



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1720 OF 2017**

**MJENGO LIMITED.....CLAIMANT**

**VERSUS**

**BAKERY CONFECTIONERY FOOD MANUFACTURING &**

**ALLIED WORKERS UNION (K).....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> March, 2019)

**JUDGMENT**

The claimant filed the statement of claim on 31.08.2017 through Triple OKLaw Advocates, LLP. The claimant prayed for judgment against the respondent for:

- a) An order terminating or revoking the recognition agreement dated 30.03.2012 between the claimant and the respondent.
- b) Any such order or reliefs as the Court may deem just and fit to grant.
- c) Costs of the suit.

The respondent filed the memorandum of response on 09.02.2018 through its Secretary General Danchael Mwangure. The respondent prayed that the suit be forthwith dismissed with costs.

It is not in dispute that on 30.03.2012 the parties entered into and signed a recognition agreement. The claimant's case is that it signed the recognition agreement based on the representations made on the check-off forms submitted to the claimant by the respondent on or about 20.09.2011. The claimant's further case is that the respondent knowingly without belief in truth recklessly submitted the check-off forms for alleged employees of the claimant for the purpose of being recognised by the claimant as representing simple majority of its employees. The respondent states that it later verified the names and signatures of the alleged employees contained in the check-off forms and established inter alia that the respondent fraudulently misrepresented to it through the said forms that the persons in the forms were employees of the claimant. In particular, the claimant's case is that 31 persons listed in the check-off forms were not its legitimate employees as they were not on its payroll and that one person listed on the form did not sign at all. Further as at 30.03.2012 when the impugned agreement was signed, the claimant's case is that it had a total of 276 employees, 215 working in the factory and 64 working as drivers and turn boys. Thus, the respondent was expected to present at least 139 unionisable to meet the prescribed simple majority under section 54 of the Labour Relations Act, 2007 but presented a list of only 127 purported employees of the claimant and the recognition agreement was signed on the basis of material non-disclosure, fraudulent misrepresentation, forgery and breach of the labour laws.

On 20.03.2017 the claimant applied to the National Labour Board (the Board) for the revocation of the recognition agreement and by the letter dated 21.02.2017 the claimant notified the respondent of the intended revocation.

On 18.04.2017 the Ministry of Labour appointed a conciliator with respect to the respondent's dispute on the claimant's failure to conclude a collective bargaining agreement. The claimant's application to the Board for revocation of the recognition agreement was pending as of that time. By the letter dated 11.05.2017 the conciliator invited the parties to a meeting fixed for 24.05.2017. The parties attended and the claimant informed the conciliator about its application to the Board for revocation of the recognition agreement. The conciliation proceedings were adjourned to 21.06.2017. On 29.05.2017 and 13.06.2017 the claimant reminded the Board about determination of the pending application to revoke the recognition agreement. The Board has not yet determined the application. On 21.06.2017 the parties signed a certificate of disagreement on the collective bargaining agreement and the conciliator issued the certificate accordingly. It is the claimant's case that the Board has refused or neglected to determine the claimant's application to have the impugned recognition agreement revoked.

The respondent's case is that the claimant had refused to sign the recognition agreement as per section 54 of the Act on account that the respondent had failed to achieve the simple majority recruitment of unionisable workers as required in the section. The claimant reported a trade dispute. Meetings were held before the conciliator including as scheduled on 16.05.2012. Subsequently, the claimant voluntarily executed the recognition agreement subject of the present suit. The respondent denies that it failed to achieve simple majority recruitment and that the recognition agreement was validly concluded as per section 54 of the Act. Further the dispute was effectively determined before the conciliator when the claimant voluntarily agreed to sign the recognition agreement. By the claimant's letter of 17.10.2011 the issue of the names and signatures of the employees recruited was raised and it must have been resolved between the parties once the agreement was signed on 30.03.2012. Further under section 74 of the Employment Act, 2007 the claimant maintained all the records of its employees and could not have signed the recognition agreement prior to ascertaining that the recruited persons were its genuine employees and further that a simple majority had been achieved by the respondent. Further, the respondent's case is that prior to signing the recognition agreement the claimant never raised the issue of some of the recruited persons not being its employees. The respondent is thereby bound by the doctrine of estoppel from going back on the signing of the recognition agreement.

The Court has considered the material on record. The only issue for determination is whether the claimant is entitled to the remedy as prayed for. The Court makes findings as follows:

1) The parties had a trade dispute about the signing of the recognition agreement before a duly appointed conciliator. The dispute appears to have been resolved amicably in terms of section 68 of the Labour Relations Act, 2007 and no certificate of disagreement in that respect was ever issued. Thus the issues now urged for the claimant about the validity of the conclusion of the recognition agreement and which were before the conciliator are found not justiciable in the manner the Court has been moved in the instant case. If the claimant was dissatisfied with that conciliation process, the conciliator would have issued a certificate of unresolved dispute under section 69 of the Act and the trade dispute referred to the Court as prescribed in the Act. There was no such dispute and the Court returns that the recognition agreement was validly concluded between the parties in accordance with the relevant statutory provisions in the Act. The Court further finds that the proper way to challenge the recognition agreement was by way of urging the conciliator to issue a certificate of unresolved dispute and thereafter referring the matter to Court. That was not done and the present suit is found an abuse of Court process filed in disregard of clear statutory process in resolving the dispute, but, which purported dispute appears not to have existed in the first place.

2) The claimant prays for an order terminating or revoking the recognition agreement dated 30.03.2012 between the claimant and the respondent. Section 54 (5) of the Labour Relations Act, 2007 provides that an employer may apply to the Board to terminate or revoke a recognition agreement. The claimant alleges that the Board has refused or neglected to determine its application for revocation of the recognition agreement. However, the Board is not a party to the present case and there is no prayer directed at the Board to do whatever it is alleged to have refused or neglected to do. Instead the Court is being asked to do that which is clearly vested in the Board to do, that is, consider and revoke the recognition agreement in issue. The Court finds that the prayer as made was clearly misconceived and will fail.

3) As the costs follow the event and the respondent is successful, the claimant is liable to pay costs of the suit. The Court has considered the continuing labour relationship between the parties and to foster good industrial engagement awards only partial costs of the proceedings fixed at **Kshs.100, 000.00** only.

In conclusion judgment is hereby entered for the respondent against the claimant for:

1) Dismissal of the statement of claim filed on 31.08.2017.

2) The respondent to pay partial costs of the suit fixed at **Kshs. 100, 000.00** only by 01.05.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 29<sup>th</sup> March, 2019.**

**BYRAM ONGAYA**

**JUDGE**