



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 559 OF 2019

BETWEEN

BAKERY, CONFECTIONERY, FOOD

MANUFACTURING & ALLIED INDUSTRIESCLAIMANT

VERSUS

BAFAGIH BAKERIES.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Daniel M. Amalemba Advocate for the Claimant

Wameyo Onyango & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimant filed its Statement of Claim on 10th July 2017. It avers, it is a registered Trade Union, representing Unionisable Employees working in the areas of economic activity identified with its name. The Respondent is described in the Statement of Claim as a Business, registered under the Registration of Business Names Act Cap 499 the Laws of Kenya, based at Voi Town, whose Unionisable Employees are represented by the Claimant.
2. Parties have a Recognition Agreement, executed on 12th April 2004.
3. They have over the years negotiated and concluded CBAs, the last covering the period 1st September 2006 and 31st August 2008. The CBA remains in force, until amended by the Parties.
4. On 12th October 2016, the Claimant wrote to the Respondent, notifying the Respondent of its intention to have the CBA amended.
5. The Claimant forwarded specific amendments to the Respondent for Respondent's consideration.
6. Parties scheduled meetings, which the Respondent ignored, resulting in report of dispute to the Cabinet Secretary for Labour, through a letter dated 14th February 2017. A Conciliator was appointed in an attempt at resolving the dispute.
7. The Conciliator scheduled meetings with the Parties, which again were ignored by the Respondent. The Conciliator made a Report dated 11th April 2017, recommending that in the absence of input from the Respondent, proposals made by the Claimant are adopted.
8. The Claimant avers that the Respondent belatedly claimed to have been registered as a limited liability company, disowning the Recognition Agreement, as not binding, having been executed by other entities, not Bafagih Bakeries Company Limited.

9. The Claimant carried out a search with the Registrar of Companies, who on 23rd June 2017, confirmed that the Respondent continues to trade under Business Registration No. BN/342639.

10. The Claimant further states that even if the Respondent changed its registration status, its contractual obligations under the Recognition Agreement and CBA did not change.

11. The Claimant therefore prays for Judgment against the Respondent for orders:-

a. Amendments proposed by the Claimant to the CBA attached as appendix 4 [b] to the Statement of Claim, are adopted, and take effect from 1st September 2008.

b. The Respondent co-operates with the Claimant in implementation of the new CBA.

c. Any other Order the Court deems fit to grant.

12. The Respondent filed a Statement of Response under protest, on 8th November 2017. It states it does not have a Recognition Agreement with the Claimant. It is a separate entity from Bafagih Bakeries. It is known as Bafagih Bakeries Limited. The Respondent prays the Court to dismiss the Claim with costs.

13. Being an economic dispute, the Court ordered Central Planning and Monitoring Unit [CPMU] to investigate the issues in dispute and prepare a Report to aid the Court in making a determination. The order issued on 15th February 2018.

14. CPMU filed a Report dated 17th September 2018, explaining that it sent out questionnaires to the Respondent on 8th June 2018 seeking relevant data from the Respondent, to enable CPMU investigate the dispute and compile a Report. The Respondent declined to answer the questionnaires, arguing as in the Statement of Response, that the business is no longer the same business that granted recognition to the Claimant. CPMU could not therefore prepare a comprehensive economic analysis.

15. The Court directed the Advocate for the Respondent, on 20th March 2019 to prevail upon his Client to answer the questionnaire. On 20th June 2019, the Court was told that the Respondent declined to answer the questionnaire holding, it was wrongly described in the questionnaire.

16. The Court directed that the dispute is resolved through Written Submissions. The Claimant filed its Submissions on 18th September 2019, while the Respondent did not file Submissions. Instead the Advocate for the Respondent told the Court he relies on one point of law – on the legal status of the Respondent – captured at paragraph C of Claimant's Submissions.

The Court Finds:-

17. There is no evidence presented by the Respondent, to show it is not the same Business and Employer, which executed Recognition and Collective Bargaining Agreements with the Claimant Union.

18. Search carried out by the Claimant Union with the Registrar of Companies, confirms the Respondent still operates its business at Voi Town, under Registration of Business Names Act

19. The Business, if at all it changed its registration status, ought to have notified the Claimant Union to have the change in status reflected, purely as a measure of good industrial relations, in the existing labour contracts.

20. Lack of notification, if at all the Business changed its registration, does not in the view of the Court however, invalidate the existing labour contracts.

21. Parties must not rush to argue legal separateness, and cite *Salmon v. A. Salmon & Co Limited [1896 UKHL 1]*, in seeking to avoid liability arising under labour contracts. The Court has pointed out repeatedly that labour contracts are special contracts.

22. The Labour Relations Act No. 14 of 2007, defines under Section 2, as do the other Labour Laws enacted in 2007/2008, the term "Employer" broadly, to include: any person, public body, firm, corporation or company, who or which entered into a contract of service to employ any individual and includes the agent, the foreman, manager or factor of search person, public body, firm, corporation or company.

23. The Respondent, whether registered under Registration of Business Names Act or later under the Companies Act, did not change its character as the Employer of the Unionisable Employees represented by the Claimant Union.

24. The employer obligations of Bafagih Bakeries and Bafagih Bakeries Limited [or Barfagh as variously named in the Pleadings], did not change or become destroyed or in any way impaired by the change. If it was intended that the change in registration of either Party would have effect on existing obligations, the intention would have been stated in the Recognition Agreement or in the CBA.

25. The fundamental problem with the Respondent's position lies in its failure to recognize that labour contracts are not ordinary contracts, and employment and labour relations are not resolved by quick resort to *Salmon v A Salmon*. The same Officers who signed the Recognition Agreement, are the same Officers who have been communicating their resistance to amendment of the CBA, to the Claimant. The place of business has not changed. The postal address is the same. The business is the same. The Employer is the same Bakery. It is not without

reason that Section 2 of the Labour Relations Act, defines the term 'Employer' to include any person, natural or juridical, and/or their reincarnations. The broad definition would be rendered unworkable, if the Court was to apply *Salmon v. A Salmon* across the labour and employment relations spectrum.

26. The answer to Respondent's eternal objection in this dispute, on legal separateness is this:-

- The Respondent has not presented any evidence to show it is now a registered Company.
- Evidence from the Registrar of Companies shows the business is still operating under Registration of Business Names Act.
- Even had the Respondent established it is a registered Company, it is still the same Employer and Business, which executed Recognition Agreement with the Claimant Union.
- Existing obligations between the Parties would not become vitiated by change in registration.

27. The eternal objection by the Respondent is overruled.

28. The Respondent failed to answer questionnaires forwarded by the CPMU, even upon the order of the Court that the Respondent's Advocate's prevails upon the Respondent, to comply.

29. The proposals made by the Claimant Union are un-opposed. The Court does not have the benefit of a comprehensive CPMU Report. The proposals are reasonable, regular and made within the confines of the law.

IT IS ORDERED:-

a. Parties shall sign fresh CBA with amendments as proposed by the Claimant in appendix 4[b] of the Statement of Claim.

b. The Respondent shall forthwith, for purposes of good industrial relations and record keeping, supply the Claimant with its Certificate of Incorporation if any.

c. Other prayers are unnecessary.

d. Costs to the Claimant Union.

Dated and delivered at Mombasa this 13th day of February 2020.

James Rika

Judge