



**Kenya Building Construction Timber and Furniture Industries  
Employees Union v Italian Space Agency (ASI) & 2 others (Cause  
E069 of 2021) [2022] KEELRC 1432 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1432 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E069 OF 2021**

**B ONGAYA, J**

**MAY 27, 2022**

**BETWEEN**

**KENYA BUILDING CONSTRUCTION TIMBER AND FURNITURE  
INDUSTRIES EMPLOYEES UNION ..... CLAIMANT**

**AND**

**ITALIAN SPACE AGENCY (ASI) ..... 1<sup>ST</sup> RESPONDENT**

**UNION OF NATIONAL RESEARCH INSTITUTES STAFF OF KENYA  
(UNRISK) ..... 2<sup>ND</sup> RESPONDENT**

**GRASI S.C AR.L. (BRANCH OF KENYA) SAN MARCO  
PROJECT) ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The claimant filed a memorandum of claim of claim dated 14.07.2021 and prayed for
  - a. A declaration that the claimant has met the threshold to be recognised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly known as Group of Employers under section 54 of the *Labour Relations Act*.
  - b. A permanent order of injunction to issue restraining the 1<sup>st</sup> and the 2<sup>nd</sup> respondents from signing a recognition agreement in favour of the 3<sup>rd</sup> respondent or in any other way recognizing the 3<sup>rd</sup> respondent through any other process except under the provisions of section 54 of the *Labour Relations Act*, 2007.
  - c. An order to issue directing the 1<sup>st</sup> and the 2<sup>nd</sup> respondents to sign a recognition agreement recognising the claimant within a time frame to be set by the Honourable Court.



- d. That upon grant of prayer (c) above, the Honourable Court be pleased to direct the 1<sup>st</sup> and the 2<sup>nd</sup> respondent to negotiate and conclude a collective bargaining agreement (CBA) within a time frame to be set by the Honourable Court.
  - e. Any other order that the Honourable Court may deem fit to grant.
  - f. Costs of the claim.
2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed the memorandum of response on December 1, 2021 through the Federation of Kenya Employers (FKE). They prayed that the Honourable Court be pleased to find that the claim herein is devoid of merit, has been overtaken by events and is an abuse of the Court process as is liable for dismissal with costs.
  3. The 3<sup>rd</sup> respondent filed its response to the memorandum of claim on August 16, 2021 and through Odin Boaz Otieno (Janitor), the authorised representative of the 3<sup>rd</sup> respondent trade union. The 3<sup>rd</sup> respondent effectively opposed the claimant's suit as unmerited.
  4. The Court has considered the parties' respective pleadings and material on record. The background to the case is as follows. The 1<sup>st</sup> respondent is appointed by the Italian Government as recognised by the Kenyan Government to manage a project between the two Governments known as San Marco Project situated in Malindi. It is a project run in Kenya by the Italian institutions with support of the Italian Government and which commenced sometime in 1973. The 2<sup>nd</sup> respondent (as urged for the claimant as styling itself as Group of Employers) is an independent employer of the technical and logistic support staff of the Project and has assumed, under some arrangements, the role of employer of the 1<sup>st</sup> respondent's staff. Over the years, the technical and logistics management of the Project has been run by different organisations or companies under service contracts with the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent therefore took over the employment management of the project about December 1, 2020. The claimant appears to have signed a recognition agreement and negotiated some CBA with the 2<sup>nd</sup> respondent's predecessor trading under the name of Vistrociset SPA Branch of Kenya, the last of such CBAs said to have lapsed in 2015.
  5. The 3<sup>rd</sup> respondent trade union signed a recognition agreement with 1<sup>st</sup> respondent and Vistrociset SPA Branch of Kenya and concluded a CBA dated 11.03.2019 and registered by the Court on October 1, 2019 as CBA No. 185 of 2019 at Nairobi. The 3<sup>rd</sup> respondent also obtained a ministerial order under section 49(1) of the *Labour Relations Act*, 2007 signed on 13.06.2018 by Ukur Yatani, Cabinet Secretary responsible for Labour. The order specifically directed Italian Space Agency (Vistrociset) to deduct union duties from its employees being members of the 3<sup>rd</sup> respondent and agency fees from unionisable employees not being members of the 3<sup>rd</sup> respondent. The CBA provided that it would continue in force until a new CBA would be negotiated by the parties. While that CBA was in force, the 2<sup>nd</sup> respondent took over operations and liabilities of its predecessor, Vistrociset SPA Branch of Kenya.
  6. Thus the 2<sup>nd</sup> respondent took over effective 01.12.2020 the role of the employer of the 1<sup>st</sup> respondent's employees. The 2<sup>nd</sup> respondent notified the employees and required them to sign new contracts of service taking effect from December 1, 2020 and that the terms and conditions in the individual letter of appointment and following amendments according to both CBA 2018-2020 and Staff-Manual 2018-2020 signed March 2019 would be respected. The terms and conditions of service would be liable to change in future as modified by the next CBA and Staff-Manual when renegotiated.
  7. The 2<sup>nd</sup> respondent and the 3<sup>rd</sup> respondent engaged in negotiations and on July 16, 2021 they signed a recognition agreement. Further, on 18.11.2021 they signed a CBA after their trade dispute reported to the Cabinet Secretary was resolved as had been reported by the 3<sup>rd</sup> respondent. The concluded CBA



is awaiting registration by the Court. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent's case is that when the recognition agreement was signed, the 3<sup>rd</sup> respondent had recruited the majority of the unionisable employees – a position supported by the 3<sup>rd</sup> respondent. The 2<sup>nd</sup> respondent's case is that the claimant has not at all material time recruited its majority unionisable employees to justify recognition in terms of section 54 of the *Labour Relations Act*, 2007. Further, the 1<sup>st</sup> and 3<sup>rd</sup> respondents' case is that they concluded a recognition agreement with the 3<sup>rd</sup> respondent with full knowledge of the claimant or indolence on the part of the claimant. At the time the 2<sup>nd</sup> respondent took over the roles of an employer of the 1<sup>st</sup> respondent's employees on December 1, 2020, the CBA concluded between the 3<sup>rd</sup> respondent and the 1<sup>st</sup> respondent and Victrociset SPA Branch of Kenya was in force. The CBA was honoured until it lapsed on December 31, 2020 and thereafter the 2<sup>nd</sup> respondent engaged to renegotiate the next CBA with the 3<sup>rd</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also urge that they agreed to negotiate with the 3<sup>rd</sup> respondent to secure employees' rights at a time the claimant had gone absent and never availed itself to negotiate for the employees. The 1<sup>st</sup> and 2<sup>nd</sup> respondent denied the claimant's case that the 3<sup>rd</sup> respondent recruited employees who had been the claimant's employees. The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied that as at time of filing the suit the claimant had recruited 87 members being in employment of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and as alleged for the claimant.

8. The Court has considered the memorandum of claim and the documents exhibited for the claimant. The claimant has pleaded at paragraph 9 of its memorandum of claim that whenever the 1<sup>st</sup> respondent engaged a new manager of its project (staff) the practice was that the new management entity or company negotiates a recognition agreement or expressly agree to continue with the existing recognition agreement and CBA. Further, Victrociset SPA Branch of Kenya had by agreement committed itself to continue recognising the claimant in line with the then existing recognition agreement and CBA. In 2016 Victrociset SPA Branch of Kenya and the 3<sup>rd</sup> respondent negotiated a CBA for 2018-2020 and lapsing on December 31, 2020. Further as the 2<sup>nd</sup> respondent took over employer roles on December 1, 2020, the claimant had managed to recruit 107 out of 153 unionisable employees of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's. The claimant further pleads as follows. The negotiations to conclude a recognition agreement collapsed and a dispute was reported to the Cabinet Secretary per section 62 of the *Labour Relations Act*, 2007. The 1<sup>st</sup> and 2<sup>nd</sup> respondents attended conciliation proceedings and confirmed that the claimant had attained a simple majority membership of unionisable employees per section 54(1) of the Act because it had recruited 90 out of 152 unionisable employees. The employer agreed to recognise the claimant in 30 days but that failed to take place. As at filing the claimant had 86 recruited members as other recruited employees had withdrawn their membership in the claimant union. The conciliator had also urged the claimant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents to conclude a CBA and at a time the 3<sup>rd</sup> respondent had also reported a dispute to the Cabinet Secretary on revision of the 2018-2020 CBA that had lapsed on December 31, 2020. The appointed conciliator in both trade disputes (one by the claimant and the other by the 3<sup>rd</sup> respondent) has locked out the claimant in conciliation proceedings initiated by the 3<sup>rd</sup> respondent. The claimant urged that it was entitled to recognition by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as the 3<sup>rd</sup> respondent had never been duly recognised in accordance with section 54 of the Act.
9. The parties did not call witnesses and it was ordered that the suit be determined on the basis of the pleadings, documents filed for parties and final submissions. The claimant, 1<sup>st</sup> and 2<sup>nd</sup> respondent, and the 3<sup>rd</sup> respondent filed their respective submissions. The Court has considered all the material on record. The Court makes findings as follows:
10. First, by its own pleadings, the claimant has confirmed that it has no previous recognition agreement with the 2<sup>nd</sup> respondent as employer of the 1<sup>st</sup> respondent's staff and therefore, the claimant embarked



on recruitment of the employees so as to satisfy requirements in section 54 of the [Labour Relations Act, 2007](#) towards recognition by the 1<sup>st</sup> and 2<sup>nd</sup> respondents - the 2<sup>nd</sup> respondent having taken over the role of employer of the 1<sup>st</sup> respondent's employees effective December 1, 2020.

11. Second, has the claimant attained simple majority membership of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' unionisable employees as required in section 54 of the Act? The claimant relies on the undisputed conciliator's report by the letter dated April 23, 2021 where the conciliator stated as follows:

“It has been confirmed from records made available that Grasi employs majority of unionisable staff at one hundred and forty-six (146) against ASI six (6) adding to one hundred and fifty-two (152) total unionisable employees. Kenya Building, Construction, Timber and Furniture Employees Industries (KBCTFEI) reported this dispute on 15<sup>th</sup> march 2021.
12. In our first conciliation meeting held on 30<sup>th</sup> march 2021, the union produced ninety (90) letters of employees individually withdrawing membership from UNRISK to join KBCTFEI. The letters were dated between 1<sup>st</sup> February 2021 and 18<sup>th</sup> February 2021. On verification from the February 2021 payroll, it was found that thirty-one employees were still being deducted union dues under UNRISK. On further perusal from March 2021 payroll, the thirty-one employees were now being deducted union dues under KBCTFEI. This is proof that the ninety (90) employees actually joined to be members of KBCTFEI voluntarily and the update in March reflected the actual position on the ground.
13. In conclusion therefore with ninety (90) members out of the one hundred and fifty-two (152) unionisable employees, KBCTFEI has a simple majority of members of the employees of ASI and Grasi. The simple majority is seventy-seven (77) total membership.” With that finding the conciliator recommended that the claimant be recognised and a CBA be concluded with the claimant in 30 days. The conciliator's report also shows that at the conciliation proceedings the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that as at 23.03.2021 they had 152 unionisable employees of which 87 were members of the claimant trade union and 56 were members of the 3<sup>rd</sup> respondent trade union. The management also sought a solution in that circumstance whereby membership kept on changing. The claimant has exhibited letters by employees who resigned from the 3<sup>rd</sup> respondent's membership and affirmed membership in the claimant union.
14. The Court has considered all the material on record and particularly the 1<sup>st</sup> and 2<sup>nd</sup> respondent's memorandum of response wherein it is not denied that the claimant had attained simple majority per section 54 of the [Labour Relations Act, 2007](#). The Court finds that the claimant has indeed satisfied the statutory requirements to be recognised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The Court further holds that the recognition of the 3<sup>rd</sup> respondent by the 1<sup>st</sup> and 2<sup>nd</sup> respondent is no bar to the recognition as claimed by the claimant especially that there is no dispute that the claimant is the sector union. The evidence is that employees appear to be resigning from membership of the 3<sup>rd</sup> respondent in preference to the representation of the claimant trade union. The Court will therefore uphold their right to join the claimant union per Article 41 of [the Constitution](#) and their other constitutional freedom to associate.
15. Third, is the claimant entitled to remedies as prayed for? The Court has already found that the claimant is entitled to recognition and to conclusion of a CBA with the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The claimant is entitled accordingly.
16. In the intervening period the evidence is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have already concluded a recognition agreement and negotiated a CBA which is said to be moving towards registration by the



Court. The Court has also considered the order by the Cabinet Secretary requiring the 1<sup>st</sup> and 2<sup>nd</sup> respondents to deduct union dues as well as agency fees with respect of the employees and in favour of the 3<sup>rd</sup> respondent. In the circumstances the Court returns that prayer (b) for an injunction to permanently restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents from concluding recognition agreement or status except in accordance with section 54 of the Act is found overtaken with events and will be declined. While making that finding the Court reckons that the present suit is not about revocation of the 3<sup>rd</sup> respondent's recognition and details and circumstances of that recognition were not issues for determination in the present suit.

17. The Court has also considered that section 54(5) of the Act provides that an employer or group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement. The section should be available to the 1<sup>st</sup> and 2<sup>nd</sup> respondents should they find any hardship in recognising the two unions as appears to be the turn of events.
18. As the parties will continue in industrial relationship and towards promotion of that co-existence, each party will bear own costs of the suit.
19. In conclusion judgment is entered for the claimant against the respondents for:
  1. The declaration that the claimant has met the threshold to be recognised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly known as Group of Employers under section 54 of the [Labour Relations Act](#).
  2. The 1st and the 2nd respondents to sign a recognition agreement recognising the claimant by July 1, 2022.
  3. The 1<sup>st</sup> and the 2<sup>nd</sup> respondents to negotiate and conclude a collective bargaining agreement (CBA) by September 1, 2022.
  4. Each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 27<sup>TH</sup> MAY, 2022.**

**BYRAM ONGAYA**

**JUDGE**

