



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 164 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

KENYA PETROLEUM OIL WORKERS UNION.....CLAIMANT

-Versus-

KENOL MAHAVIR SERVICE STATION.....RESPONDENT

TRANSPORT WORKERS UNION.....INTERESTED PARTY

JUDGEMENT

Introduction

The Claimant is a trade union registered in Kenya to represent workers in the petroleum oil sector. It has filed this suit against the Respondent, a petrol station in Kisumu City. The issue in dispute is the refusal of the Respondent to sign recognition agreement with the Claimant.

The Interested Party, the Transport Workers Union, also a trade union registered in Kenya to represent workers in the transport sector, was enjoined in the suit upon its application on grounds that it also represents workers of the Respondent. The Interested Party alleges that it has a valid recognition agreement with the Respondent signed on 1st December 2013 and witnessed by Hellen Maneno, the County Labour Officer, Kisumu.

Background

The Claim herein was filed on 16th June 2016 vide Memorandum of Claim dated 13th June 2016. In the Memorandum of Claim, the Claimant seeks the following orders-

1. That the Respondent do enter into recognition agreement with the Claimant Union and commence negotiations of Collective Bargaining Agreement (C.B.A) immediately within 30 days to safeguard the right of claimants members.
2. That the respondent be ordered to deducts and remits Union Dues to the Claimant Union.
3. That the court grants any award it deems just and fit.
4. That the costs of this claim be borne by the Respondent.

The Claim was filed together with a notice of motion under certificate of urgency seeking the following orders-

1. **THAT** the Respondent be ordered to sign the recognition agreement, in accordance with the Labour Relations Act Sect. 54 within 30 days.

2. **THAT** the Respondent be ordered to commence C.B.A negotiations in accordance with Labour Relations Act Section 57 within 30 days.

3. **THAT** the Respondent be ordered to stop interfering with the claimant's member's right of association by intimidating, coercing, harassing, terminating, dismissing, forcing withdrawals from the union, transferring or disciplining the claimant's members in employment of the respondent on account of their trade union membership.

4. **THAT** the costs of this application be awarded to Claimant.

When the application came up for hearing *inter partes* the court consolidated the application with the Claim in view of the fact the prayers in both the application and the claim are similar. The court further ordered that the matter proceeds by way of written submissions. The case was fixed for highlighting of submissions on 6th September 2016 when the matter was again adjourned at the Respondent's request and fixed for hearing on 28th November 2016.

On 28th November the Interested Party was enjoined to the suit pursuant to its application dated and filed on 28th November 2016. The parties thereafter filed written submission which were highlighted in court on 13th February 2017. Mr. Olala appeared for the Claimant, Ms. Nishi Pandit for the Respondent and Mr. Ndege for the Interested Party. In their submissions the parties reiterated and expounded on their pleadings and written submissions.

Claimant's Case

The Claimant's case is that it recruited 17 out of a possible 28 unionisable employees of the Respondent translating to approximately 85% which is above the threshold for recognition of 50%+1. Copies of the check off forms are annexed to the Claimant's Memorandum of Claim as appendices A1 to A6. It is further the Claimant's case that on 2nd February 2015 the employees of the Respondent wrote to Transport Workers Union, the Interested Party revoking their membership to the Interested Party on grounds that the Interested Party's representative who recruited the employees was an imposter with no mandate of the Interested Party. The letter was copied to the Respondent's Managing Director requesting him to stop further deduction of union dues in favour of the Interested Party.

It is further the Claimant's case that on 10th March 2015 it wrote to the Respondent forwarding 3 check off forms with 13 names of the recruited employees and requested the Respondent to effect deduction of union dues from them and remit to the Claimant in accordance with section 48(2) of the Labour Relations Act but the Respondent refused to comply.

The Claimant states that on 26th March 2015 it reported a dispute against the Respondent on the issue of the Respondent forcing workers to withdraw from its membership through intimidation and harassment among other complaints. The dispute was accepted and Mr. J. Omweno of Kisumu Labour Office was appointed as conciliator.

On the 13th October 2015 the Claimant wrote to the Respondent seeking a meeting on 16th October 2015 to sign recognition agreement having recruited 12 out of 19 unionisable employees of the Respondent. The Respondent however refused to sign the recognition agreement on 16th October 2015.

It is the Claimant's submission that Article 41 of the Constitution and section 4 of the Labour Relations Act grant employees an inalienable right to join a union of their choice and to participate in all lawful activities of the union. The Claimant submits that it has recruited 17 out of 28 employees of the Respondent being 85% of unionisable employees and is entitled to recognition by the Respondent having satisfied the requirements of section 54(1) of the Labour Relations Act.

The Claimant further submits that it is the relevant union in that sector as per its constitution which permits it to represent employees in petroleum, oil, gas and petrol stations and related industries. The Claimant further submits that there is no rival union with a simple majority of membership in the employment of the Respondent. It prays for orders as set out in the Memorandum of Claim.

Respondent's case

The Respondent filed a Response to the Claim and a Replying Affidavit of PRASHANT PIYUSH THAKRAR sworn on 20th July 2016.

In the Response to the Claim and in the Replying affidavit the Respondent states that since 2013 it has been running a petrol station at Kamas which as at 2016 had 7 employees. That it operates another petrol station on Nairobi Road since 2013 which as at 2016 had 9 employees. That in the year 2013 it signed a recognition agreement with Transport Workers Union (K) and has since 2013 made remittance of union dues to the said union.

The Respondent states that in or about the year 2015 a representative of the Claimant union called at the Respondent's place of work and demanded recognition of the Claimant. The Respondent informed the Claimant's representative that since it already had a recognition agreement with Transport Workers Union it required to consult with the said union and the employees. The Respondent states that it was threatened by the Claimant's officer with the result that the recognition agreement was not signed.

The Respondent states that it later discussed the matter with its employees and Transport Workers Union and the outcome of the discussion was that its employees did not wish to join the Claimant Union. That as a result the Respondent has up-to-date been remitting union dues to the Transport Workers Union. The Respondent states that the Claimant referred the matter to the Ministry of Labour and has failed to disclose to the Court the advice it was given by the Conciliator on 23rd October 2015, instead preferring to file this dispute in court. It is the Respondent's position that it has no objection to its employees joining any union of their choice.

The Respondent prays that in the circumstances this case should be dismissed with costs to the Respondent.

Interested Party's Case

The Interested Party filed its Memorandum on 28th November 2016 and a Response to the Claim on 18th January 2017.

In the Memorandum of the Interested Party it states that it is a union registered to represent unionisable employees in petrol/service stations among other trades. It states that it started recruiting employees of the Respondent in 2013 and the Respondent implemented deduction of union dues as required under section 48 and 50 of the Labour Relations Act. It states that the Respondent and Interested Party entered into and signed a recognition agreement voluntarily to formalise their relationship.

The Interested Party states that the Claimant's actions are aimed at interference and confusing the members of the Interested Party by inducing them to sign other check off forms in favour of the Claimant, and that this is poaching which should not be allowed or encouraged. The Interested Party states that interference by the Claimant has made it unable to negotiate collective bargaining agreement with the Respondent on behalf of its members. It further states that there has further been misinformation that it has no members among the Respondent's employees but this has been clarified by letter dated 14th November 2016. It further states that it has a fully manned and managed office in Kisumu covering the County and its environs and taking care of its members needs and representing their labour interests.

The Interested Party states that it has since 1965 represented workers in petrol stations, and that the Registrar of Trade Unions had rejected the inclusion of petrol stations in the representation of the Claimant during its formation in 1981. The Interested Party states that the Claimant amended its

constitution in 1987 and deleted the word petrol stations under its objects clause and inserted the same under the membership clause and mysteriously had it registered. It submits that this does not stop the interested Party from representing its members in petrol stations but rather that both unions are allowed to continue representing employees of petrol stations.

It is the Interested Party's submission that where any trade union has recruited members and signed a recognition agreement the other union should refrain from interfering to ensure industrial harmony.

In the Response to the Memorandum of Claim the Interested Party submits that it has a binding recognition agreement with the Respondent since 2013 and the same has not been revoked. It is further submitted that the Interested Party and the Respondent are in the process of negotiating a collective bargaining agreement. It is submitted that in a court ruling in Cause No. 75 of 1998 the Court decided that where a party has entered into a recognition agreement other unions should refrain from interfering in order to maintain industrial harmony.

The Interested Party prays that the Claimant's case be dismissed.

Claimant's Response to Interested Party's Memorandum and Response

In a rejoinder to the Memorandum and Response of the Interested Party the Claimant submits that there is a conspiracy between the Respondent and the Interested Party as reflected in the documents filed in court by the two. The Respondent questions why the Interested Party's Appendix TW1 and the Respondent's Appendix M-4 are not the same if one is a copy of the other. It further points out that the Check-off form at page 5 of the Interested Party's Memorandum is the same as the Respondent Appendix M-4 but one has a date of 9th July 2015 while the other has a date of 9th July 2013. The Claimant further submits that Appendix TW2 contains the name of Simba Matoro whom the Interested Party's General Secretary had earlier on 7th August 2015 confirmed was not an official or officer of the Interested Party.

The Claimant further points out that whereas the recognition agreement Appendix TW3 is alleged to have been signed on 1st December 2013 the membership forms are signed in 2015 and without any authorising signature of the General Secretary.

The Claimant referred to the date of signature of the recognition agreement on 1st December 2013 which was a Sunday when government offices are closed and yet is purported to have been witnessed by a Labour Officer. The Claimant also points out that prior to filing this dispute the Claimant sought clarification from the Interested party about some allegations made by the Respondent and confirmed that she had no members at Mahavir Service Station and further denied that Simba Matoro was its member. The Claimant further points out that the Interested Party has no office or branch in Kisumu City and has no interest in engaging in petroleum industry.

Determination

I have considered the pleadings and evidence on record. I have further considered the written and oral submissions filed on behalf of the parties. The issues for determination are the following:

1. Whether there is a valid recognition agreement between the Respondent and Interested Party,
2. Whether the Claimant has recruited a simple majority of the Respondents employees and if it has qualified for recognition by the Respondent
3. Whether the Claimant is entitled to the prayers sought.

The Law

The law on union representation is Article 41 of the Constitution and section 4 and 5 of the Labour Relations Act which protect the right of employees to form, join and participate in activities of trade

unions. The Employment Act also recognises participation in union activities and at section 46 protects employees participating in union activities from victimisation.

Section 48 of the Labour Relations Act provides for deduction and remittance of trade union dues by employers through check-off while section 54 provides for recognition of trade unions by employers for purposes of collective bargaining.

Recognition Agreement Between the Respondent and Interested Party

The Respondent and Interested party have both submitted that they entered into a recognition agreement on 1st December 2013. The Claimant has expressed doubt over the existence of the alleged recognition agreement and has raised several grounds for the doubt. The first is that before it filed this dispute it wrote to the Interested Party seeking confirmation of existence of any relationship between the Respondent and Interested Party. The Response received from the Interested Party's General Secretary Mr. Dan Mihadi dated 7th August 2015 is that the Interested Party did not have any members or a recognition agreement with Mahavir Service Station Kisumu and further that Mr. Simba Matoro is not an employee or elected official of the Interested Party. This information was again confirmed by letter dated 2nd August 2016 by the same Dan Mihadi, General Secretary of the Interested Party.

Secondly the date of signature of the recognition agreement, that is 1st December 2013, is a Sunday when government offices do not work yet the recognition agreements indicates that it was witnessed by Hellen Maneno, the County Labour Officer in Kisumu on that date.

Thirdly the Respondent's Appendix M-4 and Interested Party's Appendix TW1 appear to be the same but one has union membership numbers while the other does not. The last two names on the check off form also have different dates which is proof of tampering and the dates are also different one having a date of 2013 and the other 2015. Fourthly all the check off forms from the Interested Party dated before January 2015 do not have any signature of the General Secretary or any other signatures while those after are signed for and not by the General Secretary .

Besides the contradictions raised by the Claimant about the documents filed by the Respondent and Interested Party, the Court was not able to see any correspondence between the two before 1st December 2013 making reference to membership, check-off forms or remittance of union dues. The only evidence filed relating to payment of union dues are for 2016 after this dispute had been reported to the Minister. There is also no correspondence relating to signature of the recognition agreement. One would have expected both the Respondent and Interested Party to have discussed the issue of date and time of signing recognition agreement and at least there would be a letter forwarding check-off forms and recognition agreement to the Respondent. These are all not produced or mentioned. It has also not escaped the attention of the court that there is no physical address of the Interested Party's Office in Kisumu yet it is a requirement under section 25 of the Labour Relations Act which provides that:

25. Registration of branches

(1) A trade union, employers' organisation or federation shall apply to the Registrar to register its branches in Form F set out in the Second Schedule.

(2) An application to register a branch shall—

(a) be made by an authorised representative within thirty days of the formation of the branch;

(b) specify the name of the branch, its postal address and the place at which the branch will meet or conduct its business; and

(c) specify the titles, names, ages, occupation and place of work of all officials of the branch.

[Emphasis added]

The foregoing raise the questions whether the recognition agreement was signed before any remittance of union dues and whether the Interested Party has a registered office in Kisumu as it alleges.

Another fundamental issue is why there were no negotiations of CBA before the Claimant started agitating for recognition. If the recognition agreement between the Respondent and Interested Party was signed on 1st December 2013 as alleged, why did the Interested Party not send proposals for negotiation of CBA between December 2013 and January 2017 when the first ever proposals were sent to the Respondent while this case was pending in court? Why was there correspondence about negotiations in January 2016 but without proposals for the CBA from the Interested Party?

In the court's opinion the only answer to all these questions is because there was no recognition agreement and the one filed in court is a sham intended prevent the Claimant from pushing for recognition by the Respondent. I therefore find and hold that there is no valid recognition agreement between the Respondent and the Interested Party.

Whether the Claimant has met the threshold for recognition by the Respondent

Section 54 of the Labour Relations Act provides that

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 organization of employers in the public sector, shall recognize 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' organization within a sector.

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

(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.

Section 54 provides for the threshold for recognition of a trade union being recruitment of a simple majority of members and taking into account the sector in which the employer operates. In the Present case it is unfortunate that the Claimant has not supplied a copy of its constitution to the court for the court

to determine the sectors that it is authorised to cover. However as is stated in the Cause No. 75 of 1998 between Kenya Petroleum Oil Workers Union v Transport and Allied Workers Union, "...**workers employed by the petrol stations will have the freedom to choose the trade union they wish to join from the two parties in the dispute.**"

This being the case the only threshold that the Claimant should meet is the recruitment of a simple majority. The Respondent submitted that it has 7 employees at Kamas petrol station and 9 employees at the Nairobi Road petrol station, a total of 16 employees. The Claimant on the other hand submitted that it recruited 17 out of a possible 28 employees of the Respondent. The Claimant annexed copies of check off forms with names and signatures of employees whose authenticity the Respondent did not deny.

Going by the names in the check off forms submitted by the Claimant, it has recruited about 61% of the Respondents employees which is above the threshold of 50%+1(simple majority).

It is therefore entitled to recognition by the Respondent for purposes of collective bargaining under section 54 of the Labour relations Act.

Whether the Claimant is entitled to the prayers sought.

Having found that the Claimant meets the threshold for recognition under section 54 of the Labour Relations Act, it is entitled to the orders sought.

Conclusion

In conclusion, I enter judgment for the Claimant against the Respondent and order as follows:

1. That the Respondent be and is hereby ordered to enter into recognition agreement with the Claimant union within 30 days from that date of judgment
2. That the Respondent be and is hereby ordered to deduct and remit union dues to the Claimant's registered account stated in the check off forms with effect from June 2017
3. The Respondent do pay Claimant's costs for this suit assessed at kshs. 50,000.
4. That any recognition agreement alleged to have been signed between the Respondent and the Interested Party is hereby declared null and void.

Dated and signed and delivered this 8th day of June, 2017

MAUREEN ONYANGO

JUDGE