REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1239 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

UNION OF NATIONAL RESEARCH INSTITUTES STAFF OF KENYA.....CLAIMANT

VERSUS

KENYA INDUSTRIAL PROPERTY INSTITUT..... RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the Labour Relations Act, 2007 to represent employees in all research institutions and those providing similar services under Rule 3 of the Registered Constitution.

2. The Respondent on the other hand is a state corporation established under Section 3 of the Industrial Property Act, 2001. It administers intellectual property rights and promotes innovation for social and economic development by providing industrial property information for technological and economic development to the public.

3. In its statement of claim dated 20th June 2017, the Claimant avers that it had recruited up to sixty nine (69) employees of the Respondent who had voluntarily signed the check off forms served upon the Respondent by a covering letter dated 21st July 2016. That the Respondent complied with the check off as evidenced by members' contributions for the month of April 2017. That the 69 employees constituted 94% of the Respondent's workforce of 74.

4. The Claimant seeks the following orders –

i. An order that the Claimant is the right trade union for the Respondent's economic activities and has the merits to be accorded recognition.

ii. An order directing the Respondent to sign a recognition agreement with the Claimant within thirty (30) days from the date of judgment.

iii. An order directing the Respondent to pay the Claimant's costs of this suit.

5. The Respondent filed its statement of response on 9th June 2017. It also filed an amended statement dated 9th August 2021. The amended statement incorporated the functions of the Respondent under Section 5 of the Industrial Property Act, 2001, that Rule 3 of the Claimant's constitution states that its scope is limited to research institutions and that the Claimant convinced the Respondents employees to sign a check off before substantive engagements with the Respondent. It also avers that the Claimant would be overlapping its mandate if granted the right to represent unionisable employees beyond research institutions.

6. The Respondent admits that its employees voluntarily joined the Claimant but disputes the legality of the procedure in the commencement of the check off system. It avers that its employees do not fall under the ambit of the Claimant's mandate as a union.

7. It further avers that although it pays contributions from its employees, no recognition agreement had been signed and the Respondent had not made a decision to recognise the Claimant since the latter's constitution was unclear on the ambit of its mandate.

8. The Respondent denies having recognised the Claimant and avers that it has sought guidance from relevant authorities with respect to the matter.

9. It is the Respondent's case, that the Claimant erroneously indicated that the Respondent had a work force of 74 while the actual number was 87 at the time.

10. That despite repeated requests to the Claimant to avail a copy of its constitution, it did not do so. That the Respondent needed the document to ascertain whether the Claimant's constitution mandated it to represent the interests of the Respondent's employees who are in the field of industrial property. That an incomplete copy was provided after the Conciliator had been appointed.

11. It is also averred that the Respondent engaged the Conciliator and lack of a sitting was not its fault. That the claim herein is premature and the Claimant has not presented before the Court any justifiable reasons for the Court to order the Respondent to recognise it and prays for dismissal of the claim with costs.

Evidence

12. The claim was at the request of the parties disposed of by way of written submissions. However, the Claimant filed an affidavit of rejoinder to the amended Respondent's statement and contended that the Respondent did not adduce evidence to challenge the Claimant's averments in the statement of claim. That without research, the Respondent's functions under Section 5 of the Industrial Property Act cannot be attained. That the Respondent did not produce its industrial groupings as per the tripartite agreement in the Industrial Relations Charter revised on 30th April 1984 to rebut the Claimant's assertions.

13. That the Respondent did not deny that the Claimant had recruited 69 employees out of the 87 employees as admitted by the Respondent representing 61% of all employees and well above the threshold of simple majority required by Section 54 of the Labour Relations Act, 2007.

14. That the Deputy Managing Director of the Respondent failed to obey instructions of its board to engage in the conciliation process.

Claimant's Submissions

15. The Claimant submitted that Rule 3 of its registered constitution mandates it to serve all cadres of workers in all national research and related institutions. That a copy of the constitution was dispatched to the Respondent by a covering letter dated 21st March 2017.

16. It is submitted that by April 2017; the Claimant had recruited 69 employees representing 79% of the Respondent's workforce of 87 thereby qualifying to be accorded recognition under Section 54 of the Labour Relations Act and a draft agreement relative to recognition and negotiation procedure was sent to the Respondent and a proposed date of signing the agreement was given but the Respondent did not honour the date.

17. That owing to the dilatory tactics of the Respondent, the matter was reported to the Cabinet Secretary for Labour and a Conciliator was appointed on 16th December 2016 but the process failed and the Conciliator filed a certificate of unsettled dispute dated 5th May 2017. The Conciliator complained of lack of co-operation by the Respondent. That the Claimant invoked Section 73 of the Labour Relations Act and filed the suit herein.

18. Paragraphs 10, 11 and 12 of the submissions rehashes the contents on the affidavit above on the number of employees recruited by the union, the absence of industrial grouping of the Respondent as per the Tripartite Agreement in the Industrial Relations Charter and the Respondent's Deputy Managing Direct handling of the matter after the board resolution on engagement with the Claimant.

19. Finally, the Claimant submits that applying the *ejusdem generis* rule of construction under the International Standard Industrial Classification of All Economic Activities (ISIC) and Rule 3 of the Claimant's constitution and Section 54(8) of the Labour Relations Court Act 2007, the Claimant was the right trade union for the Respondent's employees and should be accorded recognition.

20. In conclusion, the Claimant submits that there is no rival trade union demanding or seeking recognition by the Respondent.

Respondent's Submissions

21. It is submitted that the Claimant did not controvert paragraphs 2, 3 and 4 of the amended response and failed to demonstrate that it was the right trade union mandated by the constitution to represent unionisable employees of the Respondent under Section 54 of the Labour Relations Act and Clause no. 11(3) of Kenya Industrial Relations Charter.

22. That the Claimant is mandated to represent unionisable employees in National Research Institutions.

23. That the mandate of the Respondent set forth in Section 5 of the Industrial Relations Act 2001 does not include research.

24. It is further submitted that the Claimant should not be accorded recognition to negotiate a collective bargaining agreement outside the scope of its sectoral representation as provided by its constitution.

25. That the Claimant has not shown that its constitution mandates it to represent unionisable staff across all sectors contrary to Clause 11(3) of the Industrial Relations Charter and the Court should find it proper to decline recognition since it was acting beyond the sector in which it is mandated to represent unionisable employees as it would contrary Section 54 of the Labour Relations Act and Clause 11(3) above.

26. The Respondent submits that the Claimant should restrict its operations to the sector defined by its constitution.

27. Finally, the Court is urged to declare the Claimant an inappropriate trade union to represent unionisable employees of the Respondent.

Determination

28. From the pleadings and submissions on record, the issue for determination is whether the Claimant is the right union to represent the Respondent's unionisable employees. The corollary issue for consideration is whether the Claimant qualifies for recognition by the Respondent. Section 54 of the Labour Relations Act 2007 provides as follows –

> **1. An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.**
>
> **2.A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.**
>
> **3. An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.**
>
> **4. The Minister may, after consultation with the Board, publish a model recognition agreement.**
>
> **5. An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.**
>
> **6. If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.**
>
> **7. If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.**
>
> **8. When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.**

29. This Section is categorical that for union to qualify for recognition, it must establish that it has recruited and represents a simple majority of the employees of the Respondent, if the employer is a single entity or a simple majority of employees of members of an association where the union is seeking to be recognised by an association.

30. Under Section 54(8) of the Act, the Court is required to take into account the sector in which the employer operates and the model recognition agreement published by the Minister.

31. In its submissions highlighted above, the Respondent raised several issues on why the Claimant should not be recognised for purposes of representing the unionisable employees of the Respondent. For instance, the Claimant's constitution, Clause 11(3) of the Kenya's Industrial Relations Charter, Respondent's mandate under Section 4 of the Industrial Property Act and overreaching its mandate.

32. On whether the Claimant was the rightful trade union to represent the Respondent's unionisable employees, **Clause 11(3) of the Kenya's Industrial Relations Charter** provides that –

> "That the government will as a matter of policy promote industrial trade unionism; that is trade unions organised based on a broadly defined industry irrespective of the craft occupation or trade in which the workers are engaged. In this connection it will in cooperation with Federation of Kenya Employers and the Central Organisation of Trade Unions (Kenya) encourage conditions which would progressively achieve industrial trade unionism."

33. From the foregoing clause, it is decipherable that the government is obligated to promote trade unions organised along "broadly defined industry irrespective of craft, occupation or trade".

34. The objective of this cluse is to ensure that trade unionism permeates all sectors irrespective of their specialization as long as they form a broadly defined industry. Although Clause II(3) provides that "*A list of industrial groupings will be established and attached to this charter, as an appendix*" none was filed by eitheir party to buttress its case and neither party made reference to it. It would appear to the Court that it does not exist or the parties misled the Court.

35. Relatedly, Rule 3 of the Registered constitution of the Claimant provides that –

> "This trade union is established to serve all cadres of workers in all National Research Institutes and those providing similar services including but not limited to

- …
- …
- …
- …
- …
- Kenya Bureau of Standards (KEBS)
- Kenya Plant Health Inspectorate Services (KEHIS)
- …
- All similar institutions"

36. Research shows that other institutions in this broad category would include Kenya Copyright Board (KECOBO), National Biosafety Authority and others.

Would the list contemplated by the Claimant include the Respondent?

37. Section 5 of the Industrial Property Act No. 3 of 2001 provides that –

> **The functions of the Institute shall be to—**
>
> > **a.consider applications for and grant industrial property rights;**
> >
> > **b. screen technology transfer agreements and licences;**
> >
> > **c. provide to the public, industrial property information for technological and economic development; and**
> >
> > **d. promote inventiveness and innovativeness in Kenya.**

38. Relatedly Section 3(f) of the Act, the Kenya Industrial Property Institute (KIPI), the Respondent here is mandated to:

> **"Doing or performing all such other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done by a body corporate."**

39. This catch-all provision broadens the Respondent's capacity to engage in other activities which facilitate the functions set forth in Section 5 of the Act.

40. The Claimant submits that the Respondent cannot perform its functions effectively without undertaking research and Rule 3 of its constitution mandates it to represent unionisable employees of the Respondent.

41. As submitted by the Claimant, the Respondent belongs to the broad class of organisations generally categorised as research institutions and/or regulators as mandated by Clause 11(3). The fact that research is not identified as a core function does not of itself exclude the Respondent from the broadly defined industry.

42. Relatedly, it is notable that neither the statutorily defined functions of the Kenya Bureau of Standards (KEBS) nor the Kenya Plant Health Inspectorate Services (KEHIS) on the Claimant's list identifies research as a funciton.

43. Substantively, the broadly defined industry would include organisations that are not categorised as research institutes but research is subsumed in their functions and have some regulatory functions.

44. Finally, it would appear to the Court interpreted *ejusdem generis* Rule 3 of the Claimant's constitution would include the Respondent. Although it is not identified as a research organisation, research is subsumed in its core functions and it has regulatory functions similar to those of the Kenya Bureau of Standards (KEBS) and Kenya Plant Health Inspectorate Services (KEHIS) both in Rule 3 above.

45. For the foregoing reasons, it is the finding of the Court that the Claimant is by Rule 3 of its registered constitution and Clause 11(3) of the Industrial Relations Charter employer to represent unionisable employees of the Respondent, the fact that it is not a research institution properly so called notwithstanding.

