



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2103 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

KENYA ENGINEERING WORKERS UNION..... CLAIMANT

VERSUS

STEEL STRUCTURES LIMITED..... RESPONDENT

AND

KENYA BUILDING, CONSTRUCTION, TIMBER AND

FURNITURE INDUSTRIES EMPLOYEES UNION..... INTERESTED PARTY

JUDGMENT

The Claimant filed a Memorandum of Claim on 12th October 2016, in which it avers that during the month of August 2016 it recruited 317 of the Respondent's employees which constitutes 79%.

It avers that it has met all 3 conditions set out under section 54(1) of the Labour Relations Act but the Respondent has declined to sign the Recognition Agreement or to remit union dues. It further avers that after reporting the dispute to the Conciliator, the Conciliator neither invited the parties to a meeting nor issued a certificate of the unresolved matter.

It seeks the following prayers:

1. That the Court deem fit and find that the Claimant met all three (3) requirements of the provision of the law to be accorded Recognition Agreement and order the parties to sign the same within the shortest time possible.
2. That the Respondent be ordered to comply with Section 48 of the Labour Relations Act 2007 by way of deducting Union dues and remitting the same in the Claimant Gazetted Account.
3. That the costs of this be met by the Respondent.
4. That among any other relief which this Court may deem fit to grant.

The Respondent and Interested Party filed their respective Memorandum of Defence on 24th July, 2019. The Claimant filed a Response to the Respondent's Memorandum of Claim on 30th August 2019. The matter proceeded by way of written submissions with each party filing its submissions.

Respondent's Case

It denies there being a recruitment and avers that if any recruitment was conducted, it was unlawful as the Respondent has recognised the Interested Party. It further denies having a duty to grant the Claimant recognition in accordance with section 54 of the Labour Relations Act and the right to remittance of union dues in accordance with section 48 of the Act.

It avers that it is a member of the Kenya Association of Building and Civil Engineering Contractors which is an employer's association and

that it has through the said employer's association recognised the Interested Party.

It avers that through the association it has negotiated and reviewed periodic Collective Bargaining Agreements (CBAs) and has current valid CBA.

It avers that its affairs do not fall under the Claimant's scope of representation which is engineering. It avers that the Claimant can only be recognised by the Respondent vide the Kenya Association of Building and Civil Engineering Contractors (KABCEC) after successfully recruiting a simple majority of all members employers of the association.

It avers that the employees who the Claimant purports to have as its members have since withdrawn their membership from the Claimant through their resignation letters. It further contends that the employees have signed check off forms in favour of the Interested Party and served on the Respondent.

The Claimant in its Response to the Respondent's Memorandum of Defence, contends that it has the right to membership and recognition of another union cannot be used to deny it union dues.

It contends that the withdrawal letters and check off forms produced by the Respondent are undated and contain 3 management staff and 20 employees who are no longer in service.

It contends that the CBAs referred to by Respondent does not specify the companies that are party to the CBA. It further contends that there is no proof of registration of the said association or recognition letter admitting the Respondent to it.

Interested Party's case

It denies that the Claimant has the right to be granted recognition by the Respondent in accordance with Section 54 of the Labour Relations Act as it has been recognised by the Respondent's association.

It confirms that the Respondent, through the association, has negotiated and reviewed CBAs. It avers that it has enjoyed a harmonious industrial relationship with the Respondent for more than 20 years.

It confirms that the employees who the Claimant purports to have recruited have withdrawn membership and have signed check off forms in its favour.

It contends that even if the Claimant has attained the requisite membership to be recognised by the Respondent, this can only be done through the employer's association. It contends that the Claimant's intents are to disorganise organised workers and the mileage gained by itself in such organisation.

Claimant's submissions

The Claimant submits that it has attained a simple majority of the Respondent's unionisable employees. It submits that its constitution covers engineering sector and no rival union such as the Interested Party has challenged it.

It submits that there is no recognition between the Respondent and the Association thus these are just mere allegations.

It submits that the Respondent should remit union dues as its employees voluntarily joined the Union and no due process has been followed for any withdrawal as required under section 48 of the Labour Relations Act.

It submits that there is no CBA or recognition agreement between the Respondent and the Association and the Interested Party thus membership to the Association remains mere allegations.

Respondent's submissions

The Respondent submits that the requirements for recognition of a trade union by an employer are that the trade union must have recruited a simple majority of the unionisable employees under Section 54(1) of the Labour Relations Act but the claimant has not attained such numbers as the said members resigned.

It further submits that the Claimant is a trade union in the engineering sector while it is a building firm. It submits that the Interested party is the right union to represent its workers as they belong to the same sector.

It submits by virtue of sections 54 and 6 of the Labour Relations Act, it is a member if an employer's association the KABCEC.

It submits that the Claimant is required to attain a simple majority of the unionisable employees of all members of KABCEC. It relied on the case of **Cause No. 1394 of 2014, Kenya Hotels and Allied Workers Union v Hilton Hotel Nairobi** where the Court held:

“The Claimant union to dislodge KUDHEIHA from being the sole union to negotiate the terms and conditions of employment of the employees of Hotels who are members of the Association, it has to recruit a simple majority of the employees of the Hotels who are members of the Association and not a simple majority of one hotel only.”

In conclusion, it submits that the Claimant is not a union registered in the building and construction sector but in the engineering sector thus it has no authority to seek recruitment of its employees.

Interested Party's submissions

The Interested Party filed its written in which it reiterates the respondent's submissions.

Claimant's Further Submissions

The claimant submits that the Respondent's Memorandum of Defence is defective and should be struck out as it is supported by the Verifying affidavit signed by the Interested Party's General Secretary.

Determination

The issue for determination is whether the Claimant Union meets the requirements for recognition by the respondent.

Section 54(1) and (2) of the Labour Relations Court Act provides:

1. 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.

2. A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

The Claimant produced several check-off forms as proof of having recruited 317 of the Respondent's employees. The produced check off forms do not have a sequential numbering and even if the names were summed up they would not result to 315 employees. Further, some check off forms were produced twice. The total number of the Respondent's unionisable employees which would translate to the Claimant having recruited a simple majority has not been stated.

The Respondent and the Interested Party maintain that the Interested Party is the union recognised by the Respondent through KABCEC. The Respondent did not provide any proof of being a member of KABCEC. However, one of the documents annexed to the Respondent's bundle of documents and Interested Party is a Memorandum of Agreement executed on 16th July, 2019 between Kenya Association of Building and Civil Engineering Contractors (KABCEC) and Kenya Building, Construction, Timber and Furniture Industries Employees Union.

The Preamble of the Agreement provides:

"Whereas by terms of Recognition and Negotiating Procedure Agreement signed between the Association and the Union it was agreed that the Union has been recognised by the Association and for that purpose, individual members have also recognised the Union as a sole labour organisation representing the interest of employees employed by the employers in Building, Construction, Roads and Civil Engineering, Structural Engineering and all other Allied Industries..."

The Respondent also produced notices dated 28th October, 2016 and 2017 issued by the Interested Party authorising deductions from the Interested Party's members.

The Claimant produced resignation letters by its members indicating that they had withdrawn from the Interested Party. The Respondent and Interested Party produced reaffirmation letters from members stating that they were still members of the Interested Party and had never signed any letter changing their union membership.

For a trade union to qualify for recognition by an employer, it must prove that according to its constitution it is authorised to do so. The claimant did not provide a copy of its constitution to prove that it is mandated to represent employees in the civil engineering sector. Further the respondent and Interested Party have submitted that under Section 54(2) of the Labour Relations Act, the claimant must recruit a simple majority of employees of the Association in order to qualify for recognition. The respondent further relies on Section 6 of the Labour Relations Act which provides that –

6. Employer's right to freedom of association

1. Every employer has the right to —

a. participate in forming an employers' organisation or a federation of employers organisations; and

b. subject to its constitution, join an employers organisation or a federation of employers' organisations.

2. Every member of an employers' organisation has the right, subject to the constitution of that employers' organisation to —

- a. participate in its lawful activities;
- b. participate in the election of any of its office bearers or officials; and
- c. stand for election or seek for appointment as an office bearer or official and, if elected or appointed, to hold office.

