



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1553 OF 2018

BANKING, INSURANCE AND FINANCE UNION.....CLAIMANT

v

MIDDLE EAST BANK (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Banking, Insurance & Finance Union (the Union) commenced legal proceedings against the Middle East Bank (K) Ltd (the Bank) on 26 November 2018 contending that some 4 named employees (Grievants) were unionisable, and therefore entitled to enjoy the benefits of any *collective bargaining agreement* as entered into with the Kenya Bankers Association.

2. The *Memorandum of Claim* was accompanied by a motion under certificate of urgency seeking certain interim orders.

3. When the application came up for *inter partes* hearing on 29 November 2018, the Bank sought for more time to file its responses to the application, but because the orders sought in the application were essentially the same as the prayers sought in the *Memorandum of Claim*, the Court directed that both the application and Cause be heard together.

4. The Court therefore directed the Respondent to file its Response, witness statements and documents before 21 December 2018 with mention set for 21 January 2019.

5. On 21 January 2019, the Bank sought for 2 more weeks to file, and serve witness statements. The Court directed the statements and *Agreed Issues* to be filed before 15 February 2019.

6. The *Agreed Issues* were filed on 18 February 2019 setting out some 9 Issues for the determination of the Court.

7. The Cause was heard on 3 June 2019, 9 October 2019 and 4 November 2019.

8. The Grievants and the Bank's Human Resources Manager testified after which the Union filed its submissions on 13 November 2019 while the Bank filed its submissions on 4 December 2019.

9. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination as examined hereunder.

Whether the Grievants are unionisable?

10. As stated earlier, the dispute relates to some 4 Grievants.

11. Stephen Mungai was offered employment (fixed term contract) by the Bank as an Officer in the IT department on 10 October 2011. The job description gave the title as Systems Administrator.

12. On 25 February 2013, the Bank converted the fixed term contract into permanent employment.

13. Irene Gichuhi was appointed on 19 July 2013 as Finance Officer.

14. David Onamu was employed as Officer Trainee in September 2003, but was later confirmed/designated as Operations Officer on or about 8 December 2005.

15. Florence Munga was promoted to the position of Officer on 12 January 2004, and around 25 February 2013 her contract was converted from fixed term to permanent and pensionable. On 1 March 2013 she was re-designated as Relationship Officer/ Customer Service Officer.

16. On 18 October 2018, the Grievants notified the Bank separately that they had joined/were members of the Union and did not consider themselves as part of management. They also reminded the Bank that it had been deducting and remitting dues to the Union.

17. Before the notifications by the Grievants, the Union had on 13 June 2018 reported a trade dispute to the Cabinet Secretary, Labour stating the Issue in dispute as *failure or refusal to pay the Grievants wage increments and other allowances* agreed with the Bank from 1 March 2017.

18. The Cabinet Secretary accepted the trade dispute and appointed a Conciliator, but because the parties failed to agree, the Conciliator issued a *Certificate of Unresolved Dispute* on 17 September 2018.

19. On 26 October 2018, the Bank wrote to the Grievants severally notifying them that the positions they held were part of junior management, and that in terms of the *recognition agreement* in place, they were ineligible to join the Union.

20. On 26 November 2018, the Union moved the Court seeking among other prayers, a declaration that the Grievants were unionisable employees.

Union's case

21. In asserting that the Grievants were unionisable, the Union contended that the *Industrial Relations Charter*, the *recognition agreement* and *collective bargaining agreement(s)* between it and the Kenya Bankers Association (of which the Bank was a member) established two categories of employees, management staff and unionisable staff, and that the Grievants fell within the unionisable category.

22. According to the Union, *management staff* comprised top cadre staff involved in the day to day running of the banks affairs, and included secretaries, human resource assistants, General Managers, Chief Managers, Superintendents, Regional Managers, Assistant Managers, Group Managers, Staff Controllers, Staff Managers, Accounts Assistants, Accountants, Sub-Accountants and Industrial Relations Officers.

23. The Union also drew the attention of the Court to the pre-amble of the *collective bargaining agreement(s)* with the Kenya Bankers Association where *job profiles* for different cadres of employees were set out to contend that the Grievants were unionisable as they carried out unionisable duties, and not management functions.

24. The Union further asked the Court to consider that the Bank had all along deducted union dues from the Grievants and remitted the same to it (Union).

25. To further its case that the Grievants were unionisable, the Union asserted that the Grievants employment contracts did not expressly state that they were part of management, and that it was only after the institution of the instant Cause that the Bank wrote to the Grievants to notify them that they were part of junior management.

26. The Union sought solace in the decision of the precursor of this Court in Cause No. 81 of 1985, *Kenya Union of Commercial, Food & Allied Workers v Kenya Bankers Association* (Saeed R Cockar J as he then was) where the distinguished Industrial Court Judge held that lower and middle management staff in banks were unionisable and should be allowed to join a union.

27. The Union also cited *East African Portland Cement Co. Ltd v Kenya Chemical & Allied Workers Union* (2017) eKLR to argue that a *collective bargaining agreement* applied to all unionisable employees without discrimination, whether members of a union or not.

Bank's case

28. The Bank was of a contrary persuasion. It took the position that the Grievants were not unionisable and it relied on 2 primary documents to advance its case and these were the *recognition agreement* between the Union and the Kenya Bankers Association of which it is a member, and the *Industrial Relations Charter*.

29. According to the Bank, clause 2 of the *recognition agreement* precluded and/or excluded the Grievants from union membership. The clause provides

The Union shall be recognised as the negotiating body representing employees of members of the Association with the exception of officers who, for purposes of this Agreement shall be defined as follows: Those who exercise confidential, directive, administrative, representation or supervisory functions and the lower level of management to which disciplinary matters and decisions are delegated.

30. The Bank confirmed the titles and duties of the Grievants as follows: Stephen Mungai was Officer Information Technology Department-Systems Administrator, handling sensitive bank systems (and had resigned from the Union in May 2019); David Onamu was a Branch Operations Officer serving as joint custodian of the Banks vault and safes; Florence Munga was a Customer Service Officer whose duties included joint custody of vaults and safes (also resigned from the Union in May 2019), while Irene Gichuhi was a Finance Officer handling sensitive and confidential information, and at times serving as Head of Department.

31. The Bank consequently maintained that the Grievants were management staff performing confidential, supervisory and lower level management functions, and that their employment contracts designated them as *officers*, and therefore they were not unionisable and that they could not benefit from terms and conditions of service negotiated with the Union, and reduced to a *collective bargaining agreement(s)*.

32. The Bank also contended that it had previously solely determined the terms and conditions of employment of the Grievants from time of

their respective employments.

33. The Bank also challenged the competency of the Cause on the basis that the dispute over level of unionisation could only be properly adjudicated at the industry level between the Union and the Kenya Bankers Association, the direct parties to the *recognition agreement*, and *collective bargaining agreement(s)* whose terms were sought to be extended to the Grievants.

34. Consequently, the Bank submitted that any dispute on whether the Grievants were unionisable in terms of the *recognition agreement* should have been a dispute between the Union and the Kenya Bankers Association.

35. Submitting that the authorities cited by the Union were irrelevant to the case at hand, the Bank urged the Court to follow the legal proposition by the Court in *Banking, Insurance and Finance Union v Bank of India* (2019) eKLR that where there is need for a uniform standard/practice over the banking sector there was need for the direct involvement of the Kenya Bankers Association.

Evaluation

Competency of the Cause

36. The Bank challenged the competency of the Cause on the ground that the relevant instruments providing for unionisation were reached between the *Kenya Bankers Association* and the Union, and that in the absence of the Association from the litigation, any challenge which would purport to alter the tenure of the agreement would require the participation of the Association. A right and proper party, it was submitted, was not before the Court.

37. The Bank in this respect urged the Court to adopt the conclusion in *Banking, Insurance and Finance Union v Bank of India* (2019) eKLR and hold that the question of unionisation should be dealt with at an industry-wide level, and not individual bank basis.

38. The Court has looked at the decision. It was a dispute urging the Court to set a retirement age for employees of Bank of India, a negotiable item which the parties had not agreed to during the *collective bargaining agreement* negotiations with the Association. The Union therein had sought to rely on a custom or practice within the banking sector.

39. The instant dispute does not seek to set a uniform standard.

40. It seeks an interpretation from the Court whether the Grievants are excluded from joining and participating in the activities of a union by the instruments in place, being *the Industrial Relations Charter, the recognition agreement and collective bargaining agreement(s)*.

41. In the view of the Court, such an interpretation and application would not translate into setting of uniform standards in the banking industry, as the Court has to look at and examine the merit of the Grievants individual rights and freedoms as against the standards already agreed upon.

42. In the circumstances, the Court is of the view that the non-participation of the Kenya Bankers Association is not fatal or mandatory.

Level of Unionisation

43. Article 24 of the Constitution envisages the limitation of rights through law.

44. Currently, there is no express statute post-2010 which has attempted to set the contours of the rights to freedom of association and the right to fair labour practices within the context of unionisation.

45. However, long before the Constitution 2010, the social partners had reached a tripartite agreement to set the boundaries as to which categories of employees could benefit from the right to freedom of association and which would be excluded. The agreement was encompassed in the *Industrial Relations Charter*.

46. In the circumstances, starting from the premise that every person (worker) shall enjoy the rights and freedoms enshrined in the Constitution to the greatest extent consistent with the nature of the right (Article 20(2)), and that in applying a provision of the Bill of Rights, a Court shall adopt an interpretation that most favours the enforcement of a right or fundamental freedom, it was incumbent upon the Bank in the instant proceedings to demonstrate that the Grievants should not enjoy the right to join and participate in the activities of the Union (are non-unionisable) because they fell within the categorisation excluded by the *Industrial Relations Charter, the recognition agreement, the collective bargaining agreement* and/or under any written law.

47. The Bank contended that the functions performed by the Grievants placed them within the management category, and thus in terms of the *Industrial Relations Charter, the recognition agreement* and the *collective bargaining agreement* were within the excluded category.

48. The jurisprudence on levels of employees eligible to join a trade union in terms of the limitation set out in the *Industrial Relations Charter* in this country has now stabilised.

49. The Kenya Bankers Association, of which the Bank is a member was a party to one of leading decisions in this area of law decades ago (see Cause No. 81 of 1985, *Kenya Union of Commercial, Food & Allied Workers v Kenya Bankers Association* mentioned above).

50. In *Kenya Union of Sugar Plantation and Allied Workers v Mumias Sugar Company Limited & 6 others* (2016) eKLR, the Court held that

the social partners are still bound by the *Industrial Relations Charter*, and that the right to join a trade union was not absolute.

51. In *Kenya Game Hunting and Safari Workers Union v Lewa Wildlife Conservancy* (2014) eKLR, the Court stated that Employers have the managerial prerogative to categorize their employees. They cannot conceivably, however, have a free hand in turning all employees into managers. They are limited by the hierarchical nature of the employment place. There will always be subordinate, mid-level management and management staff. Not all can be entirely in management or in the trade union. Although the Constitution guarantees the right (to) every employee, including those in management to belong to a trade union, the restriction on management staff in the exercise of this right is a reasonable restriction. It would not be possible to negotiate collective agreements for example if management staff sat on the same side with trade union leaders at the collective bargaining forum. The exercise of the right to belong to trade unions by management staff would stunt the right of collective bargaining. The restriction is therefore reasonable in a democratic society.

52. In my view all workers, including managers are eligible to join a trade union as they have freedom of choice and the right to fair labour practices like any other worker, but the right is not absolute.

53. In considering whether a worker should indeed join a trade union, the real question is therefore, what would be the possible outcome where the worker's responsibilities and duties to the employer conflict with his obligations to the Union, and not merely the designation or title given to the worker.

54. The test, according to the Court in determining the question is to look at both the designation and title of the employee, and the job description and/or responsibilities attached to the designation, and the exclusion clause in the *Industrial Relations Charter* and any other relevant and applicable agreement such as a *recognition agreement* or *collective bargaining agreement*.

55. Titles alone, as suggested by the Union would not be sufficient, for at times they are mere labels.

56. The Court has gone beyond the designations of the Grievants as Officers and looked at their job descriptions which were filed in Court.

57. In terms of job descriptions, there is nothing to suggest or demonstrate that the Grievants have any *real human resource/personnel functions and disciplinary control* over their subordinates as envisaged by *Appendix C part 1* to the *Industrial Relations Charter*, which may potentially lead to conflict of interest if they were to join the Union.

58. In other words, the job descriptions for the Grievants do not suggest any coordination of policy or programmes but rather routine and defined tasks.

59. The Grievants have not been clothed with any supervisory or disciplinary mandate by dint of clause 2 of the *recognition agreement*.

60. Further, there was no demonstration that the Grievants performed functions of a *confidential nature* above and/or beyond any other employee within a banking system which would likely occasion prejudice to the Bank if they were to join the Union. Even clerical officers in a bank system has access to what would be considered *confidential information* relating to customers financial transactions.

61. The Court also notes that the parties did not make any reference to an organogram to show clear reporting lines for the Grievants. Save for asserting that the Bank run a lean structure in some of the stations the Grievants served in, there was no evidence that the Grievants supervised any substantial number of subordinate/junior employees.

62. In such a scenario, the designation of the Grievants as Officer(s) may be misleading as to the true nature of functions they perform.

63. The Court is, therefore of the view that the Grievants are unionisable, and validly exercised the right to join the Union.

Disturbance allowance

64. The Union did not prove that one of the Grievants, Florence Munga was entitled to a disturbance allowance of Kshs 235,406/- and relief in that respect is declined.

65. Before concluding, the Court is of the view that the decision of Saeed Cockar J in Cause No. 81 of 1985 *Kenya Union of Commercial, Food & Allied Workers v Kenya Bankers Association* is still sound law within the area of operation of the Union and Kenya Bankers Association.

Conclusion and Orders

66. The Union sought some 7 orders.

67. In the view of the Court, the most appropriate and effective orders to issue and which the Court do hereby issue are as follows

(a) A declaration that the Grievants are unionisable employees and are covered by the collective bargaining agreement in effect from 2017.

(b) The Respondent do pay the Grievants wage increment arrears as follows

(i) Stephen Mungai Kshs 316,248/-

(ii) Irene Wanjiku Gichuhi Kshs 280,970/-

(iii) Florence Munga Kshs 409,591/-

(iv) Davis Onamu Kshs 398,348/-

68. Considering the on-going social partnership between the parties, the Courts orders each party to bear own costs.

Delivered, dated and signed in Nairobi on this 24th day of January 2020.

Radido Stephen

Judge

Appearances

For Union Mr. Odero, Organising Secretary, Banking, Insurance & Finance Union

For Respondent Mr. Namasake instructed by J.N. Namasake & Co. Advocates

Court Assistant Lindsey