



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 175 OF 2019

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS

UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLES 2(1)(4)(5), 3, 10(2)(b), 19(2), 20(1)(2), 21(1), 22(1),

23(3), 24, 27(2), 35, 36 & 41 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OR BREACH OF THE

CONSTITUTION OF KENYA, ARTICLES 36 & 41

AND

IN THE MATTER OF THE INTERPRETATION, IMPLEMENTATION AND

ENFORCEMENT OF THE CONSTITUTION OF KENYA CHAPTER 4

AND

IN THE MATTER OF THE LABOUR RELATIONS ACT, 2007

AND

IN THE MATTER OF THE INTERPRETATION, IMPLEMENTATION AND

ENFORCEMENT OF SECTIONS 54 OF THE LABOUR RELATIONS ACT

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

THE KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL..... 1ST RESPONDENT

JUDGMENT

1. The Kenya Union of Commercial, Food & Allied Workers (the Union) instituted these proceedings against the Honourable Attorney General, Naivas Supermarket Ltd (Respondents) and the Central Organisation of Trade Unions (Interested Party) contending that section 54(1) of the Labour Relations Act violated the right to fair labour practises as guaranteed by Article 41 in so far as it did place a limitation to the right (s).
2. The Secretary-General of the Central Organisation of Trade Unions filed a replying affidavit sworn on 7 January 2020.
3. When the parties appeared before the Court for directions on 9 June 2020, the Attorney General sought time to file a response.
4. The Court directed the Respondents to file and serve Responses on or before 10 July 2020. Submissions were to be filed and exchanged thereafter.
5. When the Petition was mentioned on 4 August 2020 to confirm compliance, it turned out that the Respondents had not complied within the agreed timelines.
6. The Court directed the Petition to be mentioned on 7 August 2020.
7. On 7 August 2020, the Attorney General informed the Court that he had filed Grounds of Opposition on 28 July 2020. As a result, the Court revised the timelines for filing submissions.
8. The Union filed its submissions on 24 August 2020 in which it identified 2 Issues for the Court's determination:
 - (a) Whether section 54(1) of the Labour Relations Act, 2007 is unconstitutional and infringes Articles 36 and 41 of the Constitution of Kenya, 2010.
 - (b) Whether the limitation found in section 54(1) of the Labour Relations Act complies with the requirements of Article 24 of the Constitution.
9. The 1st Respondent filed its submissions on 7 August 2020, and he identified 2 Issues for determination:
 - (a) Whether section 54(1) of the Labour Relations Act, 2007 is unconstitutional to the extent that it places a limitation on Articles 36 and 41 of the Constitution of Kenya.
 - (b) Whether the Petition has merit.
10. When the Petition was mentioned on 29 October 2020, the 2nd Respondent requested 14 days to respond to the Petition and also file submissions. The Court directed it to file the response and submissions before 13 November 2020.
11. Since the Court was on transfer, it indicated that it would deliver Judgment on notice.
12. Instead of filing the response and submissions, the advocate on record for the 2nd Respondent filed an application dated 12 November 2020 seeking leave to cease acting.
13. On 11 December 2020, the Union informed the Court that the application had not been served on it. The Court directed that the file be mentioned on 16 December 2020, and the Union was ordered to notify the 2nd Respondents advocate.
14. On 16 December 2020, apart from the Union, the other parties were not represented, but the Union stated that the application had been served upon it the previous day.
15. In the absence of the 2nd Respondent, the Court declined to grant leave to the advocate to cease from acting.
16. The Respondents were again directed to file and serve their submissions before 18 January 2021 ahead of Judgment today.
17. Interestingly, instead of complying, the firm of Thuita Kiiru & Co Advocates filed on 23 February 2021 a Motion dated 20 January 2020 seeking that this Court recuses itself from further presiding over the Petition.
18. The primary reasons given for the recusal application were first, that the Court had declined the 2nd Respondents application to cease from acting on 16 December 2020 during a session for mention; second, that the Court had delivered judgment in favour of two former employees of the 2nd Respondent in Nakuru Cause No. 401 of 2012 despite the fact that a Magistrates Court had convicted the employees on

the same facts leading to termination of employment.

19. Lastly, it was asserted that it was most unusual for a Judge on transfer to continue holding onto a file.

20. On the same day, the Court directed that the recusal application be served and that directions be given on 1 March 2021.

21. The Union filed a replying affidavit in opposition to the Motion on 1 March 2021, in which it was deposed that the application was meant to delay the Petition's final determination.

22. None of the parties attended Court on this day, and the Court ordered that it would deliver the judgment as earlier scheduled.

23. By this Judgment, the Court dismisses the Motion for recusal as being without merit, frivolous and an abuse of the court process meant to delay the determination of the Petition.

24. The Issue raised by the Union in the Petition is broadly a question as to whether section 54(1) of the Labour Relations Act can pass Constitutional muster.

Constitutionality of section 54(1) of the Labour Relations Act

Union's arguments

25. Section 54(1) of the Labour Relations Act provides:

54(1) Recognition of a trade union by the employer

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.

26. The provision, the Union, argued served to limit or qualify the freedom of association as contemplated by Article 36 and right to fair labour practices as enshrined in Article 41(2) of the Constitution by failing to provide for a right of access to the employers' premises for purposes of recruitment of employees.

27. Further, the Union contended that the provision run counter to the national values and principles.

28. The Union asserted that the 2nd Respondent had refused to grant it access for purposes of recruitment and had continually harassed and victimised employees who had joined it.

29. The result of the denial of access, it was submitted, had resulted in the employees being limited from enjoying their freedom of association and right to fair labour practices (to form, join and participate in activities of a trade union).

30. Taking the argument further, the Union urged that section 54(1) of the Labour Relations Act could not meet the test envisioned by Article 24 as it provided for a simple majority threshold for recognition of a trade union by the employer.

31. The limitation, it was stated, was not reasonable or justifiable in an open democratic society.

32. The Respondents and Interested Party did not file submissions.

Evaluation

33. The Union challenged the constitutionality of section 54(1) of the Labour Relations Act on 2 premises, firstly, that it did not guarantee and/or provide for a right of access to an employers' premises, thus limiting employees right to associate and fair labour practices and secondly, that the requirement of a simple majority threshold to get recognition from an employer was not proportionate and or reasonable within the context of Article 24 of the Constitution.

Right of access to employers premises

34. Section 54(1) of the Labour Relations Act, already set out hereinabove, with due respect to the Union, does not regulate the right of a trade union to access an employer's premises for purposes of recruitment or other official trade union activities.

35. The relevant provision is section 56 of the Act, which gives a trade union a statutory right to access an employer's premises for purposes of promoting its activities and programs.

36. The Union did not challenge the adequacy or otherwise of section 56 of the Labour Relations Act in any express way.

37. The import of section 56 of the Labour Relations Act, in the humble opinion of the Court, is to secure a right to trade unions, which right can be enforced through the Court adjudicatory system on a case by case basis.

38. The Court, therefore, finds the challenge to the constitutionality of section 54(1) of the Labour Relations Act within the context of the right of access to employers' premises misplaced.

Simple majority threshold

39. The Union, in a very subtle and clever way, challenged the requirement in section 54(1) of the Labour Relations Act that a trade union should achieve a threshold of a simple majority of unionisable employees before getting recognition by an employer.

40. Citing the Employment Relations Act, 1999 of the United Kingdom, which sets out thresholds of 10% and 40%, and from India where the *Code of Discipline* puts a recognition threshold of 15%, the Union submitted that the threshold of a simple majority was not reasonable.

41. The simple majority threshold the Union submitted did not meet the proportionality or reasonableness test envisaged by Article 24 of the Constitution. It was too restrictive, according to the Union.

42. The Union, without expressly arguing so, was seeking the nod of the Court to introduce minority unions in the workplace, on the basis that the *majoritarianism* rationale in section 54(1) of the Labour Relations Act was inconsistent with the freedom of association and right to fair labour practices (joining a trade union and collective bargaining).

43. One of the principal objectives for the establishment of this Court was to *further secure and maintain* good employment and labour relations in the country.

44. The question, therefore, begs whether lowering the simple majority threshold and allowing multiple unions in the workplace would serve the need for industrial harmony in the workplace.

45. The statutory principle of simple majority is not without purpose. It facilitates the orderly conduct of collective bargaining within the industry. It reduces the risk of the proliferation of trade unions in the workplace. It enhances industrial peace.

46. Allowing multiple Unions to be recognised by an employer would be a recipe for chaos.

47. The Court in this respect is of the view that the requirement in section 54(1) of the Labour Relations Act is reasonable and proportionate and not antithetical to the Constitutional norms of freedom of association, the right to organise, the right to collective bargaining and the employee's right to join and participate in the activities of a trade union.

48. The Court finds no merit in the Petition and it is dismissed.

49. The Respondents did not comply with Court orders. They are condemned to pay the costs of the Petition.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 7TH DAY OF APRIL 2021.

RADIDO STEPHEN

JUDGE

Appearances

For Union Chiggai & Co. Advocates

For 1st Respondent Mr. Kioko, State Counsel, Office of the Attorney General

For 2nd Respondent Thuita Kiiru & Co. Advocates

Interested Party COTU

Court Assistant Lindsey/Chrispo Aura