3. Every employer, whether or not that employer is a member of an employers' organisation that is a member of a federation of employers organisations, has the right, subject to the constitution of that federation to—

- a. participate in its lawful activities;
- b. participate in the election of any of its office bearers or officials;
- c. stand for election and be eligible for appointment as an office bearer or official; and
- d. stand for election or seek appointment as an office bearer and if elected or appointed to hold office.

4. An employer that is a juristic person may exercise the right to stand for election and hold office in an employer's organisation or federation of employers' organisation through a representative.

This position has been upheld repeatedly this court. In **Nairobi Cause No. 1394 of 2014 Kenya Hotels and Allied Workers Union v Hilton Hotel Nairobi**, Nderi J. held that –

“The claimant Union to dislodge KUDHEIHA from being the sole union to negotiate the terms and conditions of employment of the employees of the hotel who are members of the association, it has to recruit a simple majority of the employees of the Hotels who are members of the Association and not a simple majority of one Hotel.”

In **Petition No. 5 of 2013 Kenya Hotels and Allied Workers Union, v The Attorney General and Others**, the court in a three Judge Bench held –

“For the Claimant to qualify for recognition by the 2nd Respondent, it must prove that it has achieved a simple majority of either 50% of the 2nd respondent's member organization or of the employees of the 2nd respondent's members. The court cannot hand the Claimant recognition without it proving that it has achieved simple majority as this would contravene both Article 41 of the Constitution and Section 54 of the Act.”

In the present case, in view of the fact that the respondent is a member of an Association, the claimant would have to recruit a simple majority of the members of the Association for it to be recognized.

I agree with the respondent and Interested Party. The Labour Relations Act recognises freedom of association of both employees and employers in line with Article 41 of the Constitution which provides that –

41. Labour Relations

- 1. Every person has the right to fair labour practices.
- 2. Every worker has the right—
 - a. to fair remuneration;
 - b. to reasonable working conditions;
 - c. to form, join or participate in the activities and programmes of a trade union; and
 - d. to go on strike.
- 3. Every employer has the right—
 - e. to form and join an employers organisation; and
 - f. to participate in the activities and programmes of an employers organisation.

Lastly, the claimant states that it recruited 317 out of a possible 400 employees of the respondent. There is no evidence of this as the check-off forms are mixed up with no proper numbering and as has been pointed out herein above, some forms are produced more than once. Without a list showing the actual names of the members recruited, it is not possible to tell how many employees have been recruited by the claimant. The Interested Party in its Appendix V presented a list of 304 employees of the claimant who paid union dues as at 28th May

2019. It further produced letters of employees who had resigned from membership of the claimant union.

The other issue raised by the respondent and Interested Party which has not been addressed by the claimant is whether the claimant can recruit employees in civil engineering sector.

Civil engineering is by definition, the discipline that deals with the design, construction and maintenance of the physical and naturally built environment including public works such as roads, bridges, canals, dams, airports, sewerage systems, pipelines and structural components of such buildings and structures. These therefore would fall under the building sector, that of the Interested Party and not the engineering sector covered by the claimant.

In respect of remittance of union dues, the Respondent and Interested Party have submitted letters of resignation from the employees who were recruited into the claimant's membership. It can therefore not claim remittance from members who have resigned from its membership.

In Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (Kudheha) v British Army Training Unit Kenya [2015] eKLR Mbaru J. held:

“The question of deduction of union dues and that of recognition of the union by an employer are separated in law. Under section 48 of the Labour Relations Act, an employer is bound to remit all union dues deducted to the union account irrespective of recognition as under this part, where there are more than 5 employees in the membership of a union, the employer should make deductions and remit to the union...”

From the foregoing, I find that the claimant has not proved that it has in its membership the employees whom it alleges are its members. It is the claimant who bears the burden of proof of the same which burden it has failed to discharge to the satisfaction of the court.

With regard the Respondent's Memorandum of Defence being defective, I find that this allegation has no basis for reason that under Rule 13 of the Employment and Labour Relations Court (Procedure) Rules and the Civil Procedure Rules, a defence is not required to be accompanied by a verifying affidavit.

For the foregoing reasons, I find that the claimant has not proved that it qualifies for recognition by the respondent. The claim is accordingly dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE