REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 56 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

SEB ESTATES LIMITED.....RESPONDENT

JUDGMENT

On 18th January 2013, the Claimant filed Memorandum of Claim dated 16th January 2013 accusing the Respondent of refusal to negotiate the Collective Bargaining Agreement in which it seeks the following reliefs:

1. The Court to find that the indifference on the part of the Respondent amounts to unfair labour practice.

2. The Respondent be ordered to negotiate with the Claimant union in good faith and conclude the Collective Bargaining Agreement in dispute within 30 days.

3. Costs of favour of the Claimant.

The Respondent in its Response dated 31st January 2013 and filed on even date, prays that the claim be dismissed with costs.

It is undisputed that both parties have a mutual relationship through a valid Recognition Agreement executed on 25th August 2011. It is also not in dispute that the Minister accepted the Claimant's report for existence of a trade dispute and endeavoured to effect settlement through conciliation after which a conciliator was appointed. The parties do not dispute that on 23rd May 2012, the conciliator convened an *inter partes* meeting wherein the Respondent requested for more time for consultations.

Claimant's Case

It is the Claimant's case that the Respondent employs 300 unionisable employees on average.

It is also the Claimant's case that on 17th October 2011, the Claimant made proposals for a Collective Bargaining Agreement for the Respondent's consideration. However, the Respondent refused to negotiate forcing the Claimant to report the existence of a trade dispute to the Minister. The Claimant avers that during negotiations the respondent sought time to consult, that once the Respondent's request for more time was granted, nothing followed. The Conciliator scheduled another meeting for 16th October, which the Respondent failed to attend. Consequently, the conciliator issued a certificate pursuant to ***section 69(a) of the Labour Relations Act 2008*** (sic).

Respondent's Case

It is the Respondent's case that out of its 232 employees, only 18 are members of the Claimant therefore the claimant does not meet the simple majority criteria required by law.

The Respondent avers that it has entered into contracts with its individual employees which adhere to the Employment Act, hence no need for a CBA. The Respondent further avers that the reason it requested for more time is because it was conducting internal consultations.

It is the Respondent's case that though the Agreement was signed by both parties, there was an understanding that its enforceability depended on the Claimant's ability to recruit a simple majority of the Respondent's employees. It is also the Respondent's case that the number of employees recruited does meet the simple majority threshold required by law.

The Respondent avers that it had valid grounds for not submitting its counter proposal for a CBA.

It is the Respondent's case that it has not engaged in any unfair labour practice as it has a recognition agreement with the Claimant and has always acted within the law.

Submissions by the Parties

The Claimant in its written submissions dated 2nd November 2018 and filed on 7th November 2018, associates itself with the report of the Central Planning and Monitoring Unit and prays that this Court do adopt paragraph B1 of the Report.

The Claimant also prays that this Court do adopt paragraphs F4, F5, F6 and F3, order and award as stated therein.

The Respondent in its written submissions dated 26th November 2018 and filed on 27th November 2018 submits that the recognition is vitiated for lack of capacity of the Claimant.

The decision of the Court in ***Kenya Union of Commercial Food and Allied Workers vs. G4S Security Services Kenya Limited [SUPRA]*** is that Kenya Guards and Allied Workers Union was the sole union vested with the legal authority to contract all CBAs on behalf of private security guards and the Claimant herein has lacks the *locus standi* to represent them. The Respondent further submits that the Claimant lacks *locus standi* because it does not have the simple majority of the Respondent's employees as required by ***section 54 of the Labour Relations Act***. For further emphasis, the Respondent relies on the cases of: ***Aviation & Allied Workers Union vs. Air Kenya Express Limited & Another [2013] eKLR***, **Transport Workers Union vs. Trans-trade Ltd (K) [2016] eKLR** and ***Kenya Union of Commercial Food and Allied Workers vs. G4S Security Services Kenya Limited [SUPRA] - orbita***.

The Respondent submits that the CPMU Report has failed in its objectivity since it has acted *ultra vires* by asserting the legitimacy of the recognition agreement and ventured in issues against its mandate. It is the Respondent's submissions that the CPMU has ignored the Security Division Financial Report which breaks down the earnings of the Respondent's security division.

It is the Respondent's submissions that it has complied with every order that this court has issued and demonstrated good faith in complying with labour practice.

Determination

Section 54 of the Labour Relations Act provides as follows –

54. Recognition of trade union by employer

> **(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.**
>
> **(3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.**
>
> **(4) The Minister may, after consultation with the Board, publish a model recognition agreement.**
>
> **(5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.**
>
> **(6) If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.**
>
> **(7) If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.**
>
> **(8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.**

The respondent and claimant herein both agree that they signed a recognition agreement dated 25th August 2011. As provided under Section 54(1) once a recognition agreement is signed it paves way for negotiation of a collective bargaining agreement. The issue of simple majority is an issue to be considered before the recognition agreement is signed.

The respondent's argument that the claimant does not have a simple majority is therefore misplaced as this would only be relevant at the time of recognition. The respondent has not given notice to terminate the recognition agreement and therefore the same is valid and entitles the union to negotiation of collective bargaining agreement for its members.

Since the union has a valid recognition agreement, the respondent's argument about the *locus standi* of the union is also misplaced as the recognition agreement gives the union the locus to negotiate.

Section 57 of the Labour Relations Act provides for negotiation of collective agreements as follows –

> **57. (1) An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.**

The respondent's averments at paragraph 16 of its memorandum of response to the effect that there was an understanding that the recognition agreement would not be enforceable until the claimant recruited a simple majority is neither supported by evidence or the law. A simple majority is necessary for recognition, not for negotiation of collective agreement. The respondent's contention that the claimant had only 18 out its 232 unionisable employees is also not supported by any evidence.

The report and recommendations of the Central Planning and Monitoring Unit (CPMU) is premature at this stage as the parties had not commenced negotiations and had not disagreed on any of the items proposed by the claimant for negotiations. The issue in dispute herein is not the specific items proposed in the claimant's proposal but the refusal of the respondent to negotiate.

For the forgoing reasons I find that the claimant and the respondent have a valid recognition agreement and as provided in Section 54(1) and 57(1) the respondent is under obligation to negotiate collective bargaining agreement with the union.

The issues in the respondent's submissions about violation of the recognition agreement are not contained in its memorandum of repose and cannot be raised in submissions.

For the foregoing reasons I order that the respondent commences negotiations of the Collective Bargaining Agreement with the union by sending its counter proposals and commencing negotiations within 30 days from the date of judgment.

The case will be fixed for mention within 60 days from date of judgment for parties to report on the progress of negotiations of the CBA.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE