



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NUMBER 613 OF 2015**  
**BETWEEN**  
**BAKERY, CONFECTIONERY, FOOD**  
**MANUFACTURING AND ALLIED WORKERS UNION (KENYA).....CLAIMANT**  
**VERSUS**  
**MZURI SWEETS LIMITED.....RESPONDENT**

*Rika J*

**Court Assistant: Benjamin Kombe**

*Mr. Amalemba Advocate, for the Claimant*

*Ms. Opolo Advocate instructed by the Federation of Kenya Employers for the Respondent*

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**ISSUE IN DISPUTE: RECOGNITION AGREEMENT**

**AWARD**

**Rule 27 (1) (a) of the Industrial Court (Procedure) Rules 2010**

1. The Claimant Union filed its Statement of Claim on 17<sup>th</sup> August 2015. It seeks the following orders against the Respondent:-

- The Respondent to execute Recognition Agreement, in the form presented to the Respondent by the Claimant.
- A declaration that the Respondent has unlawfully victimized Employees for joining the Claimant Union.
- A prohibitory order, prohibiting the Respondent from further victimization of the Employees.

- Compel the Respondent to pay to the Claimant all money it would have paid as trade union dues, from the date the Employees joined the Claimant Union.
- Any other suitable relief.
- Costs.

2. The Respondent filed its Statement of Response, on the 7<sup>th</sup> December 2015. The Respondent states some of the Check-Off Lists forwarded by the Claimant to the Respondent, contained forged Employees' signatures. The Parties had agreed at their own level, to have the Claimant recruit Employees afresh. Parties continued to engage before the Conciliator at the County Labour Office. The Claimant filed the Claim before the conciliation process was finalized. The Claim is premature, and the Claimant has not met the threshold for recognition. The Respondent prays for dismissal of the Claim.

3. Parties agreed in Court on the 8<sup>th</sup> December 2015, to have the dispute considered, and determined, on the strength of the Pleadings, Documents and Submissions on record. They confirmed the filing of their Submissions on 8<sup>th</sup> February 2016.

### **Claimant's Case.**

4. The Claimant submits, under its constitution, membership is open to all unionisable Employees in bakeries, confectionery and related industries. The Respondent is a business engaged in manufacture of sweets and chewing gum. Its unionisable Employees are eligible for Claimant's membership.

5. Sometime in November 2013 and April 2014, the Claimant Union recruited 97 Employees of the Respondent. In total, the Claimant recruited 144 Employees out a total number of 230 unionisable Employees. This represented 62% of the total workforce.

6. The Claimant forwarded the Check-Off Lists and a standard copy of the Recognition Agreement to the Respondent. The Parties proposed to meet, and execute the Agreement. The Respondent however wrote to the Claimant later, reneging on its undertaking to execute the Agreement. Various reasons were given for the refusal. The Respondent was asked by the Claimant to deduct and remit trade union dues, with respect to recruited Employees. Even that, was not honoured by the Respondent.

7. On 20<sup>th</sup> January 2014, the Claimant had had enough, and made a formal report of the existence of a trade dispute to the Cabinet Secretary responsible for labour. Mr. Nyaga, County Labour Officer Mombasa, was appointed the Conciliator. The conciliation resulted in a finding that the Claimant had met the requirements for recognition, and recommendation that recognition should be granted. It was found the Respondent engaged in intimidation of Employees. A recommendation was made the Respondent ceases to intimidate its Employees on account of their trade union membership.

8. The Respondent rejected these findings and recommendations, compelling the Claimant to approach the Court for adjudication. In the meantime the Respondent went on to declare the positions of some of the Employees' positions redundant.

9. The Claimant submits it has met the requirement of Section 54 of the Labour Relations Act Number 14 of 2007. It has recruited an overwhelming majority of the Respondent's unionisable Employees. There is no rival Union claiming representation of the same collective bargaining unit. The Employees have the right to associate with the Claimant, under Article 36 and 41 of the Constitution of Kenya. The refusal to deduct and remit trade union dues is in violation of the said Articles. The Respondent has no reason to deny its Workers the right to join the Claimant Union, for purposes of negotiating and collectively bargaining. The Claimant prays that the Claim be allowed.

### **Respondent's Case.**

10. The Respondent's position is that on 19<sup>th</sup> November 2013, the Claimant forwarded to the Respondent Check-Off Lists, containing names of 96 Employees allegedly recruited by the Claimant. 16 Employees later revoked their membership, while 3 signatures said to belong to 3 recruited Employees, were found to have been forged. The Claimant did not exhaust dialogue with the Respondent, opting to report the existence of the dispute to the relevant Cabinet Secretary.

11. The Cabinet Secretary appointed Mr. Nyaga as the Conciliator. On 23<sup>rd</sup> May 2014, the Conciliator purported to make findings and recommendations without exhaustively engaging the Parties.

12. The disputants went into a lull, until 27<sup>th</sup> January 2015, when the Claimant reported totally different issues in dispute to the Cabinet Secretary. Another Labour Officer, Mrs. Ronga, was appointed as the new Conciliator. She invited Parties for a conciliation meeting on the 29<sup>th</sup> May 2015. The Claimant rebuffed conciliation and kept away from the meeting.

13. Parties however went on negotiating outside the conciliation process. On 3<sup>rd</sup> July 2015, they agreed in writing that the Claimant initiates fresh recruitment. Parties were of the view a large period of time had lapsed, from the date of the initial recruitment, and some Employees had since left employment. The Claimant however went back on this agreement, and served the Respondent with the Court Summons on the 24<sup>th</sup> August 2015. The Conciliator then wrote to the Parties inviting them for conciliation, on the 16<sup>th</sup> September 2015. The Respondent wrote to the Conciliator, informing her, that the dispute had already been forwarded to Court for adjudication. The Respondent has not refused to recognize the Claimant. It has only asked the Claimant to recruit afresh, as the Check-Off Lists of 2013, cannot be relied upon. The Claimant filed this Claim in Court prematurely, the conciliation process having not been exhausted. The Respondent prays the Claim be dismissed with costs to the Respondent.

#### *The Court Finds:-*

14. There are two issues to this dispute, which should be separated. The first issue is on recognition. The second issue is on victimization of Employees. The Claimant should not have joined the 2 issues. The records show the Claimant initially made a report to the Minister on both recognition and victimization. There were findings and recommendation of the County Labour Officer on the first issue. It was found the Claimant had recruited 144 out of 230 Employees. There was no specific finding on victimization. There was a recommendation however, that the Respondent ceases victimization, and accords the Claimant Union recognition.

15. The Claimant made a second report on 27<sup>th</sup> January 2015, alleging victimization of Employees. That conciliation process as far as the Court is able to tell, is not finalized. There is no report, no findings, and no recommendation following the second report. The issue cannot be properly adjudicated upon by the Court, while it is pending the consideration of the Conciliator. The Court will therefore disregard all the other issues, save for recognition.

16. The County Labour Officer found the Claimant to have recruited 144 out of 230 Unionisable Employees. Check-Off Forms were exhibited before him. Up to the time the Labour Office examined the Check-Off Lists, the Claimant had 62% of the total unionisable labour force. This finding was not challenged in Court, through the questioning by the Respondent, of the Conciliator.

17. The Respondent seems to argue that subsequent to the Labour Officer's findings, there were Employees who left employment, others resigned from the Union, while yet others had their signatures forged on the Check-Off Lists. In the minutes of a joint meeting of the Parties held on 3<sup>rd</sup> July 2015, the Respondent states some of the Employees had left employment and that the issue of signature forgeries cast doubt on the integrity of the recruitment process. *'The Union needs to start afresh, and move forward with full support of the Management,'* stated the Management. This was in July 2015, while the findings and recommendations of the Labour Officer were made in May 2014, more than a year earlier.

18. The Court has held in the past that recruitment is a continuous process, and even after recognition, the

recruitment process does not come to an end. Trade Unions must continue to recruit, and Employers must keep the doors to their workplaces open to Trade Unions for recruitment. The Union must maintain a healthy weight of the collective bargaining unit, by continuous recruitment, to justify its retention as the sole collective bargaining agent. It is true that labour is highly mobile. Employees enter and exit workplaces for a variety of reasons. It is not proper that Employers manipulate this high mobility of labour, by placing barriers on union recognition through unrealistic demands for fresh recruitment. It is enough that at a certain point in time, in not too remote a past, the Trade Union can show, or is found by conciliation and investigatory bodies, to have attained a simple majority.

19. The Constitution of Kenya leans in the direction of encouraging representation of Workers by Trade Unions, in their pursuit of individual and collective rights and interests. The Court leans in the direction of promoting and protecting these fundamental rights and freedoms. Recognition of the Trade Unions is an important aspect, in the actualization of these rights and freedoms. Employers and Employees must be allowed full enjoyment of freedom of association under Articles 36, 37 and 41 of the Constitution, as well as Section 4 of the Labour Relations Act. The recognition process should not be reduced to arithmetic nitpicking, where Parties engage in an endless exercise of examining cobwebbed employment records, on which Employee has entered or exited the workplace, and at what intervals. It is sufficient that at one proximate point in time, the Trade Union has secured a simple majority; is engaged in continuous recruitment; and remains relevant in the particular industry. Grant of recognition should not be a long drawn out process, aimed at ensuring there is no Trade Union involvement at workplaces. Employers retain employment records, and in an environment of high labour mobility, could manipulate these records in a manner it will never be possible to achieve union recognition. In the United States, such practices are characterized as 'trade union busting.' The Constitution of Kenya abhors such practices. The Court must exercise its role in rooting out such practices.

20. The Minutes attached to the Statement of Response were not signed by the Claimant's representative. It cannot be concluded by the Court that Parties agreed there would be fresh recruitment. The conciliation process would be meaningless, if Parties revived settled disputes, at their own level. The Report of the Labour Officer was not challenged through his cross-examination. Employees who were alleged to have forfeited union membership were not presented before the Court to confirm their voluntary forfeiture. Cases of alleged forgery were not shown to have been criminally prosecuted. The Respondent did not explain why, even in cases of undisputed recruitment of particular Employees, trade union dues were never deducted and remitted to the Claimant Union, on account of these undisputed individuals.

21. The Court upholds the findings and recommendations of the County Labour Office. The Claimant demonstrated on conciliation and adjudication, that it has recruited a simple majority of the Respondent's Unionisable Employees. It is the relevant Union to represent these Employees. No other Union claims the same collective bargaining unit. The requirement of Section 54 of the Labour Relations Act 2007 on simple majority has been established. While the Claimant Union must continue recruitment, there is no need to demand of the Claimant Union, that it shows a second time, it has a simple majority. Parties should move on to collective bargaining. IT IS ORDERED:-

***(a) The Respondent shall execute an agreement granting the Claimant Union recognition, within 30 days of this Award.***

***(b) The Respondent shall deduct and remit trade union dues to the Claimant from the date of executing the recognition agreement.***

Dated and delivered at Mombasa this 17th day of March, 2016

James Rika

Judge