



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO. 2 OF 2019

**IN THE MATTER OF: THE CONTRAVENTION OF ARTICLES 47,
48, 50 AND 152(2) OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: THE CONTRAVENTION OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF: THE CONTRAVENTION OF SECTION 54 OF THE LABOUR RELATIONS ACT

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

OLIVADO (EPZ) LIMITED.....PETITIONER

VERSUS

ISIAH BUNDI KIRIGWA, CHAIRPERSON OF THE

NATIONAL LABOUR BOARD.....1ST RESPONDENT

KENYA UNION OF COMMERCIAL,

FOOD & ALLIED WORKERS.....2ND RESPONDENT

JUDGMENT

1. The Petitioner sued the Respondents, hereinafter the Board and Union respectively, seeking the stay of Cause No. 182 of 2017 pending before the court between the Union as Claimant and the Petitioner as Respondent. The Petitioner asserts in this Petition that it sought the revocation of the recognition agreement to the Board on 13th June 2017 as the Union did not have a valid recognition agreement.
2. The petition was opposed by the Respondents. The 2nd Respondent filed an affidavit sworn by Boniface Kavuvi the Secretary General of the 2nd Respondent asserting that the recognition agreement had been entered into voluntarily and without any problems and that the Petitioner waited until the time of presenting the Petition yet Cause 182 of 2017 was filed in 2017. The 2nd Respondent argues the Petition is intended to delay the conclusion of Cause 182 of 2017 between the 2nd Respondent as Claimant and the Petitioner as Respondent. The 2nd Respondent urged the dismissal of the Petition with costs.
3. The Petitioner argued that the motion was to compel the National Labour Board to determine its application to revoke the recognition

agreement. By the time the recognition was presented the Respondent did not represent the simple majority of members. The Petitioner submits that the maintenance of a simple majority is continuous and the validity of the recognition of the union is now in doubt. The Petitioner relied on case of **Kenya Union of Printing Paper Manufacturers & Allied Workers v Packaging Industries Limited & Another [2014] eKLR** and the case of **Bakery, Confectionery, Food Manufacturing & Allied Workers Union v Mombasa Maize Millers Limited & 3 Others [2016] eKLR** where the court was satisfied that recognition agreement was no longer valid as the question of simple majority had been called and not answered. The Petitioner submitted that the application before court is for stay as the issue of recognition is to be dealt with by the National Labour Board and in the application to National Labour Board the Petitioner seeks to have the issue of union representation determined. The Petitioner argued that from the statement of the number of the members who had joined the Union and the total number of employees who are unionsable shows that there is no simple majority. The Petitioner submitted that under Section 54(6) of Labour Relations Act the process of cancellation of recognition is that the trade Union is to refer the dispute for conciliation and at the time the Union referred the issue of refusal of CBA the issue of recognition had arisen. The Petitioner submitted that the said Section provides that the 2 issues for conciliation should have been determined and this was not done as the Union only referred one dispute which is refusal to negotiate CBA. The Petitioner placed reliance on case of **Kenya Union of Entertainment & Music Industry Employees v Bomas of Kenya Ltd [2018] eKLR** where the court held that conciliation proceedings were only restricted to refusal to complete CBA and the issue of refusal was left out and the court held the suit was filed prematurely and the issue had not been addressed. The Petitioner submitted that the 2nd Respondent in failing to refer the issue to conciliation forced it to have the Petition referred as the conciliator failed to issue any conciliation. The Petitioner submitted that it wrote and requested a determination on the issue and no response was received and in light of this failure the Petitioner invoked Section 54(5) of the Labour Relations Act to terminate the recognition agreement. The Petitioner submitted that to date it had not received any response hence this Petition to have National Labour Board give a determination of the application for revocation. The Petitioner submitted that the 2nd Respondent has not challenged the application before the National Labour Board the inference the Petitioner drew is that the 2nd Respondent has given up or is agreeable to the Petitioner's application before the National Labour Board. Reliance was placed on the case of **Kenya Union of Entertainment & Music Industry Employees v Bomas of Kenya Ltd (supra)**. The Petitioner submitted that the court held failure to challenge the refusal to recognize the Claimant and the failure to challenge the Petition before the National Labour Board meant the Claimant had given up and therefore lost the right to represent Unionsable Staff. The Petitioner submitted that the 2nd Respondent's affidavit is a mere statement as it does not confirm to the format of an affidavit and that it is true the issue of recognition agreement has been raised repeatedly and indeed there is a pending application in the said cause. The Petitioner submitted that the 2nd Respondent has also raised the issue of the conciliators reference certificate.

4. In response to the motion, the Respondent submitted that the Petitioner and 2nd Respondent have recognition agreement dated 18th July 2016 and by the time the 2nd Respondent had 50% and that is the time the recognition was signed. The 2nd Respondent argued that the National Labour Board should determine the Petition before it. The 2nd Respondent submitted that the dispute before the National Labour Board was taken to conciliation and that it was responsibility of the Petitioner to get the conciliator's report. The 2nd Respondent argued that the Petitioner has no referral certificate to indicate disagreement per Section 69 of Labour Relations Act and Rule 5(1) which also provides that there should be a conciliation report. The 2nd Respondent submitted that the issue raised is therefore incapable of being raised in a CBA where parties can agree on level of unionization as Article 11 of the Industrial Charter does not support the Petitioner's case. It was submitted that Section 4 of the Labour Relations Act and Article 41 of the Constitution as well as Article 36 allow joining of a union and that the Petitioner should have raised the issue in 2006. The 2nd Respondent submitted that the Petitioner was granted time to sought out the issue of the revocation and if it were dissatisfied in 2017 it ought to have filed the Petition after Conciliator failed to file the report. The 2nd Respondent submitted that the Petitioner could have followed the exit clause in the effort to revoke. The 2nd Respondent submitted that there is a suit which is almost concluded and Petitioner has been in court and they waited till the CPMU filed the report and only at point of submission they filed the Petition. It was submitted that fluctuation in Union membership is not the basis for revocation because 2 or 3 members have terminated their representation and that this Petition is brought to deny employees representation and the Petitioner intends to scuttle the proceedings in Cause No. 182 of 2017.

5. In reply, the Petitioner's advocate Miss. Silantoi submitted that the 1st Respondent wrote advising that parties use the exit clause in the recognition agreement and that the Petitioner wrote and that letter is before court. It was submitted that the court should rely on the case of **BIFU v Taifa Sacco Ltd. [2014] eKLR** where court held negotiations on terms of CBA cannot be reversed prior to resolving the recognition dispute.

6. The Petitioner seeks to have a stay of Cause 182 of 2017 pending the determination of the recognition dispute before the National Labour Board. It is evident the dispute was raised with the Board and to date no determination has been given. In view of the fact that the National Labour Board was reconstituted and can now legally make determinations, I will stay Cause No 182 of 2017 for 2 months to enable the National Labour Board make a determination of the recognition dispute before it. An order of the Court directed to the National Labour Board is issued for its determination to be filed before 29th September 2019. Costs of the Petition to abide the outcome of the determination of the National Labour Board.

It is so ordered.

Dated and delivered at Nyeri this 29th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar