REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER E6541 OF 2020

BETWEEN

KENYA EXPORT, FLORICULTURE,

HORTICULTURE AND ALLIED WORKERS UNION..... ...CLAIMANT

VERSUS

1. KENYA PLANTATION & AGRICULTURAL WORKERS UNION

2. AGRICULTURAL EMPLOYERS' ASSOCIATION

3. ATTORNEY-GENERAL.....RESPONDENTS

AND

1. CABINET SECRETARY FOR LABOUR AND SOCIAL PROTECTION

2. REGISTRAR OF TRADE UNIONS.....INTERESTED PARTIES

Rika J

Court Assistant: Emmanuel Kiprono

David Omulama, General-Secretary for the Claimant.

Meshack Khisa, Assistant General -Secretary for the 1st Respondent.

George Masese, Advocate [FKE] for the 2nd Respondent.

Attorney- General for the 3rd Respondent and the Interested Parties.

JUDGMENT

1. The Claimant Union was registered as a Trade Union to represent floriculture and horticulture industry, pursuant to a Judgment of this Court, in ***Appeal No. 7 of 2011***, as affirmed by the ***Court of Appeal in Civil Appeal No. 141 of 2018*** and the ***Supreme Court, in Petition No. 4 of 2018.***

2. The Claimant appears to have encountered headwinds, despite securing registration, in dislodging the 1st Respondent from the industry, and from enjoying exclusive representation. It seeks the assistance of this Court, in form of the following, summarized, final orders: -

a. Declaration that the Claimant is the sole Trade Union, which is allowed by its constitution to carry out activities in Export Floriculture Industry.

b. Declaration that the Claimant is the sole Trade Union, which is allowed by its constitution to carry out activities in Export

Vegetables Industry.

c. An order directing the 1st Respondent to vacate the Export Floriculture and Horticulture Industry.

d. An order directing the Cabinet Secretary, Labour, not to approve for registration in Court, any further CBAs, between the 1st and 2nd Respondents, relating to Floriculture and Horticulture Industry.

e. An order directing the 2nd Interested Party, to enforce the orders above.

f. Any other suitable order.

g. Costs to be borne by the 1st and 2nd Respondent.

3. The Claimant filed simultaneously with the Statement of Claim, an Application, seeking a raft of interim measures, including injunctive orders, restraining the 1st Respondent from recruiting in the area represented by the Claimant; restraining the 1st and 2nd Respondents from signing new Recognition Agreement; 2nd Respondent grants the Claimant access to Employees working in areas represented by the Claimant for purposes of recruitment; restraining the 1st Respondent from publishing any material which projects the Claimant as a non-registered Trade Union; and, that the Application and the Claim are merged and disposed of, under Rule 21 of the E&LRC [Procedure] Rules, 2016.

4. The last prayer in the Application was allowed by consent, recorded in the presence of the Parties' Representatives, on 21st January 2021. It was agreed that the Claim as a whole, is determined on the strength of the Pleadings, Affidavits, Documents and Written Submissions. These were confirmed to have been filled at the last virtual mention, on 10th June 2021. The Court scheduled delivery of the Judgment for 14th October 2021. Preparation of the Judgment has been finalized much earlier, and the Court has notified the Parties on fresh date of delivery, indicated at the end of the Judgment.

Claimant's Submissions.

5. The Claimant submits it was granted registration following Judgments in the E&LRC; the Court of Appeal; and the Supreme Court. The Courts bestowed floriculture and horticulture industry upon the Claimant.

6. The Courts declared that the 1st Respondent is a general and giant Trade Union, not sufficiently representative of the floriculture and horticulture industry. But the 1st Respondent, has continued to operate in the industry, negotiating and concluding illegitimate CBAs.

7. The Claimant submits that it has a Recognition Agreement with the 2nd Respondent [representing Equinox Horticulture Limited] and two other Recognition Agreements with Vegpro Kenya Limited. These Agreements however are of no effect, because the 1st Respondent has been insisting it is the right Union to act for the industry.

8. The 1st and 2nd Respondents have a CBA covering 67 to 73 Employers, members of the 2nd Respondent umbrella Association. They are using this CBA to tie up Employees in the floriculture and horticulture industry, disregarding the findings of respective Courts, that the Claimant is the relevant Union for the industry.

9. Continued presence of the 1st Respondent in the area demarcated for the Claimant, is causing confusion and inhibiting the Claimant, in representing an area bestowed upon it, by a succession of Judgments from the Courts. The Employees' associational rights under Section 4 of the Labour Relations Act and Article 41 of the Constitution of Kenya, have been trampled upon by the 1st Respondent.

10. Section 14 [1] of the Labour Relations Act only allows a Trade Union to recruit and represent Employees who work in clearly specified industries. This law is buttressed by the Industrial Relations Charter, which requires the 2nd Interested Party to ensure areas of representation are made clear in Trade Union constitutions. Article 3 of the Claimant's constitution is specific to floriculture and horticulture.

11. The Claimant states that it also uses the term 'allied' in describing its areas of representation, explaining that 'allied,' covers the rest of floricultural and horticultural activities, which may be necessary for export purposes.

12. Contrastingly, it is argued by the Claimant, that clause 3 of the 1st Respondent's constitution is nebulous. It allows the 1st Respondent to engage in multiple industries and sectors. The Claimant anchors its argument on the initial Judgment granting it registration, where the Court held that the Claimant would represent floriculture and horticulture industry, distinguishable from plantation and agricultural sectors, represented by the 1st Respondent.

13. The Claimant reiterates what the Courts stated in their respective Judgments: that the Claimant is the relevant Trade Union to represent floriculture and horticulture industry; and that its constitution allows the Claimant representation of this industry.

14. It is submitted by the Claimant that Recognition Agreement between the 1st and the 2nd Respondents of 1999, covers general agricultural Employees; it does not cover floricultural and horticultural Employees. The CBA signed between the 2 Respondents on 21st August 2019, roping in Flower Growers Group, was not based on a valid Recognition Agreement.

15. Consequently, the Claimant argues, the CBA in place between the 2 Respondents should not be renewed.

16. By operation of the law, pronounced in the successive Judgments of the Courts, the 1st Respondent is not the legitimate Union to represent the floriculture and horticulture industry and hence, cannot sign further Recognition or Collective Bargaining Agreements, with the 2nd Respondent.

17. If the CBA is renewed, it would lock out the Claimant from recruiting Employees from this industry; from negotiating and concluding CBAs on behalf of such Employees; and prevent the Claimant from receiving trade union dues and agency fees, from the 2nd Respondent.

18. The 67 to 73 Employers, are included in the CBA between the 2 Respondents. They are referred to as Flower Growers Group [FGG], members of the 2nd Respondent, Agricultural Employers' Association [AEA]. These Employers [FGG] operate squarely in the area represented by the Claimant. By negotiating a CBA on their behalf, the 1st Respondent has encroached on the Claimant's area of representation. The Claimant states that the 1st Respondent, through its General-Secretary, who is also the Secretary- General of the Trade Union Centre [COTU-K], Dr. Francis Atwoli, has led his Union in this encroachment and written letters, inciting the industry against the Claimant.

19. The Claimant submits that the 1st Respondent should therefore be ordered to vacate the floriculture and horticulture industry. It relies on the Judgment of the Industrial Court in ***Banking, Insurance and Finance Union [BIFU] v. Kenya Bankers Association & Kenya Union of Commercial, Food and Allied Workers Union [KUCFAW] [Cause No. 75 of 1999]*** where the Court found that BIFU was a specialist Union, awarding BIFU registration, amidst the protestations of the generalist KUCFAW.

20. It also cites at length, the Award of this Court in ***Industrial Court Cause No. 39 of 2007, Kenya Hotels and Allied Workers Union [KHAWU] v. Grand Regency Hotel Limited & Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers [KUDHEIHA] & Kenya Hotel Keepers and Caterers Association [KHKCA]***. The Court, while ordering KUDHEIHA out of the hotel industry, upheld the principles of *'one union, one industry,'* and *'community of interests,'* concluding that the Industrial Relations Charter and the Law, do not envisage Trade Unions with a generalist orientation. Also cited is this Court's ***Appeal No. 1 of 2011 between Japheth Anyira Agura & Others v. Registrar of Trade Unions,*** where the Court granted orders of registration to Kenya Union of Employees of Polytechnics, Colleges and Allied Institutions, concluding that the rival, KUDHEIHA *''is actively representing other industries, with little or no community of interest.''*

21. The Claimant correctly submits, it does not have the option of petitioning the National Labour Board to de-recognize the 1st Respondent, because Section 54 [5] of the Labour Relations Act, confers this option, on the Employer or Employers' Association.

22. The Claimant prays the Court to grant Judgment in its favour, completely decapitating the 1st Respondent, from the floriculture and horticulture industry.

1st Respondent's Position.

23. The 1st Respondent's position is expressed through an Affidavit sworn on 18th January 2021, by its National Organizing Secretary, Henry Omasire.

24. It is submitted that the 1st Respondent is mandated under clause 3 of its constitution, to represent the floriculture and horticulture industry. The 1st Respondent describes the industry as involving cultivation of ornamental flowers, fruits, vegetables, and ornamental plants in large scale, in controlled environment at pack houses, for commercial purposes. This is an area falling within clause 3 of the 1st Respondent's constitution.

25. The 1st Respondent submits that it has the Constitutional right under Article 36 and 41, read with Sections 4, 57 and 59 of the Labour Relations Act, to associate with Employees in floriculture and horticulture industry.

26. It is conceded that the 1st Respondent has concluded CBAs, with the 2nd Respondent, covering Employees working in 73 companies, named by the Claimant, referred to as the Flower Growers Group. The CBAs have been concluded by virtue of existing Recognition Agreement between the 1st and 2nd Respondents.

27. The Claimant has no *locus standi* in asking the Court to restrain the 1st and 2nd Respondents from renewing their CBA. Recognition was granted to the 1st Respondent, by the 2nd Respondent, upon the 1st Respondent recruiting a simple majority of the 2nd Respondent's members. The Claimant has not demonstrated that it has recruited a simple majority of Employees in the floriculture and horticulture industry, to be granted recognition by the 2nd Respondent.

28. The Claimant intends to use the coercive hand of the Court, to disrupt the contractual obligations in place between the 1st and 2nd Respondents.

29. It is conceded that the Claimant's constitution covers specific areas, while the 1st Respondent's covers various industries at large which include flower plantations and all types of horticultural plantations. The 2nd Respondent does not have a Recognition Agreement with the Claimant, for the Claimant to be allowed access at the 2nd Respondent's premises for purposes of recruitment of members, in terms of Section 54[2][3] of the Labour Relations Act.

30. The 1st Respondent submits that Vegpro Limited is not a Party to the Claim, neither is COTU-K which issued the letter the Claimant complains, amounted to adverse publicity about its registration status. The 1st Respondent prays the Court to dismiss the Claim.

2nd Respondent's Position.

31. The 2nd Respondent submits it is an Employers' Association, representing Employers in the Agricultural Industry. The Flower Growers Group is part of the 2nd Respondent's membership. The 1st Respondent recruited a simple majority of Employees from the industry, and executed Recognition Agreement with the 2nd Respondent. Recognition Agreement was executed on 6th September 1999.

32. Subsequently, the 1st and 2nd Respondents have negotiated and concluded a series of CBAs.

33. The present CBA covers 73 Flower Farms, and applies to over 60,000 Unionisable Employees. It expires in August 2021.

34. The Recognition Agreement allows the 1st Respondent the sole right to represent Employees under the Flower Growers Group. The 1st Respondent receives trade union dues for all Employees who are its members, and agency fees for those who are not members, but who draw benefits from CBAs negotiated and concluded through the 1st Respondent.

35. The 2nd Respondent is aware about the Courts' interventions, that resulted in the registration of the Claimant, to represent Floriculture and Horticulture industry. There is however a longstanding Recognition Agreement and a series of CBAs, binding the 1st and 2nd Respondents. The 1st Respondent cannot be said to have encroached on the Claimant's territory. Its involvement in this industry, is founded on the existing Recognition Agreement, and its constitution.

36. The 2nd Respondent understands the Judgments made in favour of the Claimant, granting registration to go no further than just that: granting of registration. It cannot have been intended that in granting registration, the Courts revoked the Recognition Agreement, a succession of CBAs, made between the 2 Respondents, and nullified the 1st Respondent's constitutional clauses extending representation to floriculture and horticulture. The stance adopted by the Claimant would create industrial disharmony, in a sector which has enjoyed industrial peace for a long time.

37. The 2nd Respondent states that the Claimant is at liberty to recruit from the industry, having been granted registration, but should not seek recognition coercively through the orders of the Court. If the Claimant intends to have the 1st Respondent de-recognized, it should do so through the available mechanisms.

38. Grant of the orders sought would create a vacuum in floriculture and horticulture industry, invalidating existing Labour Contracts, while the Claimant remains registered but un-recognized by the 2nd Respondent. It would also infringe the 1st and 2nd Respondents' Constitutional right and freedom of association.

39. These Submissions are anchored on the Affidavit of 2nd Respondent's Chief Executive Officer, Wesley Siele, sworn on 16th January 2021.

40. The record does not have Pleadings or Submissions filed by the Cabinet Secretary for Labour, the 1st Interested Party.

2nd Interested Party's Position.

41. The 2nd Interested Party states that her mandate is to register and regulate Trade Unions, Employers' Organizations and Federations. The Claimant, 1st Respondent and 2nd Respondents are registered as Trade Unions and Employers' Organization respectively.

42. The Claimant's and the 1st Respondent's respective constitutions, allow them to represent Employees in agricultural sector, whose subsectors include floriculture and horticulture.

43. The 2nd Interested Party submits that Articles 36 and 41 of the Constitution accords all persons, freedom of association, underscoring that no person shall be compelled to join an association.

44. The Claimant concedes that the 1st Respondent has a Recognition Agreement with the 2nd Respondent. The 2nd Respondent's Employees are already represented therefore, by the 1st Respondent. They are however at liberty to choose which Union to belong to. The constitutions of the Claimant and the 1st Respondent can only be amended by the respective Unions.

45. The 2nd Interested Party states, it is not her role to demarcate trade union areas of representation; this function is exercised by the Department of Labour. Section 54 of the Labour Relations Act requires recognition disputes to go for conciliation and where not resolved, be referred to the E&LRC as a matter of urgency. The 2nd Interested Party holds the position that the Claim is premature, as no conciliation has taken place. She wishes to be excused from the proceedings.

Issues.

46. The issues as understood by the Court, may be summarized as - **whether the 1st Respondent has encroached on the Claimant's area of representation; whether the 1st Respondent should be ushered out of the floriculture and horticulture industry; and, whether the 1st and 2nd Respondents' existing Labour Contracts should be invalidated, and future ones prohibited.**

The Court Finds: -

***Common facts*.**

47. The Claimant and the 1st Respondent are registered Trade Unions involved in the agricultural sector. The 2nd Respondent is an Employers' Organization duly registered, representing Employers in the sector.

48. The 1st Respondent and the 2nd Respondent have a Recognition Agreement, executed on 6th September 1999. They have concluded and registered several CBAs. The last CBA expired in August 2021, and is due for renewal. It is not disputed that the CBA covers 73 Flower Farms, identified by the 2nd Respondent as Flower Growers Group, with over 60,000 Unionisable Employees.

49. The Claimant is relatively, a newcomer to the Sector. It was granted registration following the Judgment of the ***E&LRC in Appeal No. 7 of 2011***, which was affirmed subsequently in ***CA Civil Appeal No. 141*** of ***2018,*** and ***SCOK Petition No. 4 of 2018.*** Judgment by the Court of first instance was delivered on 11th February 2014; the Appellate Court pronounced itself on 12th May 2017; while SCOK gave its imprimatur on Claimant's registration as a Trade Union, in a Judgment dated 23rd January 2020. The Claimant was granted registration to represent Employees in the floriculture and horticulture industry.

Encroachment.

50. The Claimant assertion that the 1st Respondent has encroached on its territory does not appear to the Court, persuasive. The 1st Respondent has a long-term relationship with the 2nd Respondent. There is a Recognition Agreement and CBA, binding the 1st and 2nd Respondent, and affecting 73 Flower Growers Group of Employers, and over 60,000 Employees.

51. The constitutions of the Claimant and the 1st Respondent have not been amended after registration of the Claimant. Whereas the Claimant's allows the Claimant to represent Employees in floriculture and horticulture industry, the 1st Respondent's which is broadly worded, allows the 1st Respondent to represent Employees in flower plantations, all types of horticultural plantations, floriculture plantations and floriculture pack houses.

52. Both constitutions adopt such terms as, 'and allied workers/industries,' 'all types of horticultural plantations,' which in the respectful view of this Court, negates the very argument about specifically demarcated areas of representation. Is not growing of flowers allied to their export? Once a Trade Union adopts the term 'allied workers/industries,' it ceases to focus on a specialized area, weakening its argument about specialism vis-à-vis general orientation.

53. The Court does not think it is helpful for the Claimant to regurgitate the arguments it advanced in gaining registration at various levels of the Judiciary. Those arguments were found to have weight, but not exactly the same factors, come into play in determining whether the 1st Respondent has encroached the territory delineated for the Claimant Union.

54. Encroachment means there is intrusion by the 1st Respondent on an area belonging to the Claimant. The Claimant has just obtained registration, and allowed to recruit from floriculture and horticulture industry. Does the 1st Respondent encroach, by honouring existing contractual relationship it has with the 2nd Respondent? Does it abandon 60,000 Employees it represents, because the Claimant has been allowed to recruit from among these Employees? The Court does not think so. Registration is granted on the understanding that the specified area is not represented, or sufficiently represented. In the Judgments heralding the entry of the Claimant into the agricultural sector, the Court does not think that it was a finding, that Employees in floriculture and horticulture industry were unrepresented. This cannot be, with the Recognition Agreement and a succession of CBAs in place, between the 1st and 2nd Respondents. The understanding of this Court is that the Claimant was granted registration, on the understanding that the 1st Respondent was not sufficiently representative of the industry, and there was space for a 2nd Union. Perceived, insufficient representation of the floriculture and horticulture industry by the 1st Respondent, was not outlawed through the registration of the Claimant, and there is still freedom of association between the 1st and 2nd Respondents, under the Constitution of Kenya, which must be protected, however insufficient the 1st Respondent's representation is. Declaratory orders sought cannot be granted, while the 1st Respondent's constitution extends to floriculture and horticulture industry, and while the Recognition Agreement with the 2nd Respondent subsists.

Should the 1st Respondent be ordered out of the floriculture and horticulture industry?

55. This Court wrote the Judgment in ***KHAWU v. KUDHEIHA, Grand Regency & KHKCA,*** and ***Japheth Anyira Agura & 6 others v. Registrar of Trade Unions [2014] e-KLR***, relied upon by the Claimant, espousing the principle of *'one union, one industry'* based on '*community of interest*.' In the former decision, the Court specifically ordered that KUDHEIHA ceases to engage in representation of the hotel industry.

56. As in the present dispute, the umbrella Employers' Organization [Hoteliers' Association] was against the ejection of KUDHEIHA from the industry, holding that it has a longstanding Recognition Agreement with KUDHEIHA, and has concluded several CBAs. Ejection of KUDHEIHA would destabilize the hotel industry. KHAWU was a newcomer, barely known to the industry-wide Association of Employers.

57. To-date, KUDHEIHA is actively representing the hotel industry, alongside KHAWU, and with a good reason.

58. In ***E&LRC Petition No. 5 of 2015, KHAWU v. Attorney-General & 6 others [2015] e-KLR,*** a 3-Judge panel of this Court held that KHAWU could not be granted recognition by the Hoteliers' Association, because it had not recruited simple majority of Employees within the members of the Hoteliers' Association. KUDHEIHA, about 7 years back, had already been ordered by the Court to move out of the hotel industry.

59. Recognition of KHAWU would contravene Article 41 of the Constitution and Section 54 of the Labour Relations Act. This position with regard to demarcation of areas of representation has been upheld by this Court in other decisions including ***KHAWU v. Hilton Hotel [Nairobi E&LRC Cause No. 1194 of 2014];*** and ***KHAWU v Pangoni Beach Limited [2015] e-KLR***.

60. The Court's decision in ***Cause No 39 of 2007***, ordering KUDHEIHA out of the hotel industry in favour of KHAWU, seems to have been overtaken by other decisions coming after the promulgation of the Constitution in 2010. Recognition Agreement between KUDHEIHA and the Hoteliers' Association is still in place, and KUDHEIHA has never been dislodged from the hotel industry. Award is ***Cause No. 39 of 2007*** was rendered ineffectual, through decisions coming after 2010. There is a strong bent, in favour of protection of freedom of association, in particular where the Labour Contracts sought to be undone by newcomer Trade Unions, have been in place for considerable time. Courts are inclined to uphold existing freedom of association, rather than buy the argument that freedom of association of newcomers in the relevant industries, is at stake.

61. Going by the current judicial trends, it is the view of the Court that it would not be proper to order that the 1st Respondent ceases further engagement with the Flower Growers Group, which is a member of the 2nd Respondent.

62. The Claimant must first recruit a simple majority of the 2nd Respondent's members, to claim sole organizational rights, with regard to Unionisable Employees working for members of the 2nd Respondent.

Extinguish present Labour Contracts, bar future ones?

63. This issue seems to the Court to be settled, once the conclusion was made, that the 1st Respondent has not encroached on the Claimant's territory, but is rather, acting in protection of existing contractual obligations.

64. The Recognition Agreement between the 1st and 2nd Respondent was not undone by the registration of the Claimant Union. It is in force, and legally protected, under the Labour Relations Act. The constitution of the 1st Respondent, is similarly still in force, and extends the 1st Respondent's representation to all types of floriculture, horticulture plantations and pack houses.

65. Recognition Agreement affords the 1st and 2nd Respondents centralized bargaining, with all organizational rights, vested in the 1st Respondent. It is up to the 2nd Respondent, upon presentation of check-off forms from the Claimant, to determine if it should grant the Claimant Recognition, and have more than one Trade Union at the workplace. All that the Judgments made by the Courts did, was to confirm that the Claimant merits registration as a Trade Union. Recognition, and acquisition of organizational rights, is a different process. There is no basis whatsoever, to order the Cabinet Secretary to decline registration of a CBA duly negotiated between a Recognized Trade Union, and its partner Employers' Association. The 2nd Interested Party has no role, in enforcement of CBAs.

66. The Claimant has written to the 2nd Respondent, asking the 2nd Respondent to de-recognize the 1st Respondent. De-recognition either by the 2nd Respondent, through the National Labour Board or an order of the Court, does not appear feasible, without the Claimant satisfying the requirements of Section 54 of the Labour Relations Act.

67. Invalidation of the existing Recognition Agreement, would leave thousands of Employees in the industry, in a limbo and unrepresented. The Claimant is not a Recognized Trade Union, and would not supplant the 1st Respondent, and negotiate any CBA without Recognition. It is objectionable for the Claimant to be allowed organizational rights, and the legitimacy to receive trade union dues and agency fees, from over 60,000 Employees, just on the strength of registration as a Trade Union.

68. It is also clear in the mind of the Court, that orders reversing the present industrial relations structure, would seriously infringe the 1st and 2nd Respondents' Constitutional rights and freedoms under Articles 36 and 41 of the Constitution and Section 54 of the Labour Relations Act.

69. Recognition Agreements nonetheless, are not irreversible as held in ***Scientific Research International Technical & Allied Workers Union v. Kenya Agricultural Research Institute & Another [2013] e-KLR.*** 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. Employers also, are not tied to one industry. They may change the nature of business, rendering existing workplace Trade Union, irrelevant. Recognition Agreements are not cast in bronze.

70. The Court of Appeal in ***Mombasa Maize Millers Limited v. Bakery, Confectionery, Food Manufacturing and Allied Workers Union & Another [2018] e-KLR,*** reversed the decision of this Court, where it had been ordered that membership of 2 rival Unions be verified through balloting at the shop-floor level, to determine if an existing Recognition Agreement could be invalidated in favour of a new Union, which had recruited Employees from the same workplace.

71. The Superior Court in the above decision upheld the argument, that the Employer did not need a fresh Recognition Agreement. There was already one in place, and a CBA concluded with the existing Trade Union was similarly in place. There is a presumption that the existing Recognition Agreement is valid, and that such presumption can only be rebutted by cogent evidence such as resignation notices from the affected Employees.

72. The Court of Appeal did not therefore, see the need for Employees balloting, and was persuaded that the newcomer Trade Union [Bakery] had not laid the ground for de-recognition of the existing Trade Union [KUCFAW].

73. The judicial trend has been to protect existing Recognition Agreements. There is no recent record from the Courts, where orders have been made, voiding existing Recognition Agreements. The Court has not found any decision of the National Labour Board either, upholding de-recognition. Even when this Court attempted to test the strength of the rival Trade Unions at the shop-floor level, through Employees balloting [Bakery Union dispute], the exercise was nipped in the bud by the Superior Court, in favour of the existing Recognition Agreement. Should not Employees be allowed to vote, in determining multiplicity of workplace collective matters of their rights and interests? Would not the result of a supervised balloting, offer greater probative value than the frequently contested letters of Employees' resignation from their Trade Unions?

74. Not to lose focus in this consuming subject of freedom of association, it appears settled, or at least most persuasive, that existing obligations created through various Labour Contracts, are best left undisturbed, perhaps for preservation of the *status quo*, also characterized as industrial peace and stability. Recognition Agreements and areas of representation, are about Employees, and in the end, there would be need to involve the Employees, through balloting, in determining their Trade Union of choice.

75. The Court is persuaded that the Claim must fail. The Claimant must go beyond its registration and recruit sufficient members from the 2nd Respondent, to be granted recognition and organizational rights by the 2nd Respondent. Registration on its own, does not afford the Claimant Recognition. Until there is proof that the Claimant has satisfied Section 54 of the Labour Relations Act, the *status quo* must be maintained. As held in successive decisions by the E&LRC, in the series of litigation involving the hotel industry, the Claimant must recruit at least 50% + 1, of the Unionisable Employees in the Floriculture and Horticulture industry, members of the 2nd Respondent, to be considered for recognition by the 2nd Respondent. The 1st and 2nd Respondents must be left for now, to engage within the industrial relations structure governing them. The 73 Flower Growers Group of Employers, represented by the 2nd Respondent, while open to recruitment of their Employees by the Claimant, must remain bound by the Recognition Agreement and CBA in place. The 1st and 2nd Respondents must continue to negotiate and register CBAs unhindered, with regard to the particular collective bargaining unit, until the Claimant acquires organizational rights through a Recognition Agreement.

76. The Court agrees with the 2nd Interested Party that the dispute should have been taken through conciliation under Section 54 [6] [7] of the Labour Relations Act, and was therefore presented in Court prematurely. It is also correct that the Registrar of Trade Unions does not deal with trade union demarcation, or Recognition / CBA, disputes. The 2nd Interested Party would have been discharged from the proceedings, but as the Claim ends here, it serves no purpose to discharge the 2nd Interested Party.

IT IS ORDERED: -

a. The Claim is rejected in its totality.

b. Costs to be paid by the Claimant.

Dated, signed and released to the Parties electronically, under Ministry of Health and Judiciary Covid-19 Guidelines, at Nairobi, this 10th day of September 2021.

James Rika

Judge