46. It is not in dispute that the Claimant is a registered trade union with the attendant right and duties. Section 8(1)(a) and (b) of the Labour Relations Act provides that –

> **Every trade union, employers' organisation or federation has the right to—**
>
> > **a. subject to the provisions of this Act—**
> >
> > > **i. determine its own constitution and rules; and**

ii. hold elections to elect its officers;

b. plan and organise its administration and lawful activities …;

47. Employees' rights to form, join and participate in the affairs of trade unions is protected by Sections 4 and 5 of the Labour Relations Act.

48. These rights are accorded a constitutional texture by Articles 36 and 41 of the Constitution of Kenya 2010 as follows:

49. Under Article 36 of the Constitution: -

1. Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

2. A person shall not be compelled to join an association of any kind.

3. Any legislation that requires registration of an association of any kind shall provide that—

a. registration may not be withheld or withdrawn unreasonably; and

b. there shall be a right to have a fair hearing before a registration is cancelled.

50. Article 41 Labour Relations

1. Every person has the right to fair labour practices.

2. Every worker has the right—

a. to fair remuneration;

b. to reasonable working conditions;

c. to form, join or participate in the activities and programmes of a trade union; and

d. to go on strike.

3. Every employer has the right—

a. to form and join an employers organisation; and

b. to participate in the activities and programmes of an employers organisation.

4. Every trade union and every employers' organisation has the right—

a. to determine its own administration, programmes and activities;

b. to organise; and

c. to form and join a federation.

5. Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

51. From the foregoing, it is evident that the Claimant and the employees of the Respondent were exercising their constitutional right by the latter subscribing to the membership of the Claimant and the latter applying for recognition by the Respondent.

52. Section 54 of the Labour Relations Act is couched in mandatory terms. An employer is obligated to recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees. In addition, Section 54(8) of the Act provides that in determining a dispute under this section, the Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister under Section 54(4) of the Act.

53. It therefore follows that "*Recognition is thus not a privilege to be dished out by the Respondent but a right to be exercised by the right holder*". See Onyango J. in **Kenya Building, Construction, Timber and Furniture Industries Employees Union v King Developers Limited [2020] eKLR**.

54. According to the Learned Judge –

> "Further, that once a union has acquired a simple majority the employer is obligated to recognise the union and thereafter, to collectively bargain with the union."

55. The Respondent's amended response states that the Claimant convinced the Respondent's employees to sign a check off before substantiative engagements with the Respondent in the spirit and letter of the Industrial Relations Charter. The Court is in agreement with this submission. However, as demonstrated above, membership to a union and recognition of a trade union by an employer are neither governed nor subject to negotiations between the employer, trade union and the employees. It is a constitutional imperative with prescribed thresholds. Moreover, the Respondent did not demonstrate enthusiasm in the conciliatory process which had the potential to resolve the matter amicably since the Respondent's employees had already subscribed for the Claimant's membership. This would have obviated lengthy court processes.

56. It is not in dispute that the Claimant had by the month of April 2017 recruited 69 of the 87 employees of the Respondent equivalent to 79.3% of the all employees. The Respondent did not deny that any of the employees was not unionisable or that there was coercion of employees. It even admitted paying the Claimant contributions of the employees, the absence of a recognition agreement notwithstanding.

57. The Respondent did not deny that the names of the employee in the check off forms were those of its employees. The Claimant produced a list of 69 names of employees with their payroll numbers, ID numbers and the amount deducted for April 2017. The Respondent did not puncture the list.

58. The Claimant's evidence that it had obtained a simple majority of the Respondent's unionisable employees was uncontroverted.

59. In **Micato Safaris v Kenya Game Hunting & another [2017] eKLR** the Court of Appeal stated that –

> "We agree that under section 54 (1) of the Labour Relations Act, 2007 an employer can only recognize a trade union for purposes of collective bargaining if the trade union represents a simple majority of unionisable employees …"

60. The averment by the Respondent that it wrote numerous letters requesting for a copy of the Claimant's constitution in its endeavour to determine whether the Claimant was the appropriate union to represent its employees is borne by facts. The Respondent wrote on the issue on 27th January 2016, 27th January 2017 and 17th May 2017. Whereas the delay was inordinately long and unjustified, it could not of itself hinder the Respondent's appreciation in the conciliation processes.

61. The averment by the Respondent that it had taken steps to seek guidance from the relevant authorities in Kenya was not substantiated by evidence and the outcome of the steps was not availed to the Court. At any rate an employer has no mandate to dictate to the employees which trade union they should join. See **Fairmont The Norfolk Hotel v the Industrial Court of Kenya [2012] eKLR**.

62. Relatedly, as observed by Rika J. in **Kenya Export, Floriculture, Horticulture & Allied Workers Union v Kenya Plantation & Agricultural Workers Union and 4 Others [2021] eKLR** recognition agreements are not irreversible. The Learned Judge expressed himself as follows –

> "They rest on freedom of association. Employees are not prevented from changing union membership. The right to associate is co-joined to the right to dissociate, just as much as the right of a Trade Union to be recognized by an Employer, is co-joined to the right of the Employer to de-recognize the Union. Labour is dynamic and volatile, and Employees do not stay with one Employer forever. The number of Employees subscribed to a Union, does not remain static ... Recognition Agreements are not cast in bronze."

63. It was also averred that the copy of the constitution supplied by the Claimant was incomplete, that only extracts of the document were supplied. This allegation is borne by facts. The copy in the Court's file is incomplete. It is unclear why the Claimant took unjustifiably long to furnish the Respondent with a copy of its constitution or furnish parts of the document as opposed to the entire document as it did for the draft recognition agreement. Be that as it may, the Respondent did not contest or allege that the parts delivered were insufficient for its purpose.

64. The averment that the claim by the Claimant is premature is difficult to sustain for the reason that the dispute had dragged on for over one (1) year before the claim was filed on 4th July 2017. The dispute was referred to the Cabinet Secretary for the East African Community, Labour and Social Protection by a letter dated 29th August 2016 reporting that attempts to settle the matter by the parties had failed.

65. At its meeting of 26th August 2016, the Respondent's Board of Directors authorised the management to engage the Claimant but the Claimant was notified of this development on 20th December 2016 more than four months after decisions by the Board and almost four months after reporting the dispute to the Cabinet Secretary and after appointment of a Conciliator.

66. No serious engagement took place between 16th December 2016 and 5th May 2017 when the Conciliator filed a certificate of inability to resolve the dispute due to the non-cooperation of the employer.

67. Intriguingly, neither party had sought the Conciliator's indulgence before the certificate was filed or engaged each other thereafter. The Court finds both parties are culpable for the failed conciliation.

68. The inordinate delay in concluding this matter renders the provisions of Section 74(5) and 54(7) of the Labour Relations Act purposeless. Section 74(a) of the Act provides that: -

> **A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns the recognition of a trade union in accordance with section 62;**

69. Relatedly, in **Kenya Chemical & Allied Workers Union v Base Titanium Ltd [2013] eKLR** the Court stated that:

> "Courts must always focus on the status quo when the suit was brought because time is of the essence in determining recognition disputes and that is why under Section 74(a) of the Labour Relations Act such disputes are to be treated with urgency."

70. For the foregoing reasons, it is the finding of the Court that the Claimant has on a balance of probabilities established that it had attained the threshold prescribed by Section 54(1) of the Labour Relations Act and is the proper trade union to represent the interest of the unionisable employees of the Respondent and was entitled to recognition.

Conclusion

71. The following orders commend themselves for issue –

> **i. The Respondent is directed to recognise the Claimant Union within 30 days.**
>
> **ii. The Respondent is directed to continue deducting and remitting union dues of all employees currently in its employment who have signed check off forms.**
>
> **iii. The Respondent shall pay the Claimant's costs assessed at Kshs.50,000/- to cover reasonable expenses and disbursements.**

72. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF FEBRUARY 2022

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