



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2066 2015

KENYA UNION OF ENTERTAINMENT AND MUSIC

INDUSTRY EMPLOYEES.....CLAIMANT/APPLICANT

VERSUS

BOMAS OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The parties herein had a Recognition Agreement and a Collective Bargaining Agreement (CBA) running from 1.7.2012 to 30.6.2014. In October 2014 the claimant wrote to the respondent inviting her to negotiate a new Collective Bargaining Agreement but the invitation was never honoured despite reminder being served. As a result the claimant reported a dispute to the Minister that the respondent had refused to negotiate a new Collective Bargaining Agreement and a Conciliator was appointed but the dispute was never resolved immediately and on 20/11/2015 the Claimant brought this suit basically seeking to protect her recognition Agreement with the respondent and to bar the respondent from recognizing and negotiating Collective Bargaining Agreement with another union, and if the same had already been done, the same to be nullified.

2. It would appear that she managed to get some temporary reprieve when Abuodha, J. ordered status quo to be maintained. However on 3.2.2016 the respondent applied to the National Labour Board (NLB) for revocation of the Recognition Agreement between the parties herein and thereafter she proceeded to recognise a rival union and concluded a new Collective Bargaining Agreement on 13.10.2016. The said Collective Bargaining Agreement was approved by the Ministry of Labour and forwarded to this Court on 21.10.2016 for registration which was done by Abuodha J. on 26.10.2016 as RCA No. 261 of 2016. The Claimant never gave up and on 26.2.2018, the parties agreed to dispose of the suit by written submissions on the strength of the record. The Claimant filed her submissions on 24.4.2018 while the respondent filed hers on 20.6.2018. The hearing was thereafter closed without enjoining the rival union to these proceedings.

3. The Claimant contended that the parties herein have a valid Recognition Agreement which can only be revoked under section 54(5) of the Labour Relations Act and/or moving the Court. She relied on the Reports from the Labour Ministry dated 25.1.2016 and 13.5.2016 annexed to her supplementary list of documents filed on 7.1.2016. She submitted that the recognition given to the rival union and the Collective Bargaining Agreement concluded with the said union and registered in the Court are a nullity because they were done in contempt of Court orders barring the same, and also before the National Labour Board had not revoked the Recognition Agreement between the parties herein.

She relied on **ELRC No. 1915 of 2014 herself –vs- Sports stadia Management Board** to justify her submissions. She concluded by urging that the respondent's Chief Executive Officer (CEO) be committed to civil jail and/or be ordered to pay the maximum fine or both so that the rule of law may prevail.

Respondent's Submissions

4. The respondent admitted that the parties herein had a Recognition Agreement and a Collective Bargaining Agreement but because of the Claimant's negligence and high handedness to her members, there was defection *en masse* of the members from the Claimant to Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA). That 111 members of the Claimant wrote resignation letters from the union and the letters were eventually served on her. That the said 111 members joined KUDHEIHA and signed check off forms giving the respondent the mandate to deduct and remit their union dues to KUDHEIHA.

5. Further respondent contended that through the exercise of their Constitutional right under Article 32, 33, 36 and 41 of the Constitution, the Claimant was left with only 13 members while 111 members left her to join KUDHEIHA who now enjoys majority representation. That the respondent notified the Claimant, Central Organisation of Trade Unions (COTU), Federation of Kenya Employers (FKE) and even wrote to the National Labour Board on 2.2.2016 requesting for revocation of the Recognition Agreement with the Claimant because she no longer met the threshold for recognition for purposes of Collective Bargaining under Section 54(1) of the Labour Relations Act, being representation of

a simple majority of the respondents' unionisable staff.

6. The respondent submitted that on 8.12.2015, the Claimant obtained *ex parte* Order restraining the respondent from entering into any negotiations with any other union apart from the Claimant pending the hearing and determination of the suit herein but the Order was never served upon the respondent or her agents. It is the respondent's case that being unaware of the said *ex parte* Order, she signed a Recognition Agreement with KUDHEIHA and subsequently concluded a Collective Bargaining Agreement on 13.10.2016 and which was duly registered by Abuodha, J. on 26.10.2016.

7. The respondent further contended that on 24.10.2016 the Claimant brought another application seeking basically to stop the registration of the said Collective Bargaining Agreement and Mbaru J. granted orders on 25.10.2016 directing the parties to maintain the status quo as at 20.11.2015 pending directions by Wasilwa, J. on 31.10.2016. However, the respondent submitted that the said order was again never served until days later when the Order was left at the respondent's advocate's office gate. That the Recognition Agreement between her and KUDHEIHA has not been challenged and cannot be challenged because the Claimant has lost majority of her membership in the respondent's unionisable staff and the mechanism for revoking her recognition has already been invoked. The respondent is therefore of the view that this suit and all the applications made therein amounts to abuse of the Court process and they should be dismissed.

Analysis and Determination

8. There is no dispute that the parties herein had a Recognition Agreement and Collective Bargaining Agreement as at 20.11.2015 when this suit was filed. There is also no dispute that the respondent wrote to the National Labour Board on 3.2.2016 requesting for revocation of the said Recognition Agreement. There is further no dispute that on 13.10.2016 the respondent and KUDHEIHA signed a Collective Bargaining Agreement and the Labour Ministry approved it and forwarded it to this Court for registration vide the letter dated 21.10.2016. It is further not disputed that on 24.10.2016 the Claimant applied for injunction to stop the registration of the Collective Bargaining Agreement concluded by KUDHEIHA and Mbaru, J. ordered for the status quo as at 20.11.2015 to be maintained. Finally it is common knowledge that Abuodha, J. registered the said Collective Bargaining Agreement on 26.10.2016. The issues for determination are:-

(a) Whether the Claimant has lost the right to continue representing the unionisable staff of the respondent.

(b) Whether the respondent was served with the Court Order dated 8.12.2015.

(c) Whether the respondent was bound to recognise KUDHEIHA and conclude a Collective Bargaining Agreement with her.

(d) Whether the Order issued on 25.10.2016 was served on the respondent and the Ministry of Labour or brought to the attention of Abuodha, J. before he registered the Collective Bargaining Agreement on 26.10.2016.

(e) Whether the Collective Bargaining Agreement registered on 26.10.2016 was valid and binding on the respondent and her unionisable staff.

Loss of the right to Represent Respondent's Workers

9. The right of a trade union to represent workers is derived from section 54(1) of the Labour Relations Act which provides:-

"54(1) An employer, including an employer in the Public sector, shall recognise a trade union for purposes of Collective Bargaining if that trade union represents a simple majority of unionisable employees."

10. Flowing from the foregoing provisions, it is correct to conclude that where the trade union loses the said threshold of representing a simple majority, it should lose recognition. Another conclusion to draw from the interpretation of the said provision is that, where a trade union represents a simple majority of the unionisable staff, the employer has no choice but only to accord recognition to the union for purposes of Collective Bargaining.

11. It is clear from the evidence before the Court that between August and October, 2015 the Claimant lost 111 or 115 members out of 136 in the respondent's unionisable workforce. The said evidence is in the form of Check-off forms signed on 3.9.2015 and 4.9.2015. The said information was verified by the Conciliator vide his letter dated 25.1.2016 to the parties herein by which he conveyed his finding that the Claimant had lost majority of her members to KUDHEIHA and advised them to sue for demarcation, or the respondent to apply for revocation of the Recognition Agreement with the Claimant before the issue of a new Collective Bargaining Agreement may be considered.

12. It would appear that the Claimant has not taken the issue of majority representation seriously. As at 20.11.2015 when she brought this suit, she knew that she had lost majority of her members to KUDHEIHA and that her right to recognition by the respondent under Section 54(1) of Labour Relation Act was out of question, but she failed to utilize the mechanism provided for her by the law in such circumstances. She even failed to do so after being advised by the Conciliator vide the letter dated 25.1.2016.

13. The mechanism for resolving recognition dispute is provided by Section 54(5) (6) and (7) of the Labour Relations Act as follows:-

"(5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.

(6) If there is a dispute as to the right of a trade union to be recognized for 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.

(7) If the dispute referred to in section (6) is not resolved during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.”

14. It is obvious from the facts of this suit and the conciliation proceedings lodged by the Claimant to the Labour Cabinet Secretary on 9.10.2014 that the dispute was not about refusal to recognise the Claimant or cancellation of the recognition agreement. The said conciliation proceedings were limited to refusal by the respondent to review the 2012-2014 Collective Bargaining Agreement which had expired on 30.6.2014. In view of the said express provisions of Section 54(6) and (7) of Labour Relation Act, it is clear that this suit was filed prematurely before first referring the recognition or cancellation of recognition for conciliation in accordance with Part VIII of the Labour Relation Act. The first Port of Call for a trade union to challenge cancellation of recognition under the said subsection (6) is the Conciliator and not this court. Consequently, I find that this suit is incompetent. In **Speaker of National Assembly –vs- James Njenga Karume [1992] eKLR**, the Court of Appeal held that:-

“In our view, there is merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

15. The failure to challenge the apparent refusal by the respondent to continue recognizing the Claimant and further the failure by the Claimant to challenge the application by the respondent to the National Labour Board to revoke the recognition Agreement between the parties herein, meant that the Claimant has given up and therefore lost the right to continue representing the respondent’s unionisable staff. Unfortunately for her, this suit was the wrong mechanism to preserve her right to continue enjoying recognition by the respondent under Section 54(1) of the Labour Relations Act.

