REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1345 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

TRANSPORT WORKERS UNION.....CLAIMANT

VERSUS

ETIHAD AIRWAYS.....RESPONDENT

RULING

The Claimant/Applicant, Transport Workers Union filed a Notice of Motion Application dated 14th February, 2019 brought under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules against the Respondent, Etihad Airways. It seeks for Orders that the court admits this Application for review of the ruling dated 8th February 2019 and that the Court finds that the Claimant has satisfied the requirement of section 54 of the Labour Relations Act. The Application is based on the grounds that:

1. It is not in dispute that the Claimant has recruited a simple majority of the Respondent unionisable employees.

2. By November 2017, the Respondent had in its employment a total of 11 unionisable employees and one (1) Country Manager; out of which the Claimant had recruited 8 employees.

3. The above satisfies the requirement of entering into a Recognition Agreement between the parties under section 54 of the Labour Relations Act, 2007.

4. Upon the recruitment, the Respondent carried out a redundancy exercise and declared 4 employees redundant.

5. The Claimant then recruited the remaining 3 employees and has now a membership of 7 employees.

6. The Respondent has recently employed a new employee who is the only one pending to join the Claimant union.

7. Pursuant to section 74 of the Employment Act, the Respondent is required to keep records of its employees can attest/confirm the Claimant figures as indicated.

8. The Claimant union members are entitled to their constitutional right to engage their employer in negotiating terms and conditions of employment through their union and this can only be done where a Recognition Agreement exists.

9. There is no rival union claiming the representation of the Respondent employees and as such, the Claimant is entitled to the Recognition Agreement.

10. The Claimant prays that the Court reviews the Ruling dated 08th February 2019 and Order the Respondent to enter into a Recognition Agreement with the Claimant for purposes of Collective Bargaining.

The Application is supported by the Affidavit dated 14th February 2019 sworn by the Applicant's General Secretary, Dan Mihadi who avers that the signing of the Recognition Agreement does not in any way prejudice any right of the Respondent.

Oral Submissions

The Applicant submitted that it had recruited eight employees who had signed check-off forms and that the Respondent is deducting and remitting union dues. That it is the right of the Claimant to seek recognition as it represents 75% of all airlines in Kenya and has never called

for a strike. The applicant prayed that the court grants the claimant recognition so that it can represent its members.

The Respondent did not file any response to the application. The respondent's advocate however made oral submissions. The respondent's Counsel submitted that the finding of the court in the judgment was that there was no evidence of the total number of unionisable employees engaged by the Respondent and that the Claimant/Applicant had not pointed out the error on the face of the record made by the Court. That the instant Application is bad in law and having not set out the grounds for review, it is frivolous and an abuse of the court process. That the Claimant could not introduce new facts such as the transfer of employees to Dubai in the application. That the Claimant is asking the Court to sit on appeal on its decision and make to another judgment in the claimant's favour. That nothing prevented the Claimant from asking the Court to order the production of the documents before the hearing. The Advocate submitted that nothing had been brought before the Court to warrant a review and that the Claimant has merely reproduced its claim which was considered when the Court made the decision sought to be reviewed. Counsel for the respondent prayed that the Application be dismissed with costs to the Respondent.

The Applicant's representative in a brief rejoinder stated that the application had sufficient evidence including check-off forms. That from the judgment it is clear that the Claimant did not give the total number of workforce, and that it had recruited 8 out of 9 employees which has not been denied by the Respondent.

Determination

The legal threshold for review is provided in Rule 33(1) of the Employment and Labour Relations Court Act Procedure Rules thus:-

> ***A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—***
>
> ***(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;***
>
> ***(b)on account of some mistake or error apparent on the face of the record;***
>
> ***(c) if the judgment or ruling requires clarification; or***
>
> ***(d) for any other sufficient reason.***

In Kenya Union of Hair and Beauty Salon Workers -V- Black Beauty Products Ltd; Kenya Scientific Research International & Technical Institutions Workers Union (Interested Party) [2018] eKLR, Makau J. observed that the power of review is discretionary and unfettered as was held by the Court of Appeal in Shanzu Investment Ltd vs. the Commissioner of Lands, Civil Appeal No. 100 of 1993 [1993] eKLR that:

> "The court has a wide discretion to set aside judgment and there are no limitations and restrictions on the discretion of the judge except if the judgment is varied, it must be done on terms that are just''.

The Claimant/Applicant has premised its application on the ground that there was an error on the face of the record and that it has recruited 8 out of 9 unionisable employees of the Respondent which is sufficiently evidenced through the attached check-off forms. The Respondent on the other hand has submitted that the Applicant has not pointed out the error made by the court and is yet to prove the total number of unionisable employees. Further that the Application has not set out the grounds for review.

The respondent did not defend the claim. It neither entered appearance nor filed defence. It further did not attend court for hearing. The respondent has also not filed any replying affidavit or grounds of objection to the present application for review.

In the judgment, I pointed out that the only reason I did not grant the order for recognition was that the claimant did not state the total number of unionisable employees. This I consider to have been an omission by the claimant, which it has now clarified in the application herein. The respondent has not filed any affidavit or other evidence to controvert the evidence of the claimant.

Even without considering the new evidence adduced by the claimant/applicant, it is clear that it meets the threshold for recognition.

The respondent's counsel only addressed the discovery of new evidence as a ground for review. The court can review "for any other sufficient reason".

Having proved that it recruited 8 employees of the respondent as confirmed in the judgment, and having submitted evidence to the court that the total number of unionisable employees of the respondent was 9. I find that the failure to state the total number of employees which it has now clarified is sufficient ground to review the judgment. I find that according to Section 54 of the Labour Relations Act, the claimant has met the threshold for recognition by the respondent.

For the foregoing reasons, I review the judgment dated and delivered on 8th February 2019 by setting aside the last paragraph thereof and substituting the same with the following orders –

I find that the claimant has recruited more than a simple majority of the unionisable employees of the respondent and has met the threshold for recognition as provided under Section 54 of the Labour Relations Act.

I therefore order the respondent to sign a recognition agreement with the claimant within 30 days.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE