Kenya Engineering Workers Union v Jumbo Steel Mills Limited (Employment and Labour Relations Cause 93 of 2019) [2022] KEELRC 12828 (KLR) (14 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12828 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

EMPLOYMENT AND LABOUR RELATIONS CAUSE 93 OF 2019

B ONGAYA, J

OCTOBER 14, 2022

BETWEEN

KENYA ENGINEERING WORKERS UNION ..... CLAIMANT

AND

JUMBO STEEL MILLS LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on November 29, 2019 against Jumbo Mills Limited. The claim was through the union general secretary one Wycliffe A Nyamwata. The claimant prayed for judgment against the respondent for:

    a. The respondent to comply with section 48 of the *Labour Relations Act*, 2007 by way of deducting and remitting union dues with immediate effect.

    b. The respondent to pay 2% of claimant's members' gross salaries from the month of October, 2019 to date from their own pockets.

    c. The court to order the respondent from victimizing the claimant's members on ground of trade union activities or affiliation by way of locking out, redundancy, termination, dismissal or change of their current contracts.

    d. The parties be ordered to sign the recognition agreement within specified shortest time possible to pave way for CBA negotiations.

    e. Costs of the suit be provided by the respondent.

    f. Any other relief the honourable court may deem fit to grant.

2. The claimant exhibited the letter dated August 15, 2019 addressed to Jumbo Mills Limited on deduction of union dues and prescribed forms showing 109 unionisable employees had been recruited.

By another undated letter, the union forwarded a draft recognition agreement requesting Jumbo Mills Limited to study in preparation of a meeting to be held on August 29, 2019 at 10.30am at the company's offices. By a letter dated October 14, 2019 the union reported a trade dispute to the Cabinet Secretary per section 62 of the *Labour Relations Act*, 2007 and against Jumbo Mills Limited. The issue in dispute was 'union dues'. Another letter dated October 14, 2019 raised the issue in dispute as 'recognition agreement'. The material on record show that prior to appointment of a conciliator or conclusion of the conciliation proceedings as initiated, the claimant filed the suit on November 29, 2019.

3. The respondent filed the memorandum of response on March 2, 2021 through Oluga & Company Advocates. The respondent raised a preliminary objection that the suit was premature as it had been filed prior to conclusion of the conciliation proceedings as it was in breach of sections 54(7) and 73 (1) of the *Labour Relations Act*, 2007. The respondent further pleaded as follows. The claimant had not recruited 109 employees of the respondent as was alleged and the employees allegedly recruited had signed denying membership of the trade union. The claimant had not met the threshold for recognition. The respondent had not denied its employees the right to join the trade union per article 41 of the *Constitution* of Kenya, 2010. It was contradictory for the claimant to allege recruitment of 73% of the employees and allege the same employees had been denied a chance to join the union. The claimant cannot litigate on behalf of employees not being its members as it lacks standing to do so. The claimant was not sure of the recruited employees. The respondent further pleaded that the court lacked jurisdiction as the suit was premature for want of conclusion of conciliation. It was prayed the suit be dismissed with costs.

4. The claimant amended the memorandum of claim to name the defendant as Jumbo Steel Mills Limited as filed on May 3, 2021 annexed on the notice of motion filed the same date. The amended response was filed on July 14, 2021. The claimant filed a reply to response on July 26, 2021. It annexed letter of April 29, 2021 forwarding the signed forms for recruitment of 109 employees. They were forwarded to the entity known as Jumbo Steel Mills Limited.

5. On November 23, 2021 the court ordered the parties to appear before the conciliator and the conciliator's report or certificate be filed in court.

6. The conciliator's report is filed in court on February 2, 2022. The conciliator found that per the union constitution it was the proper union to represent unionisable employees in the respondent's enterprise. The conciliator found that indeed the claimant had recruited 109 employees as per the check-off forms availed. However, the company's employees had grown from approximately 150 to around 600 and an outsourced labour supplier was in place and had employed 560 employees being mostly unionisable staff. The conciliator considered the matter overtaken in view of the true situation on the ground. It was recommended that the union to recruit afresh from the unionisable employees of the outsourced company with whom the union should seek recognition.

7. The final submissions were filed for parties and the parties called no witnesses. The court has considered all the material on record and makes pertinent findings as follows.

8. First, in absence of any other material on record by way of evidence by witnesses, there is no reason to doubt the factual findings by the conciliator. The court finds that the claimant is the sector union and it is entitled to recruit employees serving in the respondent's enterprise. However, the court further finds that the claimant has failed to meet the threshold of simple majority recruitment of the unionisable employees in the respondent's service. In any event the unionisable employees are employed by an outsourced company and it would be in vanity to seek the respondent to deduct union dues per section 48 of the Act in favour of the claimant union.

9. Second, the court finds that the suit was not premature as urged for the respondent. Section 54(6) of the *Labour Relations Act*, 2007 provides that if there is a dispute as to the right of a trade union to be recognized for the purpose of collective bargaining in accordance with the section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of part VIII of the Act. While the claimant appears to have referred the dispute for conciliation on October 14, 2019, the suit was filed on November 29, 2019. Under section 65(1) of the Act the Cabinet Secretary was to appoint a conciliator within 21 days which had lapsed on or about October 25, 2019. The 21 days had lapsed as at the time the suit was filed. In any event the respondent's case was that it was not properly named in the letter reporting the dispute as there was a mix-up in the named employer. Further, as held by the Court of Appeal in *Karen Blixen Camp Limited –versus-Kenya Hotels and Allied Workers Union, Civil Appeal No 100 of 2013* (Waki, Makhandia, & Gatembu JJA) the conciliatotion proceedings under section 62(1) of the Act are not mandatory thus '15. We agree with the trial court that section 62(1) is permissive and allows all trade disputes to be reported to the minister by the parties listed thereunder in the manner prescribed. There is no compulsion for the referral, and it was certainly not the intention of Parliament to confine parties into a straight jacket, place them at the mercy of the minister, or oust the jurisdiction of the court. At best, it was tailored to enhance good industrial relations between an employer and the trade union representing the employee, as partners in social dialogue.' The court observes that section 74 of the Act provides for urgent referrals to the court as a matter of urgency and by a trade union in matters of recognition or redundancy as specified, and, in matters of employers and employees engaged in essential services. Accordingly, the claimant was entitled to move the court under urgency and without conclusion of statutory conciliation as the matter related to recognition.

10. Third, for practical ends of justice, the court considers that it would be useful for the claimant union to recruit the employees as employed by the outsourced employer for purposes of deduction of union dues and subsequent recognition. The court has considered the circumstances of the case in which the status of the unionisable employees appear to have constantly mutated and each party to bear own costs of the suit.

11. In conclusion the suit is determined with orders each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 14TH OCTOBER, 2022.

BYRAM ONGAYA

JUDGE