Service of the Order dated 8.12.2015

16. The respondent contended that she was never served with that Order made by Ndolo, J. on 8.12.2015. The Claimant has not responded to the said contention by the respondent and as such the only inference to draw is that it is true that the Order was never served on the respondent. I have perused the court record and I did not see any Affidavit of service filed to prove that the Order was served. All what I saw was a letter dated 19.10.2016 by the Claimant to the Cabinet Secretary in Charge of Labour enclosing the Court Order issued on 10.12.2015 which was copied to the Court and the respondent among other persons. However, there is no evidence on record to prove that the said letter and the copies were served to the said persons. It follows therefore that the respondent and KUDHEIHA were not aware of the said Order when they negotiated and concluded the Collective Bargaining Agreement dated 13.10.2016. The Collective Bargaining Agreement was therefore not signed in contempt of Court.

Recognition of KUDHEIHA

17. The respondent contended that a big majority of her unionisable staff joined KUDHEIHA and authorized her to deduct and remit union dues to the new union. According to the respondent the representation by KUDHEIHA was 90% representing 111 out of 133 unionisable staff. As already opined herein above, an employer has no option under Section 54(1) of Labour Relations Act but to recognise a trade union for purposes of Collective Bargaining if it represents a simple majority of its unionisable staff. Consequently, I find and hold that the respondent was bound to accord recognition to KUDHEIHA after she recruited a vast majority of her unionisable staff. Under the said section 54(1) of Labour Relations Act, the respondent was also bound to withdraw her recognition to the Claimant after she lost her members to the rival union, and indeed she applied to the National Labour Board for revocation of the Recognition Agreement.

Service of Order dated 25.10.2016

18. I have perused the affidavit of service filed on 28.10.2016 by Mr. Stephen Njonjo, the Process Server who served the Order dated 25.10.2016. He deponed that he went to serve the Order on 26.10.2016 on the respondent’s General Manager at Hillside Apartment along Ragati Road, but he found the office closed and he left it with the security guard at the premises. Thereafter he proceeded to serve the Cabinet Secretary who received and signed it. He then served the respondent on 27.10.2016. The copy of the Order annexed to the affidavit of service bear stamps acknowledging service on 26.10.2016 and 27.10.2016. The said service was obviously late and there is no indication that Abuodha, J. was made aware of the said Order before registering the Collective Bargaining Agreement dated 13.10.2016 on 26.10.2016.

Whether Collective Bargaining Agreement registered on 26.10.2016 was valid

19. In view of the finding herein above that the respondent was bound to recognise **KUDHEIHA** for purposes of collective bargaining, and that the two concluded a Collective Bargaining Agreement on 13.10.2016 without knowledge or service of the Order dated 8.12.2015, and further that the Labour Ministry approved and forwarded the Collective Bargaining Agreement to the Court which registered the Collective Bargaining Agreement without the knowledge of the Order dated 8.12.2015 and 25.10.2016, the Collective Bargaining Agreement signed on 13.10.2016 and registered by Abuodha, J. on 26.10.2016 is valid and binding on the respondent and her unionisable staff until its expiry date and thereafter until another Collective Bargaining Agreement is concluded and registered by this Court.

Conclusion and Disposition

20. I have found that the Claimant herein has lost the right to represent the respondent’s unionisable staff under Section 54(1) of Labour Relations Act. I have also found that this suit is premature and incompetent within the meaning of Section 54(6) of Labour Relations Act. I further found that the orders dated 8.12.2015 and 25.10.2016 which sought to bar recognition of rival trade union and negotiation of Collective Bargaining Agreement with the said rival union pending the determination of this suit were either never served at all or were served too late after the recognition was granted and Collective Bargaining Agreement signed and registered by the Court. Finally, I have found that the Collective Bargaining Agreement signed between the respondent and KUDHEIHA and registered by this Court on 26.10.2016

is valid and binding on the respondent and her unionisable staff. Consequently, the suit is dismissed with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of October 2018

ONESMUS N. MAKAU

JUDGE