REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 97 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

KENYA PLANTATIONS AND

AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

KENYA CHEMICAL AND

ALLIED WORKERS UNION.....1ST RESPONDENT

HOMALIME KENYA LIMITED.....2ND RESPONDENT

AGRICULTURAL EMPLOYERS ASSOCIATION.....INTERESTED PARTY

JUDGMENT

The Claimant, Kenya Plantation and Agricultural Workers Union is a registered Union whose membership according to its constitution covers all employees engaged in general agriculture including mixed farming, dairy and livestock rearing, cereals, vegetables, fruit growing, nurseries and general agriculture processing factories.

The 1st Respondent is a registered trade union representing the interest of workers engaged in manufacturing of all types of hydraulic cement such as Portland, natural masonry, puzzolano, fibre, roma and allied products.

The 2nd Respondent is a limited liability, company engaged in agricultural activities and production of lime and is a member of the Agricultural Employers Association (Interested Party) which has recognized the Claimant through a recognition agreement signed on 6th September 1999. Over the years, they have negotiated several Collective Bargaining Agreements (CBAs) with the latest one being the one that was registered under RCA No. 256 of 2016. That the activities of the 2nd Respondent are purely and largely agriculture in nature involving sugar cane farming, forestry, livestock and production of lime for agricultural purposes of bleaching sugar in agricultural industries as well as fertilizer for neutralizing acidity in soils.

The Interested Party on the other hand is an employer's organization registered under the Labor Relations Act to represent the interests of its members who are employers in the agricultural sector.

The Claimant alleges in the Memorandum of Claim that it wrote to the 2nd Respondent through the Interested Party on the 12th March 2017 seeking permission to hold a General workers meeting at the 1st Respondent's premises to conduct election of Union representatives. The 2nd Respondent through the Interested Party confirmed the meeting vide their letter dated 24th February 2017.

The Claimant avers that on the 12th March 2017 officials, representatives and agents of the 1st Respondent gate-crashed into the 2nd Respondent's premises and stormed into the meeting held by the Claimant disrupting the scheduled election of workers representatives demanding that the 2nd Respondent sign a Recognition Agreement with them.

The claimant contends that the 1st Respondent's actions have created confusion and disharmony in the 2nd Respondent's premises and amongst the workers and is blatantly interfering with the Claimants constitutional rights to Freedom of Association and Collective Bargaining.

It is contended that if the 1st Respondent has its way, the claimant's members will suffer irreparably as all the gains made over the years while reviewing the terms and conditions of employment of the claimant's members with the 2nd Respondent will be eroded reverting back to the minimum terms under the Employment Act, 2007, until a CBA is concluded between the 1st and 2nd Respondent.

Consequently the Claimant prays for declarations that:

1) A declaration that the activities of Kenya Chemical and Allied Workers Union in Homalime Kenya Limited amounts to interference of the Claimants right to Freedom of Association and right to Collective Bargaining with Homalime Kenya Limited.

2) Kenya Chemical and Allied Workers Union by itself, its officials, its agents, servants, assigns and representatives are hereby restrained and prohibited from holding meetings, recruiting, entering into any agreement (s), or demanding trade union dues from the 2nd Respondent employees and interfering with the Claimants rights to Freedom of Association and Collective Bargaining as long as there exists a Recognition Agreement and a Collective Bargaining Agreement between the Claimant and the 2nd Respondent.

Contemporaneously with the claim, the Claimant filed a Notice of Motion Application seeking for orders that:

1. That, an order be and is hereby issued Restraining the 1st and 2nd Respondent, their agents, assigns, servants, officials and or representatives from entering into any agreement (s), recruiting, holding meetings, deducting trade union dues to the 1st Respondent and interfering with the Claimants rights to Freedom of Association and Collective Bargaining Agreement.

2. That, costs of this application be provided for.

The said Application is premised on the grounds that:

1. That, the Applicant has a Recognition Agreement and a Collective Bargaining Agreement with the 2nd Respondent.

2. That, the Applicant wrote to the 2nd Respondent through the Interested Party on the 12th March 2017 requesting to hold a general workers meeting at the 1st Respondent premises and conduct election of Union representatives.

3. That, the 2nd Respondent through the Interested Party confirmed the meeting vide their letter dated 24th February 2017.

4. That, during the meeting on the 12th March 2017 officials, representatives and agents of the 1st Respondent gate crashed into the 2nd Respondent premises and stormed into the meeting held by the Claimant disrupting the scheduled election of workers representatives.

5. That, the 1st Respondent in blatant disregard of the existing Recognition Agreement and Collective Bargaining Agreement recently concluded between the Claimant and the 2nd Respondent is demanding that the 2nd Respondent sign a Recognition Agreement with them.

6. That, the 1st Respondent has created confusion and disharmony in the 2nd Respondent premises and amongst the workers and is blatantly interfering with the Claimant's constitutional rights to Freedom of Association and Collective Bargaining.

7. That, the applicant stands to suffer irreparable damage should the 1st Respondent proceed with their blatant interference of the Claimants constitutional rights to Freedom of Association and it's in the interest of Justice and fairness that the orders.

Following the hearing of the Application ex parte it was ordered that:

1. The 1st Respondent is restrained from interfering with the relationship between the applicant/claimant and the 2nd Respondent pending the hearing and determination of this case.

2. The case is referred to the County Labour Officer – Kisumu County to carry out a demarcation exercise and file a report in Court within 30 days.

The 1st Respondent has opposed the Claim and Application by filing a Replying Affidavit and a Response to the Claim wherein it alleges that the workers of the 2nd Respondent approached the 1st Respondent's officers in early January 2016 seeking to join membership of the 1st Respondent after the workers resigned from the Claimant Union. That after a period of over one month it gave the Claimant's former members check off forms to go and enroll workers into Union membership. The 1st Respondent alleges that by the 4th March 2017 it had recruited 222 employees into 1st Respondent's membership.

That the 1st Respondent combined all the check off forms signed by the Company employees and sent them to the 2nd Respondent together with standard Recognition Agreement on 10th June 2016 for the Company to counter-sign to enable the parties to formalize their relationship

That the check off forms were sent to the 2nd Respondent on 10th June 2016 also requiring them to implement the deduction of Union dues as

from June 2016 as the workers had already given consent for such deductions.

The 1st Respondent contends that it is the right Union to represent the employees of the 2nd Respondent because the 2nd respondent's product which is Lime is used on a variety of things like lime which is odourless, used chiefly in mortar, plaster, Cement, in bleaching powder and in various compounds for improving crops and also farmers in plantation and agriculture use lime to improve on their products and this is covered in the Union Constitution under Rule 2(vii) and (viii).

Further that the 1st Respondent managed to recruit 222 employees of the 2nd Respondent who had consented to be members of this Union out of 400 workers equivalent to 56% of the total workforce. The 1st respondent contends that the employees' rights should be accorded to them as stipulated in the Kenya Constitution, under the Bill of Rights Chapter 4, Article 41(1) and also as stipulated under Labour Relation Act 2007, Section 4(1)(b) and (c).

The 1st Respondent is of the view that the 2nd Respondent should revoke the Recognition Agreement with the Claimant Union since it has ceased to have majority membership, and accord the 1st Respondent Recognition as stated in Labour Relation Act 2007, Section 54(5).

The 1st Respondent thus prays for orders that:

i. The 1st Respondent is the right Union to represent the workers of the 2nd Respondent as supported by the Constitution of the 1st Respondent's Union, and the membership accrued from the employees of the 2nd Respondent who have joined the 1st Respondent Union voluntarily and individually.

ii. The 1st Respondent having recruited over 222 out of 400 workforce which is equivalent to 56% which is above the simple majority as required by the Law, and to date, that is 5th July 2017, the 1st Respondent membership stands at 239 employees which is equivalent to 59.75% (60%).

iii. the 1st Respondent is asking this Honourable Court to consider compelling the 2nd Respondent to sign Recognition Agreement with the 1st Respondent taking into account that, the employees of the 2nd Respondent had exercised their freedom of association and their fundamental rights and their wishes should be respected because failure to recognize, this would mean that such workers right have been interfered with and nobody can take away or interfere with such rights of belonging or not belonging to the trade union of their choice.

iv. That, each party to bear its own costs.

By invitation the parties appeared before the Kisumu County Labour Officer on the 10th of April 2017 and made their submissions on the issues in dispute. The Labour Officer proceeded to file a demarcation report dated 2nd June 2017.

The 2nd Respondent and the Interested Party filed a Replying Affidavit in opposition to the Claim and Application by the Claimant. They aver that the 2nd Respondent has a valid Recognition Agreement through the Interested Party pursuant to which the Interested Party negotiated a CBA with the Claimant on behalf of the 2nd Respondent.

They admit that it is true that both the Claimant and the 1st Respondent have recruited employees of the 2nd Respondent and that the 2nd Respondent has been deducting and remitting Union dues to both Unions. However, it is contended that the 2nd Respondent has 377 unionisable employees out of which the Claimant has 75 members whereas the 1st Respondent has 168 members.

The Respondents contend that pursuant to the recruitment, the 2nd Respondent has been engaging the 1st Respondent through a series of letters mainly forwarding check off forms for recruitment and ultimately forwarding the Recognition Agreement for consideration and signing to pave way for negotiations of a CBA.

That as a result of competing interests between the Claimant and 1st Respondent which were threatening to affect operations, the 2nd Respondent approached the Interested Party to help it deal with the 1st Respondent and explore an amicable settlement pursuant to which a meeting was held between the 1st and 2nd Respondents where the following issues were highlighted:

- That the Interested Party had a valid recognition agreement with the Claimant on behalf of the 2nd Respondent as a member of the Interested Party that bound the Association to only deal with the claimant as the sole labour organization representing the interests of unionisable employees.

- That the Interested Party had already negotiated several CBAs with the Claimant on behalf of the 2nd Respondent

- That the claimant had written to the interested party accusing the management of the 2nd Respondent of inciting its workers against the claimant threatening industrial peace

- That the management was not keen on negotiating 2 CBAs for its workers and instead the claimant and the 2nd Respondent should seek assistance to establish whether the Interested Party can sign a parallel recognition agreement without breaching the existing one.

It is contended that based on the above issues the 2nd Respondent agreed to hold the signing of the Recognition Agreement pending the resolution of the issue of representation. It is further contended that the 2nd Respondent and the Interested Party uphold the constitutional freedom of association and that they will abide with the recommendation of the demarcation exercise.

The matter was canvassed by way of written submissions with the 2nd Respondent being the only party who highlighted their submissions in open Court.

Claimant's Submissions

The first issue the Claimant addresses is whether the 1st Respondent is the right Union. It is submitted that the Sector in which the 2nd Respondent operates falls within the confines of 'Agriculture' and no evidence has been adduced to the contrary by the 1st and 2nd Respondents nor the Interested Party herein.

It is submitted that the provisions of Section 54(2) and (8) of the Labour Relations Act, 2007 Laws of Kenya provide that;

> **(2) A group of employers, or an employers' organization including an organization of employers in the public sector shall recognise a trade union for the purpose of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organization within a Sector**
>
> (8) 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,

The claimant submits that for the Court to find out whether the 1st Respondent is the right Union the Court must first look at the Sector in which the employer operates and the constitution of the 1st Respondent.

That the 2nd Respondent is an Agricultural entity and engages on a large scale in the farming of sugarcane, forestry, livestock (cows, ewes and pigs) and production of lime powder for agricultural purposes as stated in paragraph 20 of the demarcation report where the findings of the county labour officer states that:-

> "*Homalime (L) Limited undertakes major activities that are agricultural in nature and involve growing of sugar cane, rearing of livestock and forestry for commercial purposes and also produce lime in a process of heating stones, cooling and grinding to produce powder which is used for bleaching sugar and as a fertiliser by product for neutralising acidity in soils within the sugar cane plantations and can therefore be evidently classified as an investment set out in the Agricultural Sector of the Economy*"

The Claimant refers to Rule No 2: of the 1st Respondent's Constitution which provides for the aims and objectives for which the 1st Respondent is established being for persons employed in the firms, companies and organisations operating in trades and industries as listed in:-

i. Manufacture of Basic Industrial Chemical including fertilisers

ii. Manufacturing of vegetables animal oil, fats and allied

iii. Manufacturing of miscellaneous Chemical Products and allied

iv. Manufacturing of non-metallic products (excluding) any petroleum products, coal, quarrying & allied

v. Manufacturing of structural clay products and allied

vi. Manufacturing of Glass and Glass products and allied

vii. Manufacturing of pottery china and earthenware, manufacturing cement (hydraulic) and allied

viii. Manufacturing of non-metallic mineral products and allied products

That from the above provisions of the 1st Respondent's Constitution, it is evident that its aims and objectives do not cover persons employed in firms, companies and organisations operating in trades and industries in the agriculture sector but chemical.

On the question whether the 2nd Respondent's employees have resigned from the Claimant Union it is submitted that the Respondents have not produced proof by way of resignation letters written by any employee having resigned from the claimant union in accordance with the provisions of Section 48(6) of the LRA. That the lack of any letter of resignation in evidence it cannot be concluded that there has been any resignation from the Claimant Union.

Further, that nothing on record in the form of request in any prescribed form addressed to the Minister by the 1st Respondent herein requiring him to issue an Order directed at the 2nd Respondent who has employed more than five employees to deduct and remit trade union dues to

the 1st Respondent herein.

That the 2nd Respondent was under express obligation in accordance with the provisions of Section 48(3) of the Labour Relations Act, to effect deduction of union dues pursuant to an order issued by the Minister under Section 48(3) of the Labour Relations Act. That the 2nd Respondent while acting jointly and severally with the 1st Respondent proceeded to deduct and remit trade union dues to the 1st Respondent without an order from the Minister. They rely on the decision of Mbaru J. in *Transport Workers Union v Automobile Association of Kenya & Another(2016) eKLR* where she observed that:-

> *"Section 48 of the Labour Relations Act sets out the mechanisms, procedures, process and provisions under which unionisable employees can join, resign and pay union dues of their choice… Trade union dues can be deducted 30 days from the time the trade union has served the prescribed notice upon the employer. Such prescribed notice is in accordance with section 48(2) where the trade union must serve the Minister with Form S under which the Minister has to issue a specific order in terms of an employer making a deduction from the unionisable employee's wages/ salary and the remittance to the account of the trade union they belong to.*
>
> *Counsel for the claimant urges the Court to be guided by the provisions of Section 19(l),(f),(i) and (6) of the Labour Relations Act, 2007 Laws of Kenya and find that the deductions by the 2nd Respondent are illegal, wrongful and do direct and order the 2nd Respondent to remit to the claimant all union dues owing and not remitted for the months of June 2016 to date and where such dues were not deducted and remitted."*

On whether the CBA between the Claimant and the Interested Party on behalf of the 2nd Respondent is valid and binding on the parties, it is submitted that the same is valid. They cite the case of *Kenya Ferry Services Limited v Dock Workers Union [Ferry Branch] 2014 eKLR* in which the court held that:

> *"The Parties have a Recognition Agreement concluded in 2011 with a clause on review of the Ferry Workers Terms and conditions of employment based on the 2 year cycle. The Recognition Agreement has not been terminated; none of the parties have ceased to be bound by the Recognition Agreement; and there is no modification by mutual agreement.*
>
> *Recognition Agreements are concluded pursuant to Section 54 of the Labour Relations Act, 2007. The terms upon which recognition is granted are stated in the Recognition Agreement and business conducted between the parties in accordance with the Recognition Agreement and business conducted between the parties in accordance with the Recognition Agreement. This is a requirement of the Labour Relations Act. The Court cannot read other clauses into the Agreement outside the purview of the Labour Relations Act.*
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> *Modification, termination or revocation of the Recognition Agreement can only be done in terms of the Recognition Agreement and as provided for under Section 54 of the Labour Relations Act. The Court does not see the basis for the Claimants submissions that the Regulations made under the ARC Act, should be read into the Recognition Agreement. The Labour Relations Act 2007 is the primary Legislation governing collective bargaining in both the private and public sectors and cannot be amended through subsidiary legislation originating from another Act of Parliament. Relevant provisions of the Labour Relations Act 2007 remain in place."*

They also cite the observations of Mbaru J. at paragraphs 9 and 10 of *Kenya Airline Pilots Association v Kenya Airways Limited [2016] eKLR* that;

