Kenya Chemical Workers Union v Krystalline Salt Limited (Cause 77 of 2019) [2022] KEELRC 1124 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1124 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 77 OF 2019

B ONGAYA, J

MAY 13, 2022

BETWEEN

KENYA CHEMICAL WORKERS UNION ..... CLAIMANT

AND

KRYSTALLINE SALT LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 04.11.2019 through its National Secretary General, one Were Dibo Ogutu, OGW. The claimant appointed Oluoch Kimoro Advocates on April 25, 2021 to act in the suit. The issues in dispute are stated as refusal to sign recognition agreement and failure by the respondent to effect deduction and remission of union dues for some of the recruited members of the claimant. The claimant also prayed for costs.

2. The claimant's case is that by May 4, 2019 the claimant had recruited 324 employees who had consented to be members of claimant trade union. The relevant check-off forms were delivered to the respondent on May 7, 2019 duly signed by 324 employees and the forms were served together with a draft recognition agreement proposing it be signed by the respondent. The claimant's further case is that it recruited further respondent's employees and the duly signed forms served upon the respondent on May 17, 2019 for 45 employees; May 31, 2019 for 20 employees; June 10, 2019 for 2 employees; July 8, 2019 for 9 employees; August 1, 2019 for 3 employees; and August 13, 2019 for 4 employees – making a further 85 members recruited to the trade union. The claimant's case is therefore that as at August 13, 2019 it had recruited 409 out of 600 unionisable employees of the respondent making 68.1% being above the simple majority required by the law under section 54 of the *Labour Relations Act*, 2007 required for the respondent to recognise the claimant for purposes of collective bargaining.

3. The claimant further case is that on June 21, 2019 the claimant reminded the respondent about the need to conclude the recognition agreement and the respondent replied on June 28, 2019 proposing amendments to the draft recognition agreement. By the letter dated 28.06.2019 the claimant informed

the respondent that the draft recognition agreement was in the standard form of the tripartite committee meeting between the Ministry of Labour, Federation of Kenya Employers (FKE), and COTU (K) concluded way back in 1962.

4. The claimant's further case is that the respondent failed to sign the recognition agreement and by letter dated July 5, 2019 the respondent reported a trade dispute per section 62(1) of the *Labour Relations Act*, 2007. By an email dated July 8, 2019 FKE invited parties to discuss the recognition agreement at a meeting scheduled for July 31, 2019 at 10.00am to be held at FKE Mombasa Office. The respondent declined to participate in the meeting in view of the trade dispute the claimant had already reported to the Ministry of Labour.

5. The Ministry appointed Boaz Musandu as the conciliator by the letter dated 22.07.2019. The issues in dispute were non-implementation of deduction of trade union dues or monthly subscription on some employees; and refusal to sign recognition agreement. The letter was addressed to the claimant's General Secretary and the respondent's Managing Director advising that the conciliator would get in touch with both parties.

6. The respondent's advocates, Arwa & Change Advocates wrote to the Cabinet Secretary responsible for labour the letter dated 02.08.2019 confirming the respondent's receipt of the claimant's letter dated 05.07.2019 reporting a trade dispute about union dues and recognition agreement. The advocates' letter stated that they were unable to file a replying memorandum as the letter reporting the dispute did not contain details of the dispute. Further, on July 31, 2019 at the meeting by parties before FKE in Mombasa office the claimant's Secretary General had informed the meeting that he was in a position to get a conciliator appointed and he made a telephone call to a Senior Officer at the Ministry requesting for a conciliator and on the same July 31, 2019, the Secretary General called the respondent's Human Resource Manager to confirm appointment of a conciliator - and true to the Secretary General's word, the letter appointing the conciliator was received by the respondent on August 1, 2019 The advocate's letter then concluded thus, "Given the circumstances, our client is apprehensive of the influence that the said Secretary General of the Union has over the process and whether it would be accorded a fair hearing. We therefore request you to look into the matter and take any action necessary to ensure that our client is guaranteed a fair hearing."

7. By the letter dated September 13, 2019 the conciliator invited parties over the two issues at a joint meeting at the conciliator's office in Nairobi scheduled for September 25, 2019. The respondent's advocates wrote the letter dated September 23, 2019 stating that in view that they had not received a response to their letter of August 2, 2019 to the Cabinet Secretary, the conciliation meeting scheduled for September 25, 2019 had to be postponed until the issues in the letter of August 2, 2019 had been resolved. On its part, the claimant wrote to the Cabinet Secretary the letter dated September 25, 2019 stating that the Secretary General had called the Ministry on July 31, 2019 when the respondent declined to participate in the compromise meeting convened by FKE and the call was to complain about delayed appointment of the conciliator. In that letter the claimant stated that the issue of bias and influence on the part of the conciliator did not therefore arise as the full process of law was followed up to appointment of conciliator. The claimant's letter concluded thus, "Arising from the above, we would like to request you to address the matter to enable the Conciliator proceed with his appointment to bring this matter to amicable settlement bearing in mind that conciliation process is supposed to be completed within 30 days from the date of the appointment unless the parties agree to extend. Thanks for your attention."

8. The claimant's case is that under section 67 of the *Labour Relations Act*, 2007 the conciliation process was to be concluded within 30 days of appointment of the conciliator and parties having not agreed

to extend the time under the section, the conciliator properly issued on 09.10.2019 the certificate of unresolved dispute as per section 69 of *the Act*.

9. The claimant's case is that the claimant has recruited simple majority of unionisable employees but the respondent has refused to sign the recognition agreement and to deduct and remit union dues for some of the unionisable employees.

10. The respondent filed on March 12, 2020 the reply to memorandum of claim and through Arwa & Change Advocates. The respondent admitted that the claimant had made attempts to recruit the employees but the recruitment exhibited inconsistencies such as double entries of a single unionisable employee, entries of persons no longer respondent's employees or strangers to the respondent, and, inclusion of supervisors who otherwise are part of the management. The respondent notified the claimant the anomalies by the letter dated May 24, 2019. The claimant failed to address the anomalies but pressured the respondent to sign the recognition agreement. The respondent's case is that as at August 13, 2019, the claimant had not recruited a simple majority of unionisable employees because the genuine unionisable employees were only 302 against a workforce of 640 employees. Further, notwithstanding the issue of number of recruited employees, the claimant wrote to the respondent the letter dated June 21, 2019 referring to the meeting at KFE at which the respondent agreed it would sign the draft recognition agreement and further requesting the respondent to sign the draft recognition agreement the claimant had already signed. The respondent had replied that letter by the letter dated June 28, 2012 stating in part, "From the discussion held at FKE Mombasa, there were amendments to be done on the draft recognition agreement and this being the first time we are dealing with union we had to engage our lawyers to review the document and they are yet to get back to us. Further, our directors have been out of the office attending to urgent family matters and once they are back they will address the same. Notwithstanding this, be rest assured that we are making every effort to get the draft with amendments shared with you." The respondent's case is that in the letter dated July 5, 2019 reporting the trade dispute, the claimant did not raise the issue of numbers of recruited staff but simply raised the dispute as refusal to sign recognition agreement and refusal to deduct union dues – and further, the report of the dispute was misconceived as the respondent was willing to resolve the issue per meeting convened by FKE on July 31, 2019. Further respondent's case is that the claimant's Secretary General had influenced the appointment of the conciliator as expressed in the letter by Arwa & Change Advocates for the respondent dated August 2, 2019. Further, without response to the advocates' letter, the conciliator did not give the conciliation process a chance but issued the letter of disagreement or unresolved dispute per section 69 of the Act. Further the respondent is committed to confer its employees due labour rights as manifested in the deduction of union dues in respect of recruited unionisable employees. The respondent's case is that rival unions such as Kenya Salt Workers Union and Kenya Private Security Workers Union have made requests to the respondent for recognition and such unions' interest appear to be in competition with those of the claimant trade union. Further, the respondent has invoked unfair tactics such as intimidation, coercion and threats to enhance recruitment of union members. Further, over time the membership has fallen as recruited members have resigned from the union reducing membership to below simple majority. It is the respondent's case that out of 664 employees, the claimant has only recruited 216 employees as its members.

11. The respondent prayed that the entire claim be dismissed with costs as the claimant has not recruited a simple majority of the respondent's unionisable employees.

12. The parties opted not to call witnesses and that the suit be determined on the basis of the pleadings, documents on record, and final submissions as filed for parties. The Court returns as follows.

First, the Court returns that the claimant is the sector trade union with respect to the respondent's enterprise as envisaged in section 54(8) of the *Labour Relations Act*, 2007. While pleading that rival unions have made requests to the respondent, no evidence has been provided to show such requests and in any event the respondent has not pleaded that the claimant is not the sector union. The claimant has pleaded that it represents workers including in the sector of manufacturing salts which is the respondent's enterprise. The claimant has exhibited its constitution which shows its sector of workers' representation includes manufacturing of salts. The claimant's pleading on the sector is in paragraphs 1 and 2 of the memorandum of claim and the respondent has pleaded in response thereto that it does not deny the substance of that pleading. The Court finds that the claimant's claims for recognition fall within its sector of operation.

Second, the claimant has exhibited Forms S showing that it had recruited 409 workers as at August 13, 2019 and which it says was out of 600 workers making 68.1% thus achieving simple majority as envisaged in section 54 (1) of the Act for signing of recognition agreement. The Court has considered the letter by the respondent dated May 24, 2019 in which the respondent pointed out numbering errors at page 4, double entry of two employees, one employee who had been dismissed, recruitment of 13 employees in supervisory and therefore managerial positions and withdrawals by two employees. The matters were to be addressed at the recognition meeting with FKE. The Court finds that in view of that respondent's letter, nothing is established to show that the claimant had not hit the simple majority threshold. The evidence is that the claimant wrote the letter dated June 21, 2019 reminding the respondent about the parties' agreement at the meeting with FKE that the recognition agreement be concluded. The respondent's letter of June 28, 2019 in reply to that claimant's letter does not deny that parties agreed to conclude a recognition agreement but only that the respondent needed to consult its lawyers on the contents of the agreement. The Court finds that at the meeting of May 30, 2019 the parties thrashed out the issue of recruited employees and agreed to sign the recognition agreement subject to such agreeable amendments or concurrence by the respondent's directors and advocates. The Court finds that to be the effect when the letter by the claimant dated June 21, 2019 is read together with the respondent's letters dated May 24, 2019 and June 28, 2019. The Court finds that the claimant established the simple majority recruitment and parties agreed to conclude the recognition agreement at the meeting of 30,05.2019 - so that the respondent's dispute and case that the claimant had not attained the simple majority recruitment envisaged in section 54(1) of *the Act* is found to be a pure afterthought. The Court further finds that the claimant was therefore not misconceived when it reported the dispute to the Cabinet Secretary as being refusal to sign recognition agreement and non-implementation of deduction of trade union dues or monthly subscriptions on some employees.

While making that finding the Court has considered the judgment by the Court of Appeal (Nambuye, Karanja, and Murgor JJA) in *Cello Thermoware Limited v Kenya Union of Commercial, Food and Allied Workers* [2022] KECA 54 (KLR) where it was held thus, "26. In effect, whether or not a simple majority specified by section 54(1) was achieved at a particular point in time is a matter of fact. This is because, the computation of a simple majority at a particular point in time is an arithmetical calculation, based on the total number of the appellant's unionisable employees against the total number of unionisable employees registered by the respondent. To discern whether, the respondent had registered a simple majority of the appellant's unionisable members by the time the dispute was lodged, will require firstly, the total number of unionisable employees, that were registered by the time

the dispute was lodged with the Ministry, and secondly, the number of members that were registered with the respondent to be ascertained."

In the present case the claimant reported the dispute to the ministry by the letter dated July 5, 2019. It is pleaded for the claimant that as at that date it had recruited 324, then 45, then 20 and then 2 employees making 391 employees and the respondent's workforce is pleaded for the claimants as being 600 employees (making 65% recruited). The union deduction report for May 2019 shows 343 employees were deducted in union deductions and which establishes that the claimant had indeed achieved simple majority of 600 employees (whether all or some of the 600 were unionisable employees or not). The claimant has also exhibited the duly signed Forms S of the recruited employees it had served upon the respondent as at time the dispute was reported to the Cabinet Secretary.

On the other hand, the respondent has pleaded at paragraph 25 of the statement of response to the claim that as at 10.03.2020, the claimant had only 216 remaining employees out of a workforce of 664 as at that March 10, 2020 (date of filing the response). The Court finds that by that pleading the respondent has failed to address the numbers as at time the dispute was made to the Cabinet Secretary. At paragraph 4 of the response the respondent does not deny the recruited numbers as pleaded for the claimant at paragraph 4 of the memorandum of claim (and which the Court has already found to meet the simple majority threshold). Further, at paragraph 8 of the response to the claim the respondent states that the genuine unionisable employees were only 302 out of 640 employees but no evidence has been offered on the particulars of the unionisable and the 640 full workforce so as to facilitate comparison with the employees already recruited by the claimant.

In the circumstances the Court returns that the claimant has established that it has recruited a simple majority of the unionisable employees as at the time the dispute was reported to the Cabinet Secretary. The Court has also found that the parties at the meeting at FKE Mombasa office held on May 30, 2019 agreed on the list of recruited unionisable employees and further agreed to sign the recognition agreement once the respondent agreed on the draft with or without amendments.

Third, the Court finds that the respondent's concerns on the independence of the conciliator and the scope of the dispute was clearly misconceived. The evidence is that the claimant's Secretary General telephoned a Ministry official when on 31.07.2019, the respondent declined to reach an amicable settlement on the signing of the recognition agreement. The emerging agenda was about appointment of a conciliator now that parties were no longer able to compromise on their own or as mediated by FKE. That was an open follow-up telephone call on delayed appointment of a conciliator but who in fact had already and earlier been appointed by the letter dated July 22, 2022. The Court does not find valid real or perceived bias on the part of the conciliator as was appointed and the respondent has not established a valid ground for failure to attend the conciliation meeting as had been fixed for September 25, 2019. Further, the dispute as set out in the letter appointing the conciliator and conciliator's letter inviting the parties to the conciliation meeting is found to have been sufficient in material details and not ambiguous or insufficient in particulars so as to enable the respondent to file a replying memorandum as was expected. The Court has found that flowing from the parties' agreement at the meeting of May 30, 2019 that the draft recognition agreement would be signed, the issue of numbers recruited had been resolved as manifested in the union deduction reports on record for May 2019 and received by the claimant on June 10, 2019.

Forth, the dispute being refusal by the respondent to sign the draft recognition agreement and the respondent not having raised any objections to the substance or content of that draft, the Court finds that the claimant has established that the same ought to be signed by the respondent.

Fifth, section 48(6) of the *Labour Relations Act*, 2007 provides that 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. The Court returns that where unionisable employees recruited by the claimant may have acted per section 48(6), the respondent is obligated to act accordingly and stop the deductions from such employee but such employee's resignation does not impair the simple majority threshold attained by the claimant as at reporting of the dispute to the Cabinet Secretary and for purposes of recognition of the claimant by the respondent per section 54(1) of *the Act*.

Sixth, the respondent is obligated to continue deducting and remitting union dues with respect to all duly recruited unionisable staff as provided in section 48 of *the Act* and for such employees there has been no compliance, deduction to commence and to continue effective payment for end of June 2022.

13. To foster future good industrial relations between the parties, the respondent to pay only 50% costs of the suit to be agreed upon within 30 days from the date of judgment and failing to be taxed in the usual manner.

14. In conclusion, judgment is hereby entered for the claimant against the respondent for:

    1) The respondent to sign the draft recognition agreement herein by 30.06.2022 to pave way for parties' conclusion of a collective agreement as per section 54(1) as read with section 57 of the *Labour Relations Act*, 2007.

    2) The declaration that the respondent is obligated to continue deducting and remitting union dues with respect to all duly recruited unionisable employees as provided for in section 48 of *the Act* and for such recruited employees where there has been no compliance, deduction to commence and to continue effective the payment for end of June 2022.

    3) The respondent to pay only 50% costs of the suit to be agreed upon within 30 days from the date of this judgment and failing to be taxed in the usual manner.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 13TH MAY, 2022.

BYRAM ONGAYA

JUDGE