REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1643 OF 2017

SANERGY LIMITED......................................CLAIMANT/APPLICANT

VERSUS

KENYA UNION OF COMMERCIAL FOOD &

ALLIED WORKERS (KUCFAW).....................................RESPONDENT

RULING

1. The Claimant seeks through the Notice of Motion application dated 21st August 2017, for the stoppage of conciliation due to revocation of the conciliation agreement signed on 17th May 2016. The application brought under certificate of urgency was expressed to be under Section 54(1) and 54(5) of the Labour Relations Act and Rules 17(1) and (3) of the Employment and Labour Relations Court (Procedure) Rules 2016 and Rule 3(2) of the High Court (Practice and Procedure) Rules 2010 and Section 12(3)(i) and (xviii) of the Employment and Labour relations Court Act. The application was supported by the grounds on the face of the motion and the affidavits of Ani Vallabhaneni.

2. The Respondent was opposed and filed a Replying Affidavit sworn by Boniface M. Kavuvi on 5th September 2017. In the affidavit, it was deposed that the parties voluntarily signed the Recognition Agreement on 17th May 2016 and that the Respondent successfully recruited 88 employees of the Claimant/Applicant and subsequently check off forms were forwarded. The Respondent deposed that the Claimant/Applicant begun declaring some union members redundant and frustrating the process of Collective Bargaining Agreement by failing to accede to convened Collective Bargaining negotiation meetings leading to the reporting of a trade dispute. The Respondent deposed that the Claimant/Applicant begun placing employees on renewable 3 months contracts and threatening employees to each write a letter withdrawing from the Respondent Union. It was deposed that the revocation was choreographed for the sole purpose of defeating the Recognition Agreement and that the membership of the Union had not gone below 51% and challenged the Claimant/Applicant to produce the payroll.

3. In the further affidavit of Ani Vallabhaneni, the Claimant/Applicant deposed that the payroll contained confidential information relating to the remuneration of employees and could therefore not be produced. The Claimant/Applicant produced a staff list and one showing the Union members as well as documents showing the consent signed between the Claimant/Applicant and the Respondent in Cause 2095 of 2015 plus copied of cheques and receipts evidencing payment of union dues and deductions.

4. The parties urged and opposed the application on 25th September 2017 and ruling deferred. Miss Babu counsel for the Claimant/Applicant urged the Motion stating that the Claimant/Applicant sought the prayers in the application because as at the time the Claimant/Applicant and Respondent signed the Recognition Agreement, the Union had attained the minimum threshold for the application of Section 54(1) of the Labour Relations Act. She submitted that the parties begun the Collective Bargaining Agreement negotiations but towards the end of the CBA negotiations due to a number of withdrawals from the Respondent, the Claimant/Applicant discerned the Union did not have the requisite numbers. She stated that as at now the number of unionized employees is 22% and that in terms of Clause 4 of the Recognition Agreement, the agreement should cease being in force as it is provided therein that the recognition comes to an end when the Union ceases to have the majority of the unionisable employees. She submitted that the Union must retain at least 51% of the unionisable workers. It was submitted that per Section 55 of the Labour Relations Act, the Claimant/Applicant had applied to the National Labour Board to revoke the Recognition Agreement. She submitted that the Claimant/Union had met the Chief Industrial Officer and lodged documents and the application is still pending as the Board is yet to determine the application for revocation. She submitted that the Court had jurisdiction to revoke the recognition agreement where the union fails to maintain the simple majority of 51%. She submitted that there had been no progress on the three issues that were pending resolution in the CBA process and thus sought a stay of the same. She stated that the Union was unable to disprove the lists submitted by the Claimant/Applicant and the Union did not show the alleged frustrations alleged by the Respondent to be the reason for the decline in numbers. It was submitted that the lists were *prima facie* evidence that the Union did not have the requisite numbers.

5. Mr. Owiyo responded for the Respondent and submtied that the application was opposed. He relied on the replying affidavit sworn by the Secretary General of the Respondent on 5th September 2017 as well as the annexures thereto save for pages 36-38 which were erroneously included as they do not relate to this case. He submitted that the prayers of the Claimant/Applicant are an attempt to bar the unionisable employees from pursuing their disputes before the Minister. He stated that as such, those issues can only be canvassed in the main claim. He submitted that the Recognition Agreement was signed on 17th May 2016 as a consequence of a Court order and that some of the Union members had been sacked because of joining the Union. He submitted that the first CBA had been proposed but it was frustrated by the Claimant/Applicant. He stated that a trade dispute had been reported and that the Claimant/Applicant had signed the Recognition Agreement against their wish. He submitted that only the National Labour Board can inform the Court of the flop of the Recognition Agreement. He stated that the letter exhibited at pages 43 and 44 of the Claimant/Applicant's bundle and addressed to the National Labour Board is not copied to the Union. He submitted that the Claimant/Applicant cannot be the one to state that the Union has lost its numbers. He stated that it is in the Claimant/Applicant's interest that the Union does not have numbers and that the manner in which a member should resign was not applied in this case. He submitted that the letters are not addressed to the Union as required and that the Court should be hesitant to grant the

final orders now sought and perhaps allow for the ventilation of the claim.

6. In her brief reply, Miss Babu submitted that the Claimant/Applicant was not asking for final orders but was seeking a stay pending the hearing of the suit on the dissolution of the Recognition Agreement. She submitted that a stay should be granted to obviate the absurdity if CBA is negotiated and the Claimant/Applicant forced to sign yet the dispute exists. She submitted that where the National Labour Board does not take action, the Court has power to declare the Recognition Agreement terminated. She stated that regarding the resignations, one cannot overlook substance for form as all that the Union requires is notice and it is not open to the Union to query the letters.

7. In matters recognition and the like, the primary legislation is the Labour Relations Act 2007 which governs the interaction of the Union, Employee and the Employer. The provisions of Part VII of the Labour Relations Act are instructive. An employer is under an obligation to recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees. Section 54(6) and (7) of the Labour Relations Act makes provision as follows:-

> *(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. The provisions above seem to be tailored for the exclusive use of trade unions and do not make provision for an employer. The employer is required to move under the provisions of Part VIII and in the final alternative Part IX applies. In this case, it is apparent that there is a trade dispute. The Court is not able to discern when this was reported as the letters reporting the dispute are not exhibited. The Claimant/Applicant is apprehensive that a CBA will be negotiated and entered into despite the existence of a dispute. It is clear that the correct forum for the resolution of the matters complained of is the conciliation mechanism provided for under Part VIII. It seems hardly likely that a collective bargaining agreement will be attained in the presently poisoned atmosphere. The application therefore is not granted and each party to bear their own costs. In the premises I will refer the matter to the Cabinet Secretary for Labour and Social Security Services in order for the parties to resolve the pending dispute within the time frames under Part VIII. If the parties are not able to resolve the matters under conciliation then a certificate to this effect will be issued and the parties can approach the Employment Court for resolution.

It is so ordered.

Dated and delivered at Nairobi this 17th day of October 2017

NZIOKI WA MAKAU

JUDGE