> *"The parties herein have a Recognition Agreement and a Collective bargaining Agreement. A Recognition Agreement in its nature is a special contract between an employer and a trade union as it sets out up a relationship between an employer and its employees through the trade union. The agreement grants the trade union Recognition' and an acknowledgement by the employer as the employees representative of their Collective interests. Like a contract, the Recognition Agreement sets out how the relationship between the parties is to be governed. Therefore, under it, the parties by mutual consent set out the terms to govern their relationship as held in BIFU Vs. Maisha Bora Sacco Society Limited, Cause No 2298 of 2014.*
>
> *Therefore, when the parties herein entered into Recognition Agreement, the terms set out are to be respected by this Court unless such are shown to have been breached or entered contrary to the law. No such breach or illegality has been cited herein. The parties are therefore bound by its terms."*

On behalf of the 1st Respondent it is submitted that 237 employees resigned from the Claimant union in favour of the 2nd Respondent Union but deny the responsibility of providing the resignation letters to the Claimant. On this ground they urge the court to revoke the recognition agreement between the Claimant, the 1st Respondent and Interested Party in order to pave way for signing of a recognition agreement between the 1st Respondent and 2nd Respondent.

On behalf of the 2nd Respondent and Interested Party it is submitted that for the purpose of Collective Bargaining and where two unions seek to be recognized as the party with more members, the 2nd Respondent is in a quagmire as there is an already existing Recognition Agreement. That in light of recent court decisions the court has recognized that two unions can coexist together. Justice Rika in *Bakery, Confectionery, Food Manufacturing and Allied Workers Union [K] v Mombasa Maize Millers Limited & 3 others [2016] eKLR* was of the view that:

> *"The Courts have made various pronouncements on the demarcation between the two Unions. In the view of this Court, these decisions have not unequivocally split food processing from food manufacturing, and placed barrier on any of the two Unions in*

recruitment of Employees from either industry. This is not a fault with the decisions of the Court, but a reflection of the choices made by the Parties themselves, in defining their spheres of representation, in their Constitutions… The Court has observed in the past that recruitment of Employees is a continuous process, and grant of recognition, does not end the requirement for the Trade Union to remain relevant, most representative, and with a healthy majority in the collective bargaining unit. The Labour Relations Act under Section 4, and Article 36 and 41 of the Constitution of Kenya grant Employees freedom of association. This includes the right to belong or not belong to an association. Recognition, once granted must therefore not be viewed as cast in bronze. Labour is highly mobile. It is not inconceivable that Employees upon which the initial recognition is made, all move out of the workplace for various reasons, after recognition is granted, leaving their Trade Union with an empty shell of a collective bargaining unit. An Employer may change its business, in which case the Trade Union's relevance is lost."

The 2nd Respondent and Interested Party urge the court to make a finding that will allow the parties a continuous and harmonious relationship.

Determination

I have considered the pleadings and submissions of the parties together with the authorities citied. I have further considered the report of the Labor Officer. Section 54 of the Labour Relations Act provides for recognition of trade unions by employer as follows

54. Recognition of trade union by employer.

(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 the simple majority of unionisable employees.

(2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

(3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.

(4) The Minister may, after consultation with the Board, publish a model recognition agreement.

(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 recognised 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.

(7) 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.

(8) 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.

There are two factors for consideration under the Section. The first is that there must be a majority of members recruited by a union before it can qualify of recognition. The second is that it must be the appropriate union in terms of the sector in which the employer operates as provided in Section 54(8).

In the present sector, there is a dispute as to both the majority membership and the sector. It is the contention of the claimant that the 1st respondent does not operate in the sector in which the 2nd respondent operates. The claimant further avers that there is no proof of resignation of members.

From the correspondence on record, especially the letter dated 23rd November 2016, it would appear that the 2nd respondent has taken sides with the 1st respondent. In the letter, the claimant accuses the 2nd respondent's Manager, Mr. Odingo of inciting workers against the 1st respondent. This is wrong. The law is clear that an employer is not supposed to interfere in membership of employees to a trade union. The 2nd respondent should not be seen to be siding with one union then complaining that it is in a quagmire as two unions are competing over the membership of its employees. It should not be seen to be recommending a ballot to establish which union has more members.

The Interested Party appears to have been caught up in the membership tussle as reflected in the replying affidavit of Mr. Siele who swore an affidavit on its behalf and on behalf of the 2nd respondent.

I must start by affirming that employees have a constitutional right to join membership of a union of their choice. However, the trade unions are required to specify in their constitution, the scope of its membership. It is thus restricted to recruit membership only from the sector in which its constitution limits it.

It therefore means that although an employee has freedom to join any union of his choice, he can only be admitted into the membership of the union of its choice if he is eligible by virtue of the membership clause of the union's constitution. The freedom to join a union of choice is thus limited to the union in which the employee is eligible to join by virtue of the industry in which the employee works.

In the present case it is admitted by all the parties that both the claimant and the 1st respondent have members from among the employees of the 2nd respondent. The issue of majority of members is therefore not the only determinant factor in this dispute.

The court must first confirm eligibility of the 1st respondent to recruit members from among the employees of the 2nd respondent and it is only where the eligibility test is satisfied that the majority test would become relevant.

The first scheduled to the Labour Relations Act provides for matters for which provision must be made in the constitution of trade union or employer's organization. Provision No. 2 thereof states –

> *"2. The whole of the objects for which the trade union is to be established, the purposes for which the funds thereof shall be applicable, the conditions under which any member thereof may become entitled to any benefit assured thereby, and the fines and forfeitures to be imposed on any member thereof."*

Section 14 (1)(d) of the Labour Relations Act provides that –

> **(a) …**
>
> **(b) …**
>
> **(c) …**
>
> **(d) no other trade union already registered is-**
>
> **(i) in the case of a trade union of employers or of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration; or**
>
> **(ii) in the case of an association of trade unions, sufficiently representative of the whole or a substantial proportion of the trade unions eligible for membership thereof:**

Section 14 (1)(e) provides that –

> (e) subject to subsection (2), only members in a sector specified in the constitution qualify for membership of the trade union;

From the foregoing it is clear that the law sets out to ensure that there is no overlap in membership of trade unions such as to cause a conflict as has been witnessed in the case herein.

The membership clause of the 1st respondent according to its constitution provides as follows –

> (i) The manufacturing of basic industrial chemicals including fertilizers
>
> (ii) Manufacturing of vegetables animal oil, fats
>
> (iii) Manufacturing of miscellaneous chemical products
>
> (iv) Manufacturing of non-metallic products (excluding any petroleum products, coal and quarrying)
>
> (v) Manufacturing of structural clay products
>
> (vi) Manufacturing of glass and glass products
>
> (vii) Manufacturing of pottery china and earthenware, manufacture cement (hydraulic)
>
> (viii) Manufacturing of non-metallic mineral products.

The law provides for membership according to sectors. The 1st respondent's justification for recruiting employees of the 2nd respondent is that it manufactures lime which is a chemical product. This reasoning is not based on the sector in which the 2nd respondent operates. As is stated in the report of the Labour Officer, the 2nd respondent operates in the agricultural sector and its activities involve growing of sugar cane, rearing of livestock and forestry for commercial purposes, and also production of lime used for bleaching sugar and as a fertilizer by product for neutralizing acidity in soils within the sugarcane plantations. The Labour officer found that the second respondent predominantly operates in the agricultural sector.

The Labour Officer further found that –

1. *The constitution of Kenya Plantation and Agricultural Workers Union provides in Rule 2 (iv) that:*

a) Membership of the Union shall be open to all employees engaged in the following industrial groups

iv) General Agriculture including mixed farming, dairy and livestock rearing, cereals, vegetable, fruit growing nurseries and general agriculture processing factories.

2. That this is the strength upon which Homalime Kenya Limited and Kenya Plantation and Agricultural Workers Union signed the Recognition Agreement through their membership to the Agricultural Employers Association.

3. *That the constitution of Kenya Chemical and Allied Workers Union provides in the referred Rule 2 (vii) that:-*

The aims and objects to which the Union is established for and committed to shall be as follows:-

a) To secure the complete organization in the union of all persons or workers employed in the undertaking firms, companies and organizations operating in Kenya, trades and industries as listed below and as specified in Rule 3 of these rules provided that such persons have achieved minimum age of sixteen years.

(vii) MANUFACTURING OF POTTERY CHINA AND EARTHENWARE, MANUFACTURE CEMENT (hydraulic) AND ALLIED

Manufacturing of all types of hydraulic cement such as Port land, natural masonry, puzzolano, fibre, Roma and Allied products etc.

