



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 836 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 18th May, 2018)

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS CLAIMANT

VERSUS

FUN AN SHOP LIMITED RESPONDEDNT

RULING

1. The Application before Court is dated 9/11/2017. The Application was filed through a Notice of Motion brought pursuant to Order 51 Rule 1 of the Civil Procedure Rules of 2010 wherein the Application seeks orders as follows:-

- 1) That this Honourable Court be pleased to order the balloting exercise conducted on 15th September 2017 be declared invalid, null and void and the results thereof be declared a nullity.*
- 2) That the Report filed by the County Labour Officer, J. M. Kiranguri, and the County Labour Officer be nullified.*
- 3) That this Honourable Court be pleased to Order a subsequent Balloting exercise with such terms as may be determined by this Honourable Court.*
- 4) That the costs of this Application be in the cause.*
- 5) Any other order deemed expedient in the circumstances.*

2. The Application is supported by the Supporting Affidavit of Walter Ambulwa, the Respondent's Manager herein sworn on 9/11/2017. The Application is also based on the following grounds:-

- 1. The Applicant and Respondent have had a simmering dispute regarding the recognition of the Respondent as a trade union representing the Applicant's employees.*
- 2. Due to the foregoing, the Respondent sought orders from the Court requiring the Applicant's employees to partake in a balloting exercise with a view to determine whether the Respondent had met the statutory threshold to warrant its recognition by the Applicant.*
- 3. On 9th May 2017, the Court granted the orders aforesaid requiring parties to:-*
 - a) Organize and carry out a balloting exercise for all unionisable employees within sixty (60) days from the date of the Ruling;*
 - b) Agree on the terms of conducting the balloting exercise between themselves; and*
 - c) Engage the County Labour Officer who would supervise and oversee the balloting exercise.*

4. Indeed, the Applicant and the Respondent met on 4th September 2017 at the County Labour Office to negotiate on the terms for the balloting exercise. However, contrary to the Applicants expectation of reaching a sensible and unbiased agreement, the Respondent and the County Labour Officer insisted on conducting the balloting exercise on arbitrary, irrational and unreasonable terms as follows:-

- a) All employees and former employees to participate in the balloting exercise;
- b) The Applicant would bear all costs in the sum of Kshs.20,000/= relating to the balloting exercise;

5. The Applicant and the Claimant/Respondent together with the Labour Officer further agreed on the foregoing terms:-

- c) The exercise would take place at the Applicant's premises;
- d) The balloting exercise to be conducted on 15th September, 2017 from 10.00 am to 12.00 am;

6. Whereas the Applicant had no issues with the last two proposals, the Applicant had major reservations regarding the first two proposals, which it deemed both malicious and made in bad faith with the sole intent to frustrate the Applicant.

7. On 14th September, 2017, the Applicants through their Advocates wrote a letter objecting to the 1st and 2nd proposal and explained reasons for the same thereby indicating that the intended balloting exercise, could not proceed unless an agreement was reached regarding the 1st two proposals:-

- a) In the letter, the Applicant's noted that there was a disagreement on which people could participate in the balloting exercise; it was the Applicant's firm position that all employees as can be determined by the current pay role are entitled to participate in the balloting exercise;
- b) Again, since it is the employees who had an intention to unionise, they ought to make contributions towards meeting the expenses of the exercise and the burden ought not be placed on the Applicant alone;
- c) The letter further informed the addresses that until the above mentioned issues were addresses to the satisfaction of both parties, the Applicant would not participate in the exercise and would instead seek the Courts indulgence on the matter.

8. Indeed, the Applicant's advocates attempted to serve the County Labour Officer together with the Respondent with the letter on the said date but, unfortunately, they found the County Labour Officer closed for the day.

9. Similarly, the Applicant's office proceeded to serve Claimant/Respondent herein on the same date but found a notice on their premises indicating that the premises would remain closed till 18th September, 2017.

10. Subsequently, the Applicant's advocates proceeded to serve the County labour Office on 15th September, 2017 by 9.00 am, which letter was received and duly stamped. The same letter was served upon the Claimant/Respondent on 18th September, 2017 after service on 14th and 15th September failed to bear fruit.

11. On the said 15th September, 2017, the Respondent and the County Labour Officer showed up at the Applicant's premises at 8.52 am, an hour earlier than the initial time agreed upon, thus ambushing the Applicant and intentionally disrupting its business operations.

12. The foregoing notwithstanding, the Applicant informed the Claimant/Respondent together with the accompanying Labour Officer that its advocates had sent a letter detailing the basic conditions for conducting the balloting exercise and that the balloting exercise could not be conducted unless and until an agreement was reached in those respects.

13. In blatant disregard of the Applicant's pertinent, reasonable and authentic concerns, the Claimant together with the aforesaid Labour Officer proceeded to conduct the balloting exercise inviting some of the Applicant's staff to an open space opposite the Applicant's premises where they engaged the balloting exercise which is not disputed on the following grounds:-

- a) The Court ordered that a balloting exercise be conducted in respect of unionisable employees of the Applicant;
- b) The balloting exercise conducted on 15th September flouted the aforesaid Court order in a gross manner by involving and allowing persons who were not longer employees of the Applicant to take part in the balloting exercise;
- c) Only eighteen employees out of the Applicant's forty-four employees took part in the balloting exercise; and
- d) The exercise was conducted outside of the hours agreed upon thus disrupting the Applicant's normal conduct of business;
- e) There is no way of ascertaining the credibility and outcome of the balloting exercise as the Applicant's cannot tell who

out of its eighteen employees voted for or against the union, without its involvement;

f) The balloting exercise contemplated by the orders of this Honourable Court required that all applicants' unionisable employees take part in the balloting exercise subject to negotiated and reasonable terms agreed upon by all parties.

14. Despite the foregoing, the County Labour officer proceeded to file a report dated 18th September, 2017 in which he misrepresented the actual facts and purported to sanitize the disputed balloting exercise as follows:

a) That parties agreed to conduct the balloting exercise at 8.00 am at Fun N Shop Premises, which representation is marred by falsehood as parties agreed to having the exercise commence from 10.00 am to 12.00 noon;

b) That 21 employees agreed to vote on the said day, which fact is equally erroneous, as only 18 employees took part in the exercise and not 21 as alleged in the report;

c) That the management does not want the union and that is why it refused to engage in the exercise, which argument is a complete fabrication by the said officers and the same has been made in bad faith for the foregoing reasons:-

i. The Applicant is interested in resolving the current dispute subject to fair and agreeable terms;

ii. Nothing could have prevented the Applicant from engaging in the balloting exercise had the Labour Officer and the claimant/Respondent considered its proposals;

iii. A mere rejection of the unfair terms proposed by the Claimant/Respondent does not mean that the Applicant was opposed to the balloting exercise.

iv. The County Labour Officer recommended that the union be recognized without wasting any more time as the union had attained simple majority of total unionisable employees. Again, this recommendation is absurd, and without any legal standing in law as the Claimant/Respondent has not met the threshold required in law for recognition.

v. The contrary to the assertions contained in the County Labour Office report to the effect that the union had attained simple majority, the union had in fact failed to attain simple majority as the Applicant had a total number of 44 employees at the time whereas those who took part in the balloting exercise were only eighteen.

15. From the foregoing, it is apparent that the County Labour Officer has acted within utmost bias, arbitrariness and impartiality and in a manner contrary to the supervisory and oversight role accorded to it by the Court. The mere fact that the County Labour Officer purports to file a report recommending recognition of the union without so much as ascertaining the total number of Applicant's employees lends credence to the Labour Officer's impartiality, biasness, bad faith and malice.

16. It is in the interest of justice and fairness that this Honourable Court allows this Application.

3. In the supporting affidavit, the Applicant reiterated the averments made in the grounds above.

4. The Respondent/Claimant opposed this application. They filed a Replying Affidavit deponed to on 30/11/2017 and filed in Court on 1/2/2017. The Respondent aver that the ballot exercise was carried out as per this Court's directions.

5. It is his averment that 21 out of 32 unionisable employees participated in the ballot exercise and they aver that the list provided by the Respondent is not the list recorded by the Labour Officer and does not bear the signatures of employees and should be disregarded.

6. It is his averment that the true list is attached to the Labour Officer's Report, contained the employees' identity card number and signatures and bears the rubber stamp of the County Labour Officer.

7. The Respondents further aver that casual employees did not avail themselves to participate in the ballot exercise and the inclusive of 13 causals in the list of employees was extensively discussed before the Labour Officer and it was agreed that only those who were in employment on the date of the order would be allowed to participate.

8. The Respondent contend that the ballot exercise went on without the participation of casual employees in the presence of Walter Ambulwa on 12/9/2017 and this application is only meant to delay the Recognition of the Respondent Union by the Applicants herein so that the unionisable employees can be sacked to defeat the entire claim.

9. The Applicants filed a Supplementary Affidavit on 30.1.2018 where they aver that indeed they held a meeting on 4th September 2017 with the Respondent but no agreement was reached. They aver that Joshua Mathenge and Vitalis Juma had been dismissed on 3.5.2017 and 19.4.2017 respectively and never participated in the ballot exercise.

10. I have considered the averments and submissions of both parties. I have also considered the report of the County Labour Officer filed in Court on 25/9/2017 and dated 18/9/2017 which explains what happened during the balloting exercise on 15/9/2017. The Labour Officer's Report supports the views of the Respondent that the ballot went on and 21 employees participated and all voted for the recognition of the union.

11. In determining whether or not to grant orders sought in this Application, I note that on 8th May 2017 this Court issued orders directing that the ballot exercise to confirm employees be done under supervision of the County Labour Officer. The exercise was to be conducted within 60 days of the Court's order.

12. From the report of the Labour Officer filed in Court, the parties agreed to conduct the balloting on 15th September 2017 from 8 am at the Respondent's premises. This balloting proceeded in presence of the Union officials but in absence of the Management who refused to attend to the process stating that their Advocates had advised them not to attend. The Labour Officer attached a list of members who attended and there is no evidence to the contrary that the list is a falsehood.

13. The Applicant through their replying affidavit attached a different list of 20 members but not signed by any of the staff and written in a similar handwriting. It is not clear how the Applicants knew of the balloting if they were not invited as they contend.

14. The Court's position is that this Court made orders which were to be implemented. The deliberate absence of the Applicants during the balloting exercise cannot be condoned.

15. There must be some level of trust. The Applicant had an opportunity to have the balloting done with the Respondents alone but this did not work. This is why this Court exercised its discretion to enlist the services of the Labour Officer as provided for under Section 15 of the Employment and Labour Relations Court Act.

16. Section 15(4) states as follows:-

“(4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration”.

17. Having referred this case to the Labour Officer for consideration, I have no reason to doubt the authenticity of the report submitted.

18. The Applicant seek the Court to declare the ballot exercise invalid, null and void and to disregard the report filed by the Labour Officer and order another balloting exercise.

19. This Court had directed the balloting exercise be conducted to determine numbers of unionisable employees before further orders could be issued. Having now received the report of the ballot and having confirmed the membership to the Union, I find that the Respondent/Applicant Application has no merit and I dismiss it accordingly.

20. In the same vain, the ballot exercise seems to determine the Application and main claim in its entirety. I therefore also order that the Respondent should henceforth deduct and remit union dues from the unionisable employees and also proceed to enter into a Recognition Agreement with the Claimants within 30 days from the date of this ruling.

21. The Respondents are ordered to stop any acts of intimidation, victimization, harassment and coercion of the unionisable employees as a result of trade union activity. The parties are also ordered to engage in Collective Bargaining within 30 days upon signing of the Recognition Agreement.

22. Costs of this Application and claim be borne by the Respondents.

Dated and delivered in open Court this 18th day of May, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyumba for Claimant – Present

Mboha holding brief Munyua for Respondent – Present