the recognition agreement and from interfering with the respondent's trade union activities contrary to law. In that suit the interested party also filed an application for interim orders dated April 21, 2022 and on April 22, 2022 the Court granted interim restraining orders. The respondent in that suit responded that the interested party had lost simple majority membership of respondent's unionisable employees. The interested party denied that allegation and further urged that only the National Labour Board could revoke a recognition agreement, and, the respondent could not conclude a recognition agreement with the claimant in the instant suit unless the prevailing recognition agreement had been revoked. The claimant applied to be enjoined as an interested party in ELRC Cause No E253/2022 and was so enjoined and filed a statement of response in that suit. It was dated August 01, 2022. the suit went to hearing, parties filed submissions and judgment was delivered on February 10, 2022 and a decree issued as exhibited. The judgment and decree must bind parties. There was no preferred appeal. The Court should not sit on appeal on its own decision. There is no new evidence like on employees' withdrawal of the membership in the interested party as such evidence ought to have been provided at the hearing of ELRC Cause No E253/2022 as it was available prior to delivery of judgment on 10.02.2023.
 - c. The claimant should not be allowed to sign a CBA with the respondent unless the prevailing recognition agreement is not revoked. The interested party has very well represented the respondent's unionisable employees.
 - d. Individual employees being members of the claimant herein also filed ELRC Cause No E045 of 2022 at Mombasa about payment of agency fees but which was struck out as being *sub-judice* ELRC Cause No E253/2022 and an abuse of court process.
 - e. The interested party and the respondent have signed a CBA registered by the Court on May 04, 2023 as RCA No 197/2023 so that prayer 1 is overtaken.
 - f. Only the National Labour Board has the jurisdiction to revoke a recognition agreement as was held by the Court of Appeal in Matco Safaris –Versus- Kenya Game Hunting & Safari Workers Union [2017] eKLR .
6. Parties filed final submissions on the application. The Court has considered all the material on record. The Court returns as follows.
 7. The main issue in the present dispute is whether the respondent should sign a recognition agreement with the claimant union in circumstances that the respondent has already signed a recognition agreement and a CBA with the interested party. As urged for the interested party, that exact issue was litigated between the three parties herein in ELRC Cause No E253/2022 and judgment delivered on February 10, 2023. The Court found that members of the interested party herein had not resigned and joined the claimant union herein so that there was no evidence that the claimant herein had legally



recruited a simple majority of the respondent's employees or that the interested party's membership had dropped below a simple majority. The Court found that there was no evidence that the respondent would then be entitled to terminate the recognition agreement between it and the interested party herein. The Court further found that it is the National Labour Board that was to terminate a recognition agreement and not an employer as the respondent had intended to proceed. That judgment was delivered on February 10, 2023 by Maureen Onyango J. Instead of appealing or seeking a review if dissatisfied, the claimant herein wrote to the respondent on February 27, 2023 demanding recognition agreement be signed by March 03, 2023. That was about 17 days from the date of the judgment. In making that demand for recognition, the claimant essentially relied upon material facts that had been before the Court or ought to have been before the Court prior to the judgment delivered on February 10, 2023 in ELRC Cause No E253/2022. Considering judgment in ELRC Cause No E253/2022, the Court returns that there exists no new cause of action between the parties who are bound by that earlier judgment. The claimant and other parties should comply with the terms of that judgment unless set aside in an appeal or review process. The instant suit is found an abuse of Court process as is liable to being struck out as had been prayed for in the interested party's application dated 22.03.2023. As urged for the interested party, the suit is trapped by the principle of *res judicata*.

8. It is alleged and submitted for the claimant that the interested party is not the sector union but such are matters that ought to have been raised in the previous suit.
9. The Court has considered the circumstances and background of the suit and each party to bear own costs.

In conclusion the suit and the application are hereby struck out with orders each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 24TH JULY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

