



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2343 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

KENYA AVIATION WORKERS UNION.....CLAIMANT

VERSUS

BOLLORE AFRICA LOGISTICS LIMITED.....RESPONDENT

AND

AVIATION AND AIRPORT SERVICERS

WORKERS UNION (K)INTERESTED PARTY

JUDGMENT

The claimant Kenya Aviation Workers Union is a trade union registered under the Labour Relations Act to represent employees engaged in the aviation industry. On 15th January 2015, the claimant and the respondent BOLLORE AFRICA LOGISTICS KENYA LIMITED signed a recognition agreement through which the claimant union acquired the right to negotiate a collective bargaining agreement (CBA) with the respondent for terms and conditions of service for its members in the employment of the respondent.

The parties negotiated and registered with the court a CBA for the period 1st January 2016 to 31st December 2017.

The claimant avers that the recognition agreement and CBA are still in force, as they have never been terminated.

It is the claimant's averment that the respondent has breached the recognition agreement by engaging in negotiations of a CBA with the Interested Party, a rival trade union in the aviation industry, and that the respondent held meetings with the Interested Party on 30th October and 7th November 2017 to negotiate a collective bargaining agreement. It is further the claimant's averment that the Interested Party has paralysed operations of the claimant by sabotaging its members under the guise that the claimant's CBA has been terminated.

By memorandum of claim dated 23rd November 2017, the claimant seeks the following orders –

- a) Permanent Injunction stopping the Respondent from breaching the Collective Bargaining Agreement dated 17th May 2016.
- b) Permanent Injunction stopping the Respondent from breaching the recognition Agreement dated 15th January 2015.
- c) Permanent Injunction stopping the Respondent from negotiating, initiating negotiations, and/or registering any Collective Bargaining Agreement reached upon with the interested party.
- d) General damages
- e) Cost of this suit.
- f) Interest on (c) and (d), above at court rates.

Together with the claim, the claimant filed a motion under certificate of urgency seeking the following orders –

1. That the application be certified urgent, its service be dispensed with and heard *ex parte* in the first instance.
2. That the Court be pleased to issue temporary injunction stopping the Respondent from breaching the Recognition Agreement dated 15th January 2015 pending the hearing and determination of this application and suit.
3. That the Court be pleased to issue temporary injunction stopping the Respondent from breaching the Collective Bargaining Agreement dated 17th May, 2016 pending the hearing and determination of this application and suit.
4. That the Court be pleased to issue an injunction stopping the Respondent from negotiating, initiating negotiations, and /or registering my Collective Bargaining Agreement reached upon with the interested party pending the hearing and determination of this application and suit.
5. That the Court be pleased to issue such further other order(s) as it may deem just and expedient for ends of justice.

The application was heard ex parte and the following orders granted –

1. That the application be and is hereby certified as urgent and fixed for hearing before another court on 3 /11/2017.
2. That the Respondent and Interested Party are hereby restrained from future negotiations of CBA pending inter parties hearing of the application.
3. That the Applicant is directed to serve both Respondent and Interested Party Forthwith

The respondent filed a response to the application vide the replying affidavit of MARY CHEMAS, the Human Resource Manager sworn on 4th December 2017. The respondent also filed a memorandum of response to the claim on 13th December 2017.

In both the replying affidavit and response, the respondent states that the claimant union was deregistered following judgment in Judicial Review Application No. 1 of 2014. The deregistration was gazetted vide Gazette Notice No. 10372 of 16th December 2016. That following the deregistration of the claimant the Interested Party approached the respondent for recognition following recruitment of a simple majority of the respondent's unionisable employees and a recognition agreement was signed by the respondent and Interested Party on 2nd February 2017, before the claimant obtained an order of stay of its deregistration on 3rd February 2017.

It is the respondent's position that the claimant no longer represents a simple majority of the respondent's employees. It is the respondent's averment that the claimant's members as at end of October 2017 were 150 employees against the Interested Party's membership of 291 employees. A list of the said membership is attached as annexure 3 of the replying affidavit.

It is the respondent's averment that it is on the basis of the foregoing that the parties embarked on negotiation of a CBA in view of the fact that the CBA signed with the claimant was lapsing on 31st December 2017.

It is the respondent's averment that the claimant failed to disclose to the court that the respondent was acting in compliance with the law and that the claimant has failed to disclose to the court that it no longer commands membership of a simple majority of the employees of the respondent.

The respondent prays that both the application and claim be dismissed with costs.

The Interested Party also filed a replying affidavit of BONNE NICHOLAS BARASA, the General Secretary, sworn on 29th November 2017 and a memorandum of defence filed on 13th February 2018.

The Interested Party states that the recognition agreement between the claimant and the respondent dated 15th January 2015 ousted the earlier Recognition Agreement between the Interested Party and the respondent and the CBA dated 17th May 2016. It is the averment of the Interested Party that the applicant is aware that it lost its simple majority and in accordance with the provisions of the Recognition Agreement there was provision for the termination of the same under the clause titled **Amendment/Alteration or Termination of This Agreement Recognition** under which either party may issue a notice for termination of the agreement. It is the Interested Party's averment that it entered into a recognition agreement with the respondent pursuant to the provisions of Section 54 of the Labour Relations Act.

It is further the Interested Party's averment that pursuant to the signing of the Recognition Agreement and by virtue of the provisions of Section 57 of the Labour Relations Act and Article 41 of the Constitution it commenced negotiation of a CBA with the respondent.

The Interested Party argues that the claimant is aware of the recognition agreement between the Interested Party and the respondent but has not sought to impeach or remand the same in its memorandum of claim, that all the claimant seeks to stop is the negotiations of the CBA. It wonders what will become of the right of its employees to renewal of a CBA once the CBA negotiated by the claimant and the respondent lapses on 31st December 2017.

It is the Interested Party's argument that the orders sought by the claimant are against public policy and that the balance of convenience tilts

in favour of the respondent and Interested Party being allowed to negotiate the CBA which will favour a larger number of employees of the respondent.

MOSS K. NDIEMA, the Secretary General of Kenya Aviation Workers Union, the claimant, filed a further affidavit in response to the replying affidavits of the respondent and Interested Party. He deposes that the Interested Party does not have a simple majority, that upon deregistration of the claimant its members did not automatically become members of the Interested Party, that the respondent could not enter into a recognition agreement with another party before terminating the recognition agreement with the claimant which is still subsisting and that it was mischievous for the respondent and Interested Party to sign a recognition agreement on 2nd February 2017 while well aware that the ruling in their application for stay of execution pending appeal against the decision in Judicial Review No. 1 of 2014 was due on 3rd February 2017.

It is further the deposition of Mr. Ndiema that the respondent and Interested Party having learned of the stay of deregistration of the claimant should have stopped negotiations of the CBA, that the CBA between the respondent and claimant would remain in force until replaced and there was no urgency in negotiating another CBA with a union with minority members and further that the respondent's actions were malicious and arbitrary.

Determination

The case was argued by way of written submissions, which the parties highlighted in court.

I have carefully considered the pleadings and submissions of the parties. The issue for determination is whether the recognition agreement between the respondent and the Interested Party is valid and whether the claimant is entitled to the orders sought.

Validity of Recognition Agreement

It is not contested that the claimant had a recognition agreement with the respondent, which was signed on 15th January 2015 pursuant to which they negotiated a CBA for the period 1st January 2016 to 31st December 2017. It is further not in dispute that the claimant was deregistered pursuant to the decision of this court in Judicial Review Application No. 1 of 2014, which was delivered on 2nd December 2016. It is further not in dispute that on 2nd February 2017 the respondent and claimant signed the now impugned recognition agreement the day before the Court of Appeal rendered its decision in the claimant's application seeking stay of execution of the decision in JR No. 1 of 2014 pending appeal. It is further not in dispute that in the ruling the Court of Appeal stayed the orders of deregistration of the claimant although a copy of the ruling was not availed to the court by any of the parties.

Under Section 54 of the Labour Relations Act, a trade union is entitled to recognition by an employer for purposes of negotiation of CBA once the trade union has recruited a simple majority of the unionisable employees of the employer.

Section 54(5) provides that an employer or group of employers may apply to the National Labour Board to terminate or revoke a recognition agreement. Further Section 54(6) of the Labour Relations Act provides that if there is a dispute over the cancellation of a recognition agreement a trade union may refer the dispute for conciliation in accordance with the provisions of the Act.

A copy of recognition agreement between the claimant and respondent is appended as document MKN1 in the claimant's bundle of documents. The last paragraph thereof bears the title AMENDMENTS/ALTERATIONS OR TERMINATION OF THIS AGREEMENT. It provides that the agreement may be terminated by issuance of 3 months' notice and with compliance with relevant laws.

The question herein is whether the recognition agreement between the claimant and the respondent has been terminated or was terminated before the respondent signed another recognition agreement with the Interested Party.

The respondent has not answered this question although it has been raised severally by the claimant. The respondent has not shown that it terminated the recognition agreement with the claimant by application to the National Labour Board, or by giving notice to the claimant as stipulated in the said recognition agreement. The respondent has not even attempted to posit to the court that the recognition agreement automatically lapsed with the deregistration of the claimant.

Besides the issue of termination of the recognition agreement, there is also the question whether the Interested Party had a simple majority at the time of signing the recognition agreement with the respondent. The respondent has stated that the Interested Party had recruited 291 members while the claimant had 150 members. The evidence submitted is a list that has the initials KAWU and AASWU. It is not stated where or when the particulars in the list was extracted from or by who. The list has no date.

Section 48 of the Labour Relations Act provides for membership of trade unions by employees notifying the employer of their membership through Form S in the Third Schedule to the Act. The Section further provides for resignation of employees by notifying the employer in writing. Neither the respondent nor the Interested Party has submitted to the court any Form S popularly referred to as "*Check-off Form*" as proof of any employee having joined the membership of the Interested Party. The respondent has further not submitted any notification by any employee in writing of having resigned from the membership of the claimant. The upshot is that there is no proof of any employee having left the membership of the claimant to reduce its majority or proof of any employee having joined the membership of the Interested Party to prove its majority.

Finally, the Interested Party is the one who filed Judicial Review Application No. 1 of 2014 and was therefore a party to the claimant's application for stay of the decision of this court deregistering the claimant. The Interested Party was aware that the ruling of the Court of Appeal was due to be delivered on 3rd February 2017. It has not denied this fact, which has been pleaded by the claimant who has stated that the respondent and Interested Party were mischievous in signing the recognition agreement the day before the ruling was to be delivered.

This can only be interpreted to be a deliberate scheme to defeat the outcome of the decision of the court should it be in favour of the claimant.

From the foregoing, I make the following findings –

1. That there is no evidence of termination of recognition agreement between the claimant and the respondent.
2. That there is no evidence of the Interested Party having achieved majority membership to oust the claimant from recognition by the respondent.
3. That the Interested Party acted in bad faith by signing recognition agreement with the respondent the day before delivery of a decision of stay of execution of orders deregistering the claimant by the Court of Appeal and without proof of majority membership.
4. That the respondent had no capacity to enter into a recognition agreement with the Interested Party as it had a subsisting recognition agreement with the claimant.
5. That the recognition agreement signed on 2nd February 2017 between the respondent and Interested Party was therefore a nullity.

For the foregoing reasons I declare that the respondent has no capacity to negotiate a CBA with the Interested Party, as there is no valid recognition agreement between the claimant and the respondent. I therefore issue an injunction stopping the respondent from negotiating or registering any collective bargaining agreement between the respondent and the Interested Party for as long as there is a valid recognition agreement between the claimant and the respondent.

I further declare any negotiations of collective bargaining agreement between the respondent and Interested Party while there is a valid recognition agreement between the claimant and respondent to be null and void.

Any prayer in the memorandum of claim or application of the claimant dated 23rd November 2017 that is not granted herein is deemed to have been declined.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2018

MAUREEN ONYANGO

JUDGE