REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 101 OF 2017

(Before Hon. Justice Mathews N. Nduma)

BOM ST. ANGELA MUMIAS SECONDARY

VOCATIONAL SCHOOL FOR DEAF GIRLS….....CLAIMANT

VERSUS

KENYA UNION OF DOMESTIC HOTELS EDUCATION

INSTITUTIONS HOSPITAL WORKERS (KUDHEIHA).....RESPONDENT

J U D G M E N T

The suit commenced vide Statement of Claim dated 2nd November, 2017 and filed on 6th November, 2017.

The Claimant school prays that there be cancellation of the Recognition Agreement dated 19th May, 2009 or in the alternative there be fresh negotiation for fresh Recognition Agreement duly and properly signed by both parties prior to recruitment by the Respondents. The cancellation is sought on allegation that –

"By purported agreement dated 19th May, 2009 the Respondents reportedly entered into a Recognition Agreement with Claimants which agreement is wholly and patently fraudulent and a forgery"

(Emphasis mine)

It is alleged that the Agreement was not signed with authority of the board of management there being no minutes of the board to that effect.

The agreement was dormant for six (6) years during the tenure of former principal Mrs. Christine Malobi only to be sneaked into the new Principal's Office (CW 1) in 2015. The rubber stamp and signature of former Principal have expressly been denied.

Notification has been made of the intended cancellation to the National Labour Board.

The Claim was supported by testimony of CW 1, the current Principal of the school Sister Margaret Sirengo and CW 2 the Chairman of the Board of Management of the Claimant Mr. John Wesonga Mungoni both of whom stated that the Recognition Agreement was a fraud and forgery, was not sanctioned by the board and same ought to be cancelled and fresh negotiations done with the union.

That the school had a total of 30 staff out of whom only 4 were union members. That the union has lost the 50 + 1 threshold necessary to sustain representation of the employees of the Claimant.

Response

The Respondent filed a Statement of Response to the Claim on 9th July, 2018 in which is stated that the Respondent recruited employees of the Claimant to the union and check-off forms dated 12th February, 2008, 8th April, 2008 and 26th August, 2008 were forwarded to the Claimant.

The Respondent conducted election of workers committee representatives at the Claimant's premises on 8th May, 2008 through a letter dated 9th May, 2008 marked App. 4.

On 10th February, 2009, Respondent forwarded a copy of Recognition Agreement to the Claimant marked App. 5. 19th May, 2009 was proposed for the signing ceremony by a letter dated 5th May, 2009 marked App. '6'.

The Recognition Agreement was signed voluntarily by the Principal of the Claimant for management and the Respondent's Kakamega Branch Secretary and witnessed by the shop steward. The signed Recognition Agreement was produced and is marked App. '7'. The document bear signatures of the stated persons and is dated 19th May, 2009. Respondent prays that the suit be dismissed with costs.

Determination

The issues for determination are as follows:-

(i) Has a case for cancellation of the Recognition Agreement dated 19th May, 2009 been made out by the Claimant?

(ii) What reliefs if at all is the Claimant entitled to.

Issue i

A Recognition Agreement is concluded by an employer organization and a union in terms of section 54(1) of the Labour Relations Act, No.14 of 2007. The condition precedent for the Recognition Agreement to be concluded is that the union must

demonstrate that at the time of the request for recognition, the union had recruited as its members a simple majority of unionsable employees in the employer organization.

Section 54(6) provides –

> ***"If there is a dispute as to the right of a trade union to be recognized for the purposes of Collective bargaining in accordance with this section or the cancellation of recognition agreement the trade union may refer the dispute for conciliation in accordance with the provisions of part VIII."***

Section 54 (7) provides –

> ***"If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the industrial court under a certificate of urgency."***
>
> And

Section 54 (8) provides –

> "***When determining a dispute under this section, the Industrial court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister."***

Contrary to the contemplation under section 54, this dispute was initiated by the employer but not by the union. This however does not invalidate the dispute if properly initiated and referred for conciliation and to the court by the employer instead of the union. Interpretation of the section of a person who may raise a dispute must include both parties to the agreement for parity of arms and equity.

Having said that, in terms of sections 107 & 108 of the Evidence Act, Cap 80 Laws of Kenya which provides:-

> "***107 (1) whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists"***
>
> "***108 The burden of proof in a suit or proceeding, lies on that person who would fail if no evidence at all were given on either side."***

In the present case, the Claimant wishes the Recognition Agreement dated 19th May, 2009 to be cancelled on the basis that it was fraudulent and a forgery. The agreement was signed by one Christine Malobi, the principal of the Claimant school at the material time. The agreement was on the other hand signed by Mr. Thomas Mboya, Branch Secretary of the Respondent. The signing was witnessed by one Margaret Muniafu the shop steward at the time at the school.

None of the above persons have repudiated the agreement by way of testimony before court or a report made to appropriate authorities who deal with fraudulent activities.

Instead we have bare allegations from CW 1 and CW 2 who were not involved at all in the conclusion of the Recognition agreement.

This dispute was also not referred to conciliation by either party in terms of section 54 (6) of the Labour Relations Act, which is a condition precedent before the matter is referred to court.

The Recognition Agreement speaks for itself and on the face of it was properly executed by the persons who signed it.

It would appear that the Claimant is opposed to the document for ulterior motives but not due to lack of its authenticity.

The Recognition Agreement binds both parties in all the matters agreed upon therein.

The suit lacks merit and is dismissed with costs for want of proof.

Dated at Bungoma this 28th day of September, 2018

Mathews N. Nduma

Judge

Appearances

Ombito for Claimant

Justine W. Kamuye for Respondent

Chrispo – Court Clerk