



Kenya Union of Commercial Food and Allied Workers v Banking Insurance and Finance Union (Kenya) & another (Cause E686 of 2022) [2023] KEELRC 2182 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2182 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E686 OF 2022
MA ONYANGO, J
SEPTEMBER 21, 2023**

BETWEEN

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS CLAIMANT

AND

**BANKING INSURANCE AND FINANCE UNION (KENYA) 1ST RESPONDENT
MWALIMU NATIONAL SAVINGS & CREDIT CO-OPERATIVE SOCIETY LIMITED 2ND RESPONDENT**

JUDGMENT

1. The Claimant is a trade union registered under the *Labour Relations Act* to represent the employees in the commercial sectors as more specifically set out in the membership clause of its Constitution.
2. The 2nd Respondent is also a trade union registered under the *Labour Relations Act* to represent employees in the banking insurance and finance sectors as set out in its constitution.
3. The 2nd Respondent is a savings and credit Cooperative Society registered under the *Cooperative Societies Act* with membership drawn from teachers within Kenya.
4. The Claimant has recognition agreement with the 2nd Respondent with whom it has negotiated several collective bargaining agreements, with the last one covering the period 1st January, 2020 to 31st December, 2021.
5. It is the Claimants case that it forwarded its proposal for renewal of the collective bargaining agreement (CBA) to the 2nd Respondent for the period 1st January, 2022 to 31st December, 2023 but the 2nd Respondent declined to meet the Claimant for the purpose of the said negotiations and further declined to send its counter proposals to the Claimant.



6. As a consequence, the Claimant reported a trade dispute on the CBA to the Minister for Labour and a Labour Officer at Nyayo House Labour Office, Mr. Boaz Musandu was appointed as conciliator.
7. It is the Claimants case that on 23rd June, 2022 it received a copy of a letter from the 1st Respondent, Banking Insurance Finance Union dated 21st June, 2022 addressed to the Cabinet Secretary, Ministry of Labour, accusing the Claimant of intermeddling and interference with the 1st Respondent's representation at Mwalimu National Sacco, the 2nd Respondent.
8. That it is by that letter that the Claimant learned that the 1st Respondent and the 2nd Respondent entered into a recognition agreement on 13th August 2021 and were in the process of negotiating a CBA when they disagreed. That the same Labour Officer, Nyayo House Mr. Boaz Musandu was appointed conciliator in the CBA dispute between the 1st and 2nd Respondents.
9. The Claimant avers that it was kept in the dark about the recognition agreement and negotiations between the 1st and 2nd Respondents
10. That on 31st August 2022 the Claimant received a letter from the 2nd Respondent addressed to the National Labour Board following up on an earlier letter for revocation of recognition agreement between the Claimant and the 2nd Respondent.
11. It is the Claimant's position that it is not aware of any of its members working with the 2nd Respondent having withdrawn from its membership as it did not receive any letters of withdrawal.
12. The Claimant avers that its constitution covers membership of employees of co-operatives and it is thus not an intruder in the sector.
13. In the Statement of Claim dated 26th September 2022 the Claimant seeks the following remedies:-
 - i. Declare that the 2nd Respondent's intention to terminate and revoke the Recognition Agreement between them and the Claimant is unlawful, null and void.
 - ii. Find that the Recognition Agreement between the Claimant and the 2nd Respondent is validly in place for purpose of Collective Bargaining.
 - iii. Find and so order that the Recognition Agreement dated 13th August, 2022 signed between the 1st & 2nd Respondents is null and void and is cancelled as if it was never recorded in the first place.
 - iv. Find that withholding the Claimants Union dues amounting to Ksh.360,500 in arrears as at the time of filing the Claim and which continue accruing to date of Judgment and until full payment to be paid from the 2nd Respondent's own funds with interest at Court rates.
14. The statement of claim was filed together with a notice of motion in which the Claimant sought the following orders-
 - i. That this Application be certified urgent and same be heard ex parte in the first instance.
 - ii. That pending hearing and determination of this Application, this Honourable Court do issue an order staying operationalization of the Recognition agreement signed between the 1st and 2nd Respondents dated 13th August, 2021.
 - iii. That pending hearing and determination of this Application, this Honourable Court do issue an order restraining the 1st and 2nd Respondents from engaging in collective bargaining on the basis of a Recognition Agreement signed by them dated 13th August, 2021.



- iv. That pending hearing and determination of this Application, this Honourable Court do issue an order directing Mr. Boaz Musundu, the conciliation in Trade Dispute ML/LD/IR/52/8/2022 between the 1st & 2nd Respondents, from facilitating any conciliation meeting between the 1st & 2nd Respondents and to stop any further action on this dispute and mark it as stood over generally.
 - v. That this Honourable Court do issue an order directing the Secretary, National Labour Board under the Ministry of Labour to engage the parties, hear their presentations, make their recommendation available to the parties and same recommendation be filed in Court within thirty days of the date of this order.
 - vi. This Honourable Court be pleased to issue any other order or direction deemed appropriate and necessary to aid the ends of justice.
 - vii. Cost of this Application be in the Cause.
15. When the parties appeared in court for the hearing of the notice of motion the court was informed that there is another suit, Cause No. 599 of 2022 relating to the CBA between the 1st and 2nd Respondents.
 16. In the said suit the 1st Respondent Banking Insurance & Finance Union sued the 2nd Respondent Mwalimu National Sacco Society Ltd over 14 clauses of the CBA that the parties failed to agree on during their negotiations. The Claimant herein Kenya Union of Commercial Food and Allied Workers (KUCFAW) applied to be joined to the said suit as an Interested Party.
 17. It has further been brought to this court's attention that there is yet another suit, Cause No. E840 of 2022 filed by the Claimant herein (KUCFAW) against the 2nd Respondent herein, Mwalimu National Sacco Society Ltd.
 18. The issue in dispute in the suit is "Review of Collective Bargaining Agreement." The Claimant cites 10 clauses in the dispute.
 19. The Respondents did not file any response to the claim in the instant suit. The 1st Respondent however filed a Notice of Preliminary Objection in which it raises the following grounds
 - a. That the court lacks jurisdiction to entertain the claim herein as the same is brought prematurely by dint of section 54 (6) and (7) of the [Labour Relations Court Act](#).
 - b. That the claim herein is frivolous, vexatious, bad in law and an abuse of court process.
 - c. That the claim herein is bad in law, brought in bad faith and should be dismissed with costs to the Respondents,
 20. The 2nd Respondent on its part filed only a Memorandum of Appearance dated 4th October, 2022. It did not file a defence.
 21. When the parties appeared before me on 2nd November, 2022 I referred the dispute to the Labour Commissioner to determine which of the two unions that is, the Claimant and 1st Respondent herein, was the appropriate union for the 2nd Respondent as this was essentially a demarcation dispute between the 2 unions. All parties were directed to file submissions on the Labour Commissioner's Report. The 2nd Respondents counsel informed the court that it did not intend to file submissions as the issue in court is between the Claimant and 1st Respondent.
 22. On 8th February, 2023 the Principal Judge directed that all the 3 suits be heard together.



23. In the Report of the Labour Commissioner dated 9th March 2023, the Labour Commissioner states that all the parties made oral and written submissions as summarised in the report.
24. After considering the submissions by the parties the Labour Commissioner framed the following issues for consideration:-
 - a. Whether the basis of representation by each of the 2 unions is consistent with the country's established system of industrial relations practice of unionisation in Kenya.
 - b. The effect and relevance of Court Order in Cause No. 75 of 1999 and Misc. Civil application No. 534 of 2002.
 - c. Whether freedom to Associate may be exercised without regard to the procedural requirements provided under the Labour Relations Act 2007.
 - d. Whether an employer can sign recognition agreements with two different unions to represent the same employees.
25. The Labour Commission concluded that the 1st Respondent lacks capacity to commence collective bargaining negotiations with the 2nd Respondent as the 2nd Respondent has a Recognition Agreement with the Claimant which has not been revoked.
26. The Claimant and 1st Respondent filed submissions on the Labour Commissioner's report.
27. I have considered the Labour Commissioners Report and the submissions filed in respect thereof.
28. There is no dispute that the constitutions of both the Claimant and the 1st Respondent allow them to represent employees in the co-operative sector.
29. the Constitution of the Claimant provides as follows in respect thereof-

“Rule No. 5: Membership Membership of the Union shall be open to all employees in the following industrial sectors industrial groups provided that such employees are above the apparent age of (18) eighteen years:-

 - a.
 - (i) ...
 - ii. ...
 - iii. ...
 - iv. Banks, Insurance and Institutions
 - v. ...
 - vi.
 - vii. ...
 - viii. Co-operative societies
 - ix. ...
 - x. ...
 - xi. ...



xii. ...

xiii. ...

b. ...

c. ...

d. ...

e. ...

30. No copy of the Constitution of the 1st Respondent was availed to the court. However, from the Report of the Labour Commissioner it is evident that the Constitution of the 1st Respondent provides for membership at Article 3A authorizing the Union to represent employees in Banking, Insurance and Financial Institutions and also Savings and Credit Cooperative Societies.
31. It is also apparent from the report that the employees of the 2nd Respondent used to be members of the Claimant, then they resigned and joined membership of the 1st Respondent then moved back to the Claimant. That they now apparently, want to go back to the 1st Respondent.
32. It is also worthy to note that before the registration of the 1st Respondent in 1986, the Claimant represented the employees in the sector now covered by the 1st Respondent. The registration of the 1st Respondent therefore introduced a second trade union in the sector hence the dispute herein in which each of the 2 unions accuse the other of interference with its members.
33. It is further worth noting that the [Labour Relations Act](#) under which trade unions are registered was enacted in 2007 before the [Constitution](#) 2010 was promulgated. the [Constitution](#) 2010 at Articles 36 and 41 provide for freedom of association and right to form, join and participate in the activities and programmes of a trade union. The [Labour Relations Act](#) has not been amended to incorporate the provisions of the [Constitution](#).
34. Although the [Labour Relations Act](#) provides for single sector trade unions at section 14(d) and (e), following the promulgation of the [Constitution](#) 2010 there has been a proliferation of trade unions such that there are now multiple trade unions registered in almost every sector, causing the kind of scramble for membership as is the case in the instant dispute.
35. This is a very undesirable situation as it causes disruption in union activities to the detriment of the employees for whose benefit trade unions exist. This case is a perfect example of how the current situation is exploited to disrupt peaceful union activities in enterprises and how employers can exploit such situations by avoiding to engage either the feuding unions.
36. The disruption herein has led to the situation where the CBA that expired on 31st December, 2021 and was due for renewal on 1st January, 2022 has not been reviewed as the two unions fight over which of them showed represent the workers of the 2nd Respondent.
37. In the instant case, it is evident that the 1st and 2nd Respondents entered into a recognition agreement when they had no capacity to do so as the recognition agreement between the Claimant and the 2nd Respondent was in force having not been either revoked or terminated, as correctly observed in the Labour Commissioner's Report.
38. It is further evident from the record that there was no resignation from membership of the Claimant by its members who are employees of the 2nd Respondent as no letters of resignation were produced by the 1st or 2nd Respondents.



39. Section 48 (6), (7) and (8) of the [Labour Relations Act](#) provides as follows in respect of resignation from union membership:
- (6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.
 - (7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.
 - (8) An employer shall forward a copy of any notice of resignation he receives to the trade union.
40. The only evidence adduced on record, is an email dated 25th August, 2021 from the Chief Shopsteward, addressed to all unionsable staff of the 2nd Respondent titled Withdrawal From KUSCFAW (sic) to BIFU". The email is reproduced below:

Fwd: Fw: Withdrawal From KUSCFAW to BIFU

Andrew Kinyua kinyaandrew111@gmail.com 25 August 2021 at 11:54

To: kuscfaw16@gmail.com

-----forwarded message-----

From George Kiroe kiroeg@mwalimunational.coop

Date: Fri, 13 Aug 2021, 12:08

Subject: FW: Withdrwal From KUSCFAW to BIFU

To: kinyaandrew111@gmail.com

From: Robert Odhiambo rodhiambo@mwalimunational.coop

Sent: Thursday, August 5, 2021 9:10am

To: unionisable staff unionsableStaff@MwalimuNationalSacco.onmicrosoft.com

Subject: Withdrwal From KUSCFAW to BIFU

Good morning Members,

I hope this finds you well,

We have noted with concern on the services we receive from KUSCFAW and bench marked with other union and we have come with a conclusion that it's high time to move our membership to a better proactive union which will deliver to us the best service to make us office bearer to give you the best.

We will forward the forms for us to fill urgently for our transfer to BIFU.

Please note that we are the best Sacco in Africa we need to be where other Sacco are in salary so that us, we enter negotiations we can compare of how the company performed and how the numeration of another Sacco is.

To give you the true picture now Harambee Sacco and Stima Sacco are the best paid and we need the same improved salary and this will only be possible with the proactive union like BIFU.

Kind regards,

Robert Omondi Odhiambo



Trust Secretary

41. The email does not constitute a withdrawal from membership by the unionisable employees as there is no evidence that any of them wrote a letter of withdrawal either addressed to the 2nd Respondent their employer, or to the Claimant.
42. There is also no evidence on record that the employees joined the membership of the 1st Respondent as no evidence was adduced as proof of such membership.
43. From the forgoing, the recognition agreement allegedly signed between the 1st and 2nd Respondents is a nullity as neither of them had capacity to enter into the same for reasons that there was already a subsisting recognition agreement between the Claimant and the 2nd Respondent, the employees did not resign from the Claimant's membership and the 1st Respondent has not proved that it had a simple majority membership as provided in Section 54 of the [Labour Relations Act](#) to give it capacity to enter into the recognition agreement.

Conclusion and orders

44. Having found that the recognition agreements entered into by the 1st and 2nd Respondents was a nullity, I make the following orders:-
 - i. That the recognition agreement between the Claimant and the 2nd Respondent is valid and substituting;
 - ii. That the recognition agreement dated 13th August 2022 between the 1st and 2nd Respondents is null and void;
 - iii. The 2nd Respondent is directed to immediately commence the deduction and remittance of union dues to the Claimant;
 - iv. Consequently, cause No. E599 of 2022 filed by the 1st Respondent herein Banking Insurance Finance Union against the 2nd Respondent Mwalimu National Sacco Society Ltd is terminated as the substratum upon which the claim is anchored is non-existent;
 - v. Cause No. E840 of 2022 between the Claimant herein and the 2nd Respondent herein shall proceed to conclusion. In view of the fact that no negotiations were held in respect of the CBA that is the subject matter of the said claim, parties are directed to meet and negotiate within the next 60 days to narrow down the issues in dispute. A date for mention of the same for the parties to report on outcome of the negotiations will be taken at the time of delivery of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 21ST DAY OF SEPTEMBER, 2023

MAUREEN ONYANGO

JUDGE

