



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2131 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**BANKING INSURANCE AND FINANCE UNION (KENYA).....CLAIMANT**

**VERSUS**

**STANDARD CHARTERED BANK KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant, a Union mandated to represent unionisable employees in banks, insurance and other financial institutions filed this Memorandum of Claim on 1<sup>st</sup> December 2014. The claimant has a recognition agreement and has negotiated several collective bargaining agreements with Kenya Bankers Association, which is registered as an employer's association under the Labour Relations Act. The respondent is a Commercial Bank and a member of the Association. Unionisable employees of the respondent are eligible to join membership of the claimant.

The claimant alleges that the respondent has violated the parties' collective bargaining agreement by unlawfully and unprocedurally creating phantom promotional titles at Band 8 and 9 which are management grades, to deny union members in those grades the right to join union membership.

It avers that the promotions are mischievous because there is no monetary gain or new responsibilities attached to the new grades. It avers that the affected employees do not resign from union membership but are forcefully stopped from contributing union dues or agency fees. It avers that it referred the dispute to Conciliation and that the Conciliator invited parties for a conciliation meeting on 28<sup>th</sup> January 2014 but no agreement was

reached. In its memorandum of claim, the claimant seeks the following prayers:

- i. That the Court should find and order that the Respondents is in violation of the parties Collective Bargaining Agreement and Recognition Agreement by unprocedurally and unlawfully promoting Section heads (supervisors), Check clerks and clerks to management cadre and subsequently conscripting such employees out of the Claimant's membership.
- ii. That the Court should find and order that the Respondent has underpaid all the promoted employees e.g. Section/Department Heads, Checks clerks and clerks and the said underpayments should be computed and paid to the affected employees and the lower salaries should then be enhanced to match with the CBA scales as per each grade since the present action of bank abuses Article 41 of the Constitution on fair labour practices and fair remuneration.
- iii. That the Court should find and declare that all employees and more specifically Band 8 and Band 9 have a right to join a trade union of their choice and to bargain collectively in line with the law and the Constitution.
- iv. That the Court should further find that hindering workers from joining the union and or conscripting the staff from the union membership is bad in law and against the ILO Conventions 98 and 87.
- v. The Court should order that all the employees who were conscripted from union membership should have their membership reinstated and unpaid union dues be paid directly by the Respondent and not from the affected employees.
- vi. Any other appropriate relief as the Court may deem fit to grant.
- vii. Costs of the suit.

The Respondent filed a Statement of Response on 21<sup>st</sup> September 2016. It avers that Appendix C of the Recognition Agreement between its Association, Kenya Bankers Association, and the Claimant sets out the level of union representation and specifically members of staff who are not eligible to join membership of the union.

It avers that Clause 19 of the Recognition Agreement sets out which jobs are covered by the CBA and which ones are exempt. That this is a matter that ought to be dealt with at the Association/Claimant's negotiations and not between the parties herein.

In its Response, it raises a Preliminary Objection on grounds that the issue on inclusion by the Respondent of jobs in Management Band 8 and 9 as unionisable jobs was raised in **Cause No. 81 of 1985 KUCFAW v Kenya Bankers Employers Association**. It states that job description of its Band 8 and 9 Job Grades are similar to job descriptions of management staff within other banks who are also members of the Association but the Claimant has discriminately singled out the Respondent with the demand that the two jobs grades be unionised.

It contends that an employee promoted from Union ranks ceases to pay Union dues as their terms and conditions of service are determined by the Respondent's management directly. It further contends that management employees are not required by law or practice to pay agency fees or to instruct the employer to stop deduction of Union dues as their acceptance of management terms on promotion automatically removes them from union ranks.

It avers that the Conciliator invited the parties to a number of conciliation meetings and at the conclusion of the meeting of 3<sup>rd</sup> July 2014 the Conciliator undertook to provide the parties with a report and recommendations but never submitted any report.

In support of the Respondent's Response, the Kenya Bankers Association filed a Supporting Affidavit sworn by HABIL OLAKA, its Chief Executive Officer, on 6<sup>th</sup> February 2018 in which he deposes that the respondent, as a member of the Association, is entitled to its constitutional rights under Articles 36(1) and 41(3) and (5) of the Constitution. He deposes that before the Association signed the recognition agreement with the claimant in 2000, the Association had a recognition agreement with Kenya Union of Commercial, Food and Allied Workers (KUCFAW). That in **Cause No. 75 of 1999**, Justice Saeed Corkar (deceased) granted the claimant union the right to represent employees in the banking sector. In the judgment the court ordered that; -

*“On the expiry of the three months' period the Claimants and the Respondents must enter into a Recognition Agreement which should be the same in content and purpose as the existing one between the Respondents and the Interested Party.”*

Mr. Olaka further deposes that the level of union representation was the subject of Cause 81 of 1985 when KUCFAW filed suit against three banks, the respondent included. That in that dispute KUCFAW sued the Association and not an individual bank as in the instant dispute. That what the claimant is attempting to do is achieve through this court what should be done through a scientific job evaluation. That the Association is willing to engage the claimant on the issue under the umbrella of the Joint Negotiating Council of the Association and the Union as provided in the recognition agreement.

### **Parties' Submissions**

The Claimant submitted that the Recognition Agreement between the Claimant and the Kenya Bankers Association categorises all bank employees into management staff and unionisable employees. It is its submission that the Respondent has consistently taken advantage of this arrangement to unilaterally remove employees from the Union through “mock” promotions.

It submitted that this Court has on several occasions made decisions confirming that management staff are those employees in positions of authority. It relied on **Cause No. 81 of 1985 KUCFAW v Kenya Bankers Employers Association**.

It further submitted that the Respondent was aware that the categories of employees in band 8 and 9 was are unionisable but elected to ignore the provisions of section 49 of the Labour Relations Act which provides for payment of agency fees. It is its submission that the employees in Band 8 and 9 of the Respondent's employees are unionisable.

On its part the Respondent submitted that the Recognition Agreement between the Association and the Claimant has to be viewed within the context of section 54 of the Labour Relations Act in that the Association recognised the Claimant on behalf of its members who include the respondent.

It maintains that the determination as to whether the posts which the Respondent considers as non-unionisable is a matter that can only be determined between the Claimant and the Association. It is its submission that allowing the Claimant to have its way by prosecuting this claim would amount to discriminating the Respondent is against all other association members and denying the Respondent the right to enjoy the benefits of negotiating and applying the same terms as other association members contrary to Article 41(3) of the Constitution.

It further submitted that it would be denied the right to participate in collective bargaining as provided under Article 41(5) of the Constitution and the right of freedom of association under Article 36 of the Constitution.

It submitted that the failure to deduct union dues with respect to employees in Band 8 and 9 by agreement of the parties and that the said employees are not eligible to be the Claimant's members unless the Recognition Agreement is amended. It relied on the case of **Kenya Game Hunters and Safaris Workers Union v Lewa Wildlife Conservancy Limited [2014] eKLR** where the Court held that the participation of trade unions in management of companies cannot extend beyond that which is agreed between the parties under the recognition agreement and successive CBAs.

In a Ruling delivered on 14<sup>th</sup> June 2019, the Court directed the parties to address it on tasks carried out by staff in the respondent's Band 8 and 9. In this regard, the Respondent filed a Supplementary Affidavit sworn by Lorraine Adoli Oyombe the Respondent's Employee

Relations Manager on 17<sup>th</sup> November 2019. She depones that Nairobi being the Respondent's Regional hub, a sizeable number of its staff are in managerial positions which is aligned to its global strategy.

She depones that Bands 8 and 9 fall within the managerial cadre of the respondent as these staff are tasked with sensitive oversight duties among them to increase customer base through new to bank customer acquisition, supervise tellers, manage branch cash position, leave and succession management. Further that staff in these Bands oversee operations of other teams of junior personnel.

### **Determination**

The issues before this Court for determination are whether the respondent's employees in Band 8 and 9 of grades are unionisable and whether the issue in dispute can be determined as against the respondent alone.

Section 2 of the Memorandum of Agreement between the Claimant and Kenya Bankers Association provides:

*“The Union shall be recognised as the negotiating body representing employees of members of the Association with the exception of officers who for the purposes of this agreement, shall be defined as follows:-*

*“Those who exercise confidentiality, directive, administrative, representational or supervisory functions and the lowest level of management to which disciplinary matters and decisions are delegated.*

*Such levels of staff are set out in Appendix “C”.*

The Claimant's bone of contention is that the staff in Bands 8 and 9 carry out duties that fall within union cadres and that the respondent was promoting unionisable staff to these positions to deny them the right to join the union. In support of this, the claimant union annexed a letter of appointment dated 4<sup>th</sup> October 1994 issued to Aggrey Onzere and an email from Harrison Onchenge dated 2<sup>nd</sup> October 2014. The promotion letter of Aggrey Onzere is dated 4<sup>th</sup> October 1994 before the Claimant and the Association signed the Recognition Agreement. With regard to the email, Harrison states that as much as they would wish for promotions and career progression, there must be willingness and consent from the affected staff. In other words, that unionisable employees should have the choice to either accept or reject promotion which would result in the staff moving from a unionisable cadre to management cadre.

