



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1916 OF 2014

BANKING, INSURANCE &

FINANCE UNION (KENYA).....CLAIMANT

VERSUS

DEVELOPMENT BANK OF KENYA LTD.....RESPONDENT

JUDGMENT

1. The Claimant filed his suit on 30<sup>th</sup> October 2014 seeking resolution of a dispute that was framed as violation of the CBA by unprocedurally and unlawfully promoting unionisable employees to managerial cadres. The gist of the pleadings was that the Respondent had elevated the staff of the Respondent to managerial positions so as to remove them from union membership and despite them being ‘managers’ they earned less than was expected for managers. The Respondent on its part filed its defence on 28<sup>th</sup> April 2015 and averred that staff promotions are at the sole discretion of management and are not subject to CBA negotiations or consultation with the Claimant as claimed.

2. The parties opted to file submissions as provided for under the Employment and Labour Relations Court (Procedure) Rules 2016 rather than call oral evidence. The Claimant filed submissions on 11<sup>th</sup> October 2017 and the Respondent filed submissions on 3<sup>rd</sup> November 2017. In the submissions, the Claimant submits that the Respondent has been in violation of the Collective Bargaining Agreement (CBA) by unprocedurally and unlawfully promoting unionisable employees to “managerial” cadres. The Claimant submitted that the Respondent had conscripted the employees so promoted out of the Claimant’s membership. The Claimant submitted that it filed the suit after going through a conciliation process as required by law and that the job profiles of its members included such roles as supervisory work, clerical duties, technical and subordinate roles. The Claimant submitted that out of the total compliment of 60 employees, only 4 were regarded by the Respondent as unionisable. The Claimant asserted that the payment of union dues on 29<sup>th</sup> September 2014 was Kshs. 2,400/- which represented only 4 employees while the rest were treated as managerial despite their work is captured under the preamble to the CBA as unionisable roles. The Respondent has misinterpreted the CBA to maintain the four – drivers and messengers as the only subordinate staff thus excluding the other staff. The Claimant submitted that no resignation had been given by any of the employees that are no longer included in the Respondent’s list of managers. The Claimant submitted that the conciliation report had revealed that the Respondent had not categorized the job descriptions as contained in the CBA as unionisable positions. The Claimant submitted that the Respondent had declined to produce on demand the list of job descriptions and salaries applicable to each category citing the information as confidential. The Claimant relied on the unreported case from the Industrial Court Tribunal being **cause no. 51 of 1985 Kenya Union of Commercial, Food and Allied Workers v Kenya Bankers (Employer’s) Association**. The Claimant submitted that the orders it sought against the Respondent were fit for grant as the Respondent was in breach of labour laws, ILO Convention No. 98 and 87 as well as the Constitution of Kenya.

3. The Respondent on its part submitted that the issues to be determined were 4.

- i. whether the Claimant has discharged the burden of proof on the allegations contained in the pleadings
- ii. whether the Respondent bank was under a legal duty to consult and/or seek approval of the Claimant union before promoting its employees;
- iii. whether the Claimant union has adduced evidence to support the allegations of underpayment of employees by the Respondent; and
- iv. whether the prayers sought can be granted on the basis of the pleadings and evidence adduced.

The Respondent submitted that the Claimant’s suit as framed is hopeless, embarrassing, lacks merit and amounts to a fishing expedition deserving to be dismissed. The Respondent stated that it had been dragged to court on generalized allegations that it had violated the CBA by promoting its staff without consultations with and/or with the approval of the union, that it had underpaid its employees and that the small number of unionisable employees on its staff violates the law and the CBA. The Respondent posit that the allegations by the Claimant were general in nature and that the case it was supposed to answer is vague and embarrassing in the circumstances. Reliance was placed on the case of **Brite Print (K) Limited v Attorney General [2001] eKLR** where the court held that general allegations made in pleadings without being substantiated are embarrassing if not so drawn that it is not clear what case the opposite party has to meet at the trial. The Respondent stated that it had no legal obligation to consult the union in promotion of its employees. The Respondent submitted that any staff promoted is given a 10% increment of basic salary or the minimum point of entry for the category to which they are promoted, whichever is higher and that the employee has the right to accept or decline the promotion. The Respondent submitted that promotion of staff is not one of the issues it is required to consult the Claimant over. The Respondent asserts that under Appendix “A” of the CBA lists the items that it has to consult the union over while Appendix “B” of the CBA lists the items that are not subjects for negotiation between the Respondent and the Claimant.

The Respondent was of the view that allowing the consultation sought would be tantamount to admitting the union in the management of the Respondent contrary to the Constitution, Labour Relations Act, Memorandum of Agreement and the CBA. The Respondent relied on the cases of **Kenya Game Hunting and Safari Workers Union v Lewa Wildlife Conservancy Limited [2014] eKLR** and **Banking Insurance and Finance Union v Jamii SACCO Society Limited [2012] eKLR**. The Respondent indicated that it was a relatively small bank with 2 branches countrywide and a staff of 60 employees. It submitted that the Claimant had not demonstrated how many employees were in its ranks prior to the promotions, their names. It was argued that there was no evidence of the employees who had renounced membership after such promotions and whether the Claimant had taken any steps to recruit members from the Respondent at any time. The Respondent cited the case of **Communication Workers Union and Another v Communication Authority of Kenya [2015] eKLR** where the court held that allowing the petition in the case before it would be encouraging an incestuous relationship between labour and capital and elevate contractual disputes into constitutional questions when there is no basis to do so. The Respondent submitted that to make the declaration sought would amount to amending the terms of the CBA, a jurisdiction that the court does not have. The Respondent asserted that notwithstanding the seriousness of the allegations made about underpayment, the Claimant had not adduced any evidence of the same. The Respondent relied on the case of **Amalgamated Union of Kenya Metal Workers v Parklands Motors Limited [2014] eKLR**. The Respondent argues that the Claimant having dragged it before this court has the duty to prove the allegations laid in the statement of claim and that the brazen allegations laid against it are neither substantiated nor proved as required by law. Reliance was placed on the case of **D.T. Dobie Company (K) Ltd v Wanyonyi Wafula Chebukati [2014] eKLR** for the proposition that the failure of a party to adduce evidence was fatal as he who asserts must prove by evidence. The Respondent thus sought that the Claimant's suit, which it termed, a fishing expedition be dismissed with costs to the Respondent.

4. The suit is one on the perceived infraction of labour rights. As such, under Article 41, both the employee and the employer have a right to belong to and subscribe to the ideals of a trade union or an employer's association to safeguard their rights. The Claimant asserts that the Respondent has abridged the rights of its members who are employees of the Respondent whilst the Respondent asserts that the claim is baseless and the orders and declarations sought not fit for grant. In the case cited by the Claimant, the said case was decided by Hon. Saed Cockar a judge of the precursor to this court. While it is not binding, it offers a peek at the Industrial Relations Charter signed by the three social partners on 14<sup>th</sup> April 1984. The charter provides *inter alia* that persons excluded from trade union representation include persons who are formulating, administering, coordinating and/or controlling any aspects of the organisation's policy; staff who perform work of a confidential nature as shall be defined by a Tripartite Committee; and any other category of staff who may in the case of any particular undertaking, be excluded from union representation by mutual agreement. The Claimant's case is worth noting as will be adverted to a little later in this judgment. The Respondent on its part is of the view that the Claimant has not proved its case as no evidence has been tendered to buttress its colourful assertions that the Respondent is guilty of unprocedural and unlawful promotions of staff. As regards promotions, the simple cold fact is that the promotion or even demotion of staff is a managerial prerogative that neither the employee nor the union has any sway over. The Respondent is thus right when it asserts that it has no obligation nor compunction to consult the Claimant before it promotes staff. In any event, the parties CBA explicitly excludes the issue of promotions from the subjects the parties can consult over. I am persuaded that the decision in **Kenya Game Hunting and Safari Workers Union v Lewa Wildlife Conservancy Ltd** (supra) is sound law. Rika J. correctly held that whereas *employers have the managerial prerogative to categorize their employees. They cannot conceivably however have a free hand in turning all employees into managers*. If indeed the Respondent has turned all its staff excluding the messengers and drivers into managers then it is manifestly up to some mischief. In the case before me however, there is no indication by way of evidence that the Respondent's entire staff compliment is managerial. If the Claimant is minded to pursue the claim against the Respondent then it would have of necessity to bring such evidence before court. It is instructive that no employee has sworn any affidavit or written a letter to support the venture. It would seem that the suit is indeed a fishing expedition and one that has no legs to stand on. In my view, the conciliation report filed demonstrates that the Conciliator failed to delve into the issues that were within his mandate. The Respondent should have been compelled to produce the records sought by the conciliator even if it was a "read only access" given the allegations of confidentiality. In the final result I will dismiss the suit but order each party to bear its own costs.

It is so ordered.

**Dated and delivered at Nairobi this 11<sup>th</sup> day of December 2017**

**Nzioki wa Makau**

**JUDGE**