4. *That the Constitution of Kenya Chemical and Allied Workers Union does not right from Rule 2 (i) to (viii) of their constitution provide for representation of workers either in the Agricultural Sector or those engaged in the production of 'Lime products' such as the activities undertaken in Homalime Kenya Limited.*

5. That despite Kenya Chemical and Allied Workers Union submitting that its current members were earlier on members of Kenya Plantation and Agricultural Workers Union resigned from Kenya Plantation and Agricultural Workers Union a fact that was confirmed by the Agricultural Employers Association no resignation letters was tabled in the demarcation meeting nor was any resignation letter forwarded to Kenya Plantation and Agricultural Workers Union contrary to the provisions of Section 48 (8) of the Labour Relations Act, 2007 for the resignations to have force of Law!

The recommendations of the County Labour Officer are as follows –

(i) First and foremost being guided by the provisions of Section 54 (8) of the Labour Relations Act, 2007 and specifically the Sector which Homalime Kenya Limited has been operating on since its inception.

(ii) Secondly, by taking cognizance of the long standing relationship between Kenya Plantation and Agricultural Workers Union, the consequent negotiated Collective Bargaining Agreements *Vis a Vis* the new entrant Kenya Chemical and Allied Workers Union as recently from July 2016 and the consequences of negotiating a new Collective Bargaining Agreement from the already applicable present terms and conditions of employment to the employees.

(iii) Thirdly, by taking cognizance of the fact that no resignation letters was forwarded to Kenya Plantation and Agricultural Workers Union in line with Section 48(8) of the Labour Relations Act, 2007.

(iv) Fourthly, the legal instruments, that is the recognition agreement and the parties collective bargaining Agreement negotiated by Homaline Limited and Kenya Plantations and Agricultural Workers Union through Agricultural Employers Association is still valid until revoked by either party.

Conclusion

From the foregoing, I reach the conclusion that the 1st respondent does not operate within the agricultural sector which is the preserve of the claimant. I further reach the conclusion that all the operations of the 2nd respondent, including the production of lime, fall within the agricultural sector, as the lime is for use in the agricultural sector.

I therefore find that the 1st respondent's constitution does not permit it to recruit employees of the 2nd respondent into its membership. The corollary is that the employees of the 2nd respondent are not eligible to join the membership of the 1st respondent.

The foregoing notwithstanding, I agree with the sentiments of Rika J. in **BAKERY CONFECTIONERY, FOOD MANUFACTURING AND ALLIED WORKERS UNION (K) –V- MOMBASA MAIZE MILLERS LIMITED AND 3 OTHERS** (supra) that

"*… recruitment of employees is a continuous process, and is a continuous process, and grant of recognition, does not end the requirement for the trade union to remain relevant, most representative, and with a healthy majority in the collective bargaining unit…*"

and further that –

> "*Recognition, once granted must therefore not be viewed as cast in bronze. Labour is highly mobile. It is not inconceivable that Employees upon which the initial recognition is made, all move out of the workplace for various reasons, after recognition is granted, leaving their Trade Union with an empty shell of a collective bargaining unit. An Employer may change its business, in which case the Trade Union's relevance is lost*."

It is therefore in the interest of the claimant herein to remain relevant by maintaining a majority of its membership from among the 2nd respondent's employees. The fact that the employees moved out to join the membership of another union speaks loudly about the perception of the employees of the union. It is unconscionable for the claimant to expect that by virtue of recognition its members are bound to remain in its membership, or that they will always use the court to maintain its membership even where it is so evident that the employees are not happy with the union.

Orders

In the final analysis the claimant's case succeeds and I make the following orders –

1. The 2nd respondent operates within the agricultural sector.

2. The 1st respondent Kenya Chemical and Allied Workers Union is not eligible to recruit members from among the employees of the 2nd respondent.

3. I declare that the activities of Kenya Chemical and Allied Workers Union in Homalime Kenya Limited amounts to interference with the Claimant's right to Freedom of Association and right to Collective Bargaining with Homalime Kenya Limited.

4. Kenya Chemical and Allied Workers Union by itself, its officials, its agents, servants, assigns and representatives be and are hereby restrained and prohibited from holding meetings, recruiting, entering into any agreement(s), or demanding trade union dues from the 2nd Respondent employees and interfering with the Claimants rights to Freedom of Association and Collective Bargaining as long as there exists a Recognition Agreement and a Collective Bargaining Agreement between the Claimant and the 2nd Respondent.

DATED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 6TH DAY OF DECEMBER 2018

MATHEWS NDERI NDUMA

JUDGE