The jobs in the respondent's Band 8 are Teller Service Manager and Branch Sales and Service Executive while those in Band 9 are Chief Teller and Senior Teller.

The job description of Teller Service Manager reports directly to

the Branch Operations Service Manager and supervises Chief Tellers and Tellers. Their job purpose includes –

- *Manage Branch cash position.*
- *Supervise tellers*
- *Ensure maintenance of a health business environment through strict compliance with Anti Money Laundering and Compliance Risk Management standards as defined by Group and Local Regulatory authorities.”*

They have authority to –

- *Authorization of system referrals per delegated authority.*
- *Deployment of tellers in the branch in conjunction with the branch Manager and Branch Operations Manager.*
- *Authorized signatory as per signature book.”*

Their other responsibilities are as indicated in the job description at Appendix LAO1 of the affidavit of Lorraine Adoli Oyombe.

The Branch Sales and Service Executive reports directly to the Branch Operations and Service Manager. The job purpose is –

- *Primarily responsible for servicing and managing customer relationships in all segments by engaging them, uncovering their needs and providing them with the appropriate products, services and solutions from the entire range of the Retail Clients suite.*
- *Responsible to drive profitable revenue and volume growth through acquisition and maximizing every customer (both new and existing) engagement.”*

The other responsibilities are as specified in the job description in Ms. Oyombe's affidavit.

The Chief Teller also reports to the Branch Operations and Service Manager and the job purpose includes –

- i) *Telling Duties*
- ii) *Supervise tellers*
- iii) *Manage branch cash position*
- iv) *Ensure maintenance of a healthy business environment through strict Compliance with Anti Money Laundering, Risk Management standards as defined by Group and Local Regulatory authorities.*
- v) *Provide Over the Counter Services to Customers*
- vi) *Processing of Back-office entries-*
- vii) *ATM Services*
- viii) *Cross-Sell Bank's products and provide sales leads."*

The other responsibilities are as detailed in the job description annexed to Ms. Oyombe's affidavit.

The Senior Teller reports to Senior Branch Operations and Service Manager and the job purpose includes –

- i) *Telling Duties*
- ii) *Supervise tellers*
- iii) *Manage branch cash position*
- iv) *Ensure maintenance of a healthy business environment through strict Compliance with Anti Money Laundering, and Compliance Risk Management standards as defined by Group and Local Regulatory authorities.*
- v) *Provide Over the Counter Services to Customers*
- vi) *Processing of Back-office entries*
- vii) *Custodian to CSM floats where applicable.*
- viii) *Cross-Sell Bank's products & provide sales leads*
- ix) *Scanning of items on eops through neap solutions (Checker), Samba, and CTS, CEMS*
- x) *Hold main branch door keys."*

Appendix C of the Memorandum of Agreement defines supervisory as:

*"All those officers who supervise the work of others, who are responsible for the activities of a section of the Bank, who are required by management as part of their duties to make effective recommendations in connection with hiring, firing, promotion or disciplinary action and to who subordinate staff would apply in the first instance for the remedy of grievances if, in connection with the foregoing, the exercise of such authority requires independent judgment."*

From the Job Description Forms produced in the affidavit of Lorraine Adoli Oyombe, it is evident that the scope of duties of staff in Band 8 entail managing other employees and making certain management decisions.

From the above job purposes in Band 8 and 9 and the definition of supervision in Appendix C, it is evident that persons holding such positions are not eligible to join union membership as they are excluded from such membership under section 2 of the Memorandum of Association.

The Respondent has submitted that the Claimant ought to have sued the Association as was the case in **Cause No. 81 of 1985**. It further submitted that the Claimant resisted the constitution of a Joint Negotiating Council to deal with the grievance as provided under Clause 18 (e) of the Memorandum of Agreement. Clause 18 of the Memorandum of Agreement provides for the grievance procedure in case of a dispute. I agree with the respondent as the level of union representation is a matter that is provided for in the recognition agreement which is signed between the Union and the Association. Where it is found that a member of the Association has not complied with the recognition agreement the issue should be dealt with at association level so that a decision is made that is binding on all the members of the Association. Section 59(1) of the Labour Relations Act recognises negotiation at association level.

Section 59(1) of the Labour Relations Act provides:

**A collective agreement binds for the period of the agreement—**

**(a) the parties to the agreement;**

**(b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or**

**(c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.**

The only matters for discussion at the individual member of the Association level are those that do not touch on the recognition agreement.

With respect to underpayment, the claimant did not adduce any evidence in support thereof. The prayer therefore fails for want of proof.

In the end, I find that the suit has no merit and is accordingly dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF JUNE 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**