



**REPUBLIC OF KENYA**

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

**CAUSE NO. 289 OF 2018**

**{Formerly Nairobi Cause No. 1276/2018}**

***(Before Hon. Justice Mathews N. Nduma)***

**KENYA UNION OF PRINTING, PUBLISHING, PAPER**

**MANUFACTURERS, PULP & PACKAGING INDUSTRIES.....CLAIMANT**

**VERSUS**

**PAN AFRICAN MILLS (2015) LIMITED.....RESPONDENT**

**JUDGMENT**

1. In the memorandum of claim filed on 1<sup>st</sup> August 2018 the claimant union seeks the following reliefs:

- (a) The respondent be compelled to sign Recognition Agreement with the Claimant Union.
- (b) The respondent be restrained from transferring the Claimant members to third party through outsourcing.
- (c) Costs of the suit.

2. The facts of the case as set out in the memorandum of claim are that the claimant union recruited employees of the respondent as its members. That by a letter dated 16<sup>th</sup> January 2018 the claimant forwarded copy of Recognition Agreement to the respondent and requested for a meeting on 15<sup>th</sup> February 2018 at the company premises for the purpose of signing the Recognition Agreement.

3. That on 25<sup>th</sup> January 2018, the respondent wrote to the union acknowledging receipt of the letter and requested for time and further date to be agreed upon by the parties for a meeting.

4. The members of the union, informed the union that they had been made to sign contracts of employment with a new entity called Handyman Staffing Solutions.

5. The union reported a dispute to the Ministry of Labour on 4<sup>th</sup> May 2018 and the minister appointed a conciliator named Peter Otwane.

6. On 29<sup>th</sup> May 2018, the conciliator convened a meeting of the parties to take place on 8<sup>th</sup> June 2018 at Bungoma County Labour office. The meeting took place and the parties were unable to resolve the dispute. The conciliator issued a certificate of unresolved dispute dated 11<sup>th</sup> June 2018 and this suit was filed.

7. The union submits that it is entitled to recognition by the respondent and the court should grant the reliefs sought.

8. The respondent filed grounds of opposition to the Notice of Application and the claim dated 16<sup>th</sup> July 2018 and subsequently filed a replying affidavit dated 8<sup>th</sup> December 2018. The prayers sought in the Notice of Motion are the same as those sought in the claim.

9. The evidence before court is therefore the Supporting Affidavit by Rajabu W. Mwondi, the General Secretary of the claimant Union who has deposed to the facts set out in this judgment in the affidavit sworn on 16<sup>th</sup> July 2018.

10. It is this evidence that has been responded to in the replying affidavit by Mr. Alfred Muyeleele Wafula, the Human Resource and

Administration Manager of the respondent sworn on 29<sup>th</sup> November 2018 and filed on 8<sup>th</sup> December 2018.

11. The respondent deposes that the respondent company which initially operated as a state parastatal was closed down and put under receivership in March 2009. The respondent acquired the parastatal by buying the full assets from the receiver and is currently operating at 30% capacity. The new company adopted a new model of operations and production totally different from the traditional wood-based raw material. The company then decided to outsource labour services. That M/S Handyman Staffing Solutions Limited was contracted to provide labour services and that the respondent company has no unionsable employees other than a few management staff. The respondent company management was still assessing the impact and general business sustainability particularly because it had remained moribund for over 10 years.

12. The Contract/Agreement between the respondent and M/S Handyman Staffing Solution Limited was produced as Annex ANW- '1' and a bundle of payroll for the employees of the service provider for August, September and October 2018. That this information was captured in the conciliation proceedings and report dated 11<sup>th</sup> June 2018. The respondent prays that the suit be dismissed with costs.

### **Determination**

13. The issue for determination is:

(a) Whether the claimant has satisfied the requirement for recognition under Section 54(1) of the Labour Relations Act, 2007.

14. To qualify for recognition by an employer, a union must demonstrate through tangible evidence that it had recruited a simple majority of all unionsable employees of the employer. That evidence must be presented before court by way of producing check-off forms duly signed by the recruited employees and evidence of payment of union dues by the stated members.

15. In the Notice of Motion dated 16<sup>th</sup> July 2018 and the supporting Affidavit by Rajabu Mwondi of the said date and in the averments set out in the memorandum of claim, it has not been pleaded the number of unionsable employees employed by the respondent and the number of employees that had been recruited by the claimant union. The claimant union did not adduce any oral evidence before court and therefore there is no evidence before court whatsoever of the total number of employees of the respondent and the percentage that had been recruited by the claimant union.

16. On this score alone, the claimant union has failed to satisfy the requirements for recognition under *Section 54(1) of the LRA* which demands prove of recruitment of a simple majority of all unionsable employees of targeted employer for a party to qualify for recognition.

17. Furthermore the claimant union has not tabled before court any evidence to demonstrate that the purported members had any employment relationship with the respondent company.

18. In terms of *Section 107 and 108 of the evidence Act, Cap 80 Laws of Kenya*, he who alleges a fact, must prove it on a balance of probabilities. This is referred to as the burden and incidence of proof onus of which remains with the claimant.

19. The respondent has indeed provided sworn evidence by way of Affidavit by the Human Resource and the Administration Manager that it has no employees directly under its employ because it has just revived the operations of the Moribund pan paper company and had adopted a new mode of operations and production that demanded that it outsourced employees vide a company known as Handyman Staffing Solutions Limited.

20. The documentary evidence presented to court by the deponent has demonstrated that indeed, the employer of the employees working for the respondent is presently a third party that has not been sued by the claimant union either as a respondent or interested party.

21. The respondent has therefore successfully rebutted the claim by the claimant. It has also not been demonstrated by the claimant vide any evidence that the respondent had violated any law in outsourcing the employees nor has it been shown that the respondent had violated the principles of outsourcing set out by a three (3) Judge Bench of Employment and Labour Relations court in '**Industrial court of Kenya at Nairobi, Petition 22 of 2012. The Wrigley Company (East Africa) Ltd vs he Attorney General and 2 others (2013) eKLR.**'

22. The claimant union has therefore failed in the second limb of its case, to demonstrate that the outsourcing of employees by the respondent was unlawful and/or unfair.

23. Accordingly, the suit by the claimant union has failed in its entirety and is dismissed with costs.

**Judgment Dated, Signed and delivered this 11<sup>th</sup> day of July, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

M/S Njeri for Claimant/Applicant

Mr. Ouma for Respondent

Chrispo – Court Clerk