REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2324 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

KENYA SHIPPING, CLEARING AND

WAREHOUSES WORKERS UNION.....APPLICANT/CLAIMANT

VERSUS

SUNRIPE (1976) LIMITED.....RESPONDENT

JUDGMENT

The facts of this case are not in dispute. The claimant is a trade union representing employees in the shipping and clearing industry. The respondent is a limited liability company engaged in horticultural business that includes export of its horticultural produce.

There is no recognition agreement or collective bargaining agreement between the parties. It is however evident that the claimant recruited some of the employees of the respondent and sought recognition as acknowledged by the respondent through documents filed in court.

While the issue of recognition was pending the respondent decided to relocate some of the employees working at its warehouses in JJKIA Nairobi to Naivasha, ostensibly on the directions of Kenya Airports Authority to remove non-core business from JKIA Airport where the respondent's Nairobi operations are based. The parties agreed that employees who were not able to move to Naivasha would be declared redundant.

Following the agreement the terminal benefits of the first batch of 71 employees was agreed upon and a cheque of Kshs.763,877 paid to the union in respect of the said employees. Parties did not agree on payments to the remaining 103 employees leading to the claimant union reporting a dispute to the Minister for Labour.

After conciliation, the Minster made the following finds and recommendations –

"Findings

From the submissions by the Management, union and employees who attended the meeting held on 23rd August 2017, the following was established as true.

ü *That the union and Management do not have a valid Recognition Agreement and Collective Bargaining Agreement in place. The union has recruited some of the employees and is still in the process of formalizing the relationship.*

ü *Vide Cause 48 of 2017, the Kenya Shipping, Clearing and Warehouses Workers' Union filed a case at the employment and Labour Relations Court in January, 2017 to restrain the Management of Sunripe (1976) Ltd from transferring the employees to Naivasha. The matter is yet to be decided by the Court.*

ü *That indeed the Landlord (J.K.I.A.) informed the management of Sunripe (1976) Ltd. That all non-essential service employees were to be relocated from the Airport. This notification is what informed the Management's decision to relocate the operations to Naivasha.*

ü *That indeed, employees were informed by the Management and required to confirm in writing their willingness to move to Naivasha. The Management vide a letter dated 3rd Apri1 2017 informed the County Labour Officer Nairobi of their intention to*

terminate seasonal contracts of 71 employees as a result of the new development at J.K.I.A. The County Labour Officer vide a letter dated 6th April 2017 responded and requested the Management to pay terminal dues as tabulated (one week's notice, Accrued leave for 2015 and 2016).

ü *Vide a cheque dated 14th April 2017 amounting to KShs.763,839/=, the first batch of 71 employees were paid with the approval of the Labour Officer and Mr. Tongi of the Union. The remaining 103 employees were not paid. The union therefore reported the matter to the Ministry where a conciliator was appointed.*

ü *That some of the employees actually reported to Naivasha and worked before they absconded without any notification to the Management.*

ü *That some of the employees were on Permanent terms of service while others were employed on one-month contracts that were automatically renewed every month.*

ü *From the findings above, it is quite apparent that this was not a redundancy as submitted by the union. The employees' services were not terminated. The ones whose services were terminated (71) were paid their dues through the union.*

Recommendation

*In light of the findings above, I recommend that the affected employees be paid the following as a basis of mutual settlement in the spirit of '**give and take**.'*

ü *One month's salary in lieu of notice for those employees who were on permanent terms of service and one week's notice for those who were paid at the end of the week.*

ü *Accrued leave subject to a maximum of three years.*

ü *Ex-gratia payment. This payment to be agreed between management and union."*

It is the claimant's positon that the respondent failed to pay the redundancy package as set out in it tabulations at appendix JT"C" of the memorandum of claim.

Arising from the foregoing the claimant filed this suit in which it avers that–

(a.) That the Respondent errored by not notifying he Applicant/Claimant union his attention of moving to another location away from the principal area. Further, the Respondent is aware that the employees are members of the Applicant /claimant union as the Respondent deduct and remit union dues to the Applicant/claimant union. Section 40 of Employment is very clear. Therefore, the Respondent violated this particular section of the law, because of this reason the Applicant/Claimant union believed strongly that the Respondent abolished those employees their employment resulting the meaning of section 40 of Employment Act 2007.

(b.) The Respondent has to pay them as herein tabulated calculations in the list marked "C"

The claimant prays for the following orders –

1) The Respondent to the 103 employees' their Redundancy benefit as shown on calculations list Marked C.

2) The Respondent to pay the cost of the suit.

The respondent in its statement of reply avers that the claimant has no *locus standi* as it does not have a recognition agreement or collective agreement with the union. The respondent further avers that the issues in the claim herein are similar to those in Cause No. 48 of 2017. The respondent however states that it has been ready and willing to conclude this matter amicably by complying with the Conciliator's report and that the filing of this suit is an abuse of court process.

The respondent prays for the following orders –

a) The Applicant/Claimant's claim be dismissed with costs to the respondent.

b) This **Cause 2234 of 2017** be stayed until **Cause 48 of 2017** has been heard and determined and/or consolidated with **Cause Number 48 of 2017.**

c) Any other relief the Court may deem fit to grant.

Determination

This dispute was disposed of by way of written submissions at the request of the parties. I have considered the pleadings and submissions of the parties. The issues for determination are whether claimant has *locus standi,* whether there was redundancy and if the claimant is entitled to the prayers sought.

Locus Standi

The respondent had submitted that the claimant union lacks *locus standi* to file suit on grounds that it does not have a recognition agreement or collective bargaining agreement. A recognition agreement is signed by a union and employer where the union had recruited a simple majority. The recognition agreement gives the union the right to negotiate collective bargaining agreement. This is provided for under Section 54(1) and (2) of the Labour Relations Act. Membership of trade union by employees is however provided for under Section 48(3) of the Labour Relations Act and is signified by an employee signing Form S set out in the Third Schedule in the Ac. It is membership of trade unions that gives an employee the right of representation by the union irrespective of whether the union has achieved a simple majority to entitle it to recognition by the employer or not.

The submissions by the respondent that the claimant has no *locus standi* is therefore a fallacy as recognition and collective agreement are not the determinants of *locus standi.* It is membership of a union that gives the union *locus standi* to represent an employee. The respondent has not denied that the claimant has recruited members from among its employees.

Article 41(2)(c) of the Constitution and Section 4 of the Labour Relations Act provide for the right of an employee to join membership of a trade union and to participate in the activities of the trade union without reference to recognition agreement or collective bargaining agreement.

The argument by the respondent that the claimant lacks *locus standi* appears to be an afterthought as the respondent has admitted paying the claimant terminal dues in respect of the first batch of 71 employees declared redundant. The payment was made by cheque dated 14th April 2017. This begs the question in what capacity the respondent paid terminal dues of the employees to the claimant whom it now claims has no *locus standi*.

I find that the claimant union has *locus standi* to represent employees and that the case of **LAW SOCIETY OF KENYA -V- COMMISSIONER OF LANDS AND OTHERS** relied upon by the respondent is not applicable to the present case as the facts and circumstances different.

Whether there was Redundancy

The respondent has admitted that there was redundancy following the relocation of its Packhouse to Naivasha as communicated in the company's notice to staff darted 27th October 2016 which is reproduced below –

> *"27th OCT 2016.*
>
> *Dear Staff Member _____*
>
> ***REF: RELOCATION TO NA1VASHA***
>
> *It is with great pleasure that we are writing this to inform you that tie move to our new, more spacious and comfortable Naivasha Packhouse has been confirmed.*
>
> *After several discussions, communication and planning, within the company, it has now been finalized that the new facility is being handed over to us by 2nd November 2016.*
>
> *In view of this, we hereby ask you for your commitment to this move. You are hereby required to give a written feedback of your willingness to move or otherwise. This should be not later than 4th November 2016, so as to enable the moving team to plan well.*
>
> *Kindly adhere to this, as failure to receive your response by the set date, will be assumed that your feedback is negative and you will be excluded from the list.*
>
> *We look forward to continue working with you at our new location.*
>
> *Sincerely*
>
> *SIGNED*
>
> *CHRIS KALUKU*
>
> *HUMAN RESOURCE MANGER"*

The respondent admitted the redundancy in its submissions to the Conciliator in which it confirmed having paid the first batch of employees numbering 71. The respondent further admitted in the statement of reply at paragraph 19 where it is pleaded –

> *"19. The respondent at all times has been ready and willing to conclude this matter amicably by complying with the conciliator's report….."*

I find that there was redundancy of all employees whoe were unable to move to Naivasha following relocation of the respondent's packhouse from JKIA to Naivasha.

Remedies

The claimant prays for payment of the 103 employees aes set out in the list marked C annexed to the memorandum of claim. I however note that this list is different from the one annexed to the claimant's submissions.

I enter judgment in favour of the claimant union and order the respondent to pay terminal dues to the 103 employees who are the subject of this dispute. The parties are directed to come up with the amount payable in line with payments made to the 71 employees and report back to court with 30 days.

Payments will be made directly to employees and not through the union.

The respondent will pay the claimant union costs in the sum of Kshs.50,000 to cover reasonable expenses and disbursements.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE