



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 201 OF 2017

[FORMERLY NAIROBI E&LRC CAUSE NO. 396/2017]

BETWEEN

KENYA UNION OF PRINTING, PUBLISHING,

PAPER MANUFACTURERS & ALLIED WORKERS.....CLAIMANT

VERSUS

MFI DOCUMENTS.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

M/s J.A Guserwa & Company Advocates for the Claimant

Ms. Kilonzo & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant initially filed Cause No. 677 of 2015 at the E&LRC Mombasa, seeking recognition from the Respondent.
2. The Court declined the Claim, on the ground that the Claimant had failed to refer the dispute to the Cabinet Secretary of Labour, as intended under Sections 54(6), 54(7), 62 and 74(a) of the Labour Relations Act.
3. The dispute was subsequently reported to the Minister.
4. 2 different Conciliators seem to have been appointed by the Minister to conciliate. There are 2 separate Conciliator's Reports on record.
5. The 1st is dated 1st December 2016, addressed to former Principal Judge, E&LRC, Hon. Justice Nduma Nderi. The Conciliator was G.A. Omondi. The issue in dispute according to the Conciliator, was victimization of Claimant's Members, on the account of the association with the Claimant.
6. Conciliator Omondi indicates he met the Parties on 3 occasions.
7. He also indicates that joint and separate conciliation meetings were held in the Labour commissioner's Boardroom. It is suggested by this Statement, that Omondi was himself not in those separate conciliation meetings.
8. He broadens the issues in dispute, from the single issue of victimization, adding 2 issues – recognition and strike notice.
9. Omondi heard the Parties, and recommended that the Respondent should grant recognition to the Claimant; 7 Employees whose contracts were terminated are paid monetary compensation; and the Claimant Union withdraws strike notice.

10. This Report is dated 15th December 2016. Curiously, the Report refers to another conciliation process, presided over by Hellen Apiyo.
11. Now, there is a Report dated 17th February 2017 made by Conciliator Hellen Apiyo, essentially on the same dispute. She too states she held conciliation meetings with the Parties on 3 occasions.
12. The issues in dispute before Hellen Apiyo, are stated to be: Recognition Agreement; Union dues; and termination of 3 Employees contracts by the Respondent.
13. Apiyo said nothing on recognition, recommending that the Respondent should deduct union dues with respect to 156 Employees of the Respondent, and pay unspecified compensation to the 3 Employees, for wrongful loss of employment.
14. Against this Conciliation background, the Claimant, filed Cause No. 396 of 2017 at Nairobi E&LRC against the Respondent, seeking orders that:-
- The Respondent be compelled to implement the recommendations of the Conciliator Mr. A. Omondi.
 - The Respondent is restrained from further unfair termination of Unionisable Employees.
 - The Respondent to pay costs of the Claim.
15. Upon receiving the Statement of Claim, the Respondent filed what is described as a Statement of Response and Cross-Petition.
16. The Respondent was not able to explain during pre-trial conference, why a Statement of Claim should be answered though a Statement of Response and Cross-Petition. One would think cross-pleading in a Statement of Claim, would result in a Counter-Claim. There was no Petition filed to prompt the Respondent to file a Cross-Petition. If the Cross-Petition was thought necessary to enable the Respondent plead Articles of the Constitution set out in the Cross-Petition, this was needless, because rule 7(3) of the E&LRC (Procedure) Rules 2016, allows a Party to seek enforcement of constitutional rights and freedoms in a Statement of Claim or other Suit filed before the Court. There was no need to bring a Cross-Petition in proceedings where no Petition was filed. The Cross-Petition only adds confusion to a dispute, which has had more than its fair share of confusion, from the date the Parties first approached this Court.
17. The Court could order the striking out of the Cross-Petition, but no useful purpose would be served by such an order.
18. Parties filed written submissions, which they highlighted on 24th October 2019 closing the hearing.

The Court Finds:-

19. Section 65 of the Labour Relations Act, requires the Minister to appoint a Conciliator, not conciliators, within 21 days of a trade dispute being reported. Section 66 and 67 suggest the Minister can also, appoint a Conciliation Committee.
20. In what circumstances was Hellen Apiyo and G.A. Omondi appointed Conciliators, to oversee separate conciliation processes, over the same issues in dispute?
21. Hellen Apiyo was the 1st Conciliator. It is not indicated why she was succeeded by G.A. Omondi.
22. Although Omondi was engaged after Apiyo, he wrote his Report earlier than did Apiyo. His is dated 1st December 2016. The same Report is addressed to Respondent's Advocate on 12th January 2017. The Report by Apiyo, addressed to both Parties is dated 17th February 2017.
23. The main dispute is about recognition. The issue was submitted before Apiyo. She said nothing about it in her recommendations.
24. Omondi, recommended recognition, without stating why Apiyo, who analyzed the numbers in the 1st place, did not recommend recognition.
25. The Court cannot grant recognition in the absence of evidence, clear evidence, from the Claimant, establishing it has recruited a simple majority of Respondent's Unionisable Employees.
26. Why does the Claimant Union seek to have the Report by Omondi endorsed as the Judgment of the Court, and not the Report by Apiyo?
27. The Court gave the Claimant Union an opportunity to invoke and exhaust conciliation process. Its members are alleged to have threatened strike action, resulting in a second report of a dispute. The ensuing appointment of G.A. Omondi as Conciliator, while Hellen Apiyo was already overseeing conciliation, brought confusion, clouding the issues in dispute.
28. Conciliation in the end, did not conform with the Labour Relations Act. 2 separate Conciliation Reports were generated.
29. Independent of that process, the Court does not have sufficient evidence, to show that the Claimant has recruited a simple majority of

Respondent's Unionisable Employees, to merit recognition under Section 54 of the Labour Relations Act. The Claimant needs to recruit afresh.

IT IS ORDERED:-

a) The Claim is declined.

b) The Cross-Petition shall be deemed superfluous.

c) No order on the costs.

Dated and delivered at Mombasa this 28th day of January 2020.

James Rika

Judge