



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT
 AT MOMBASA
 CAUSE NUMBER 279 OF 2014

BETWEEN

BAKERY, CONFECTIONERY, FOOD MANUFACTURING
 AND ALLIED WORKERS UNION [K] CLAIMANT

VERSUS

MOMBASA MAIZE MILLERS LIMITED, MOMBASA
 MOMBASA MAIZE MILLERS LIMITED, NAIROBI
 MOMBASA MAIZE MILLERS LIMITED, KISUMU.....RESPONDENTS

AND

KENYA UNION OF COMMERCIAL, FOOD AND
 ALLIED WORKERS INTERESTED PARTY

Rika J

Court Assistant: Benjamin Kombe

Mr. Amalemba Advocate and Legal Officer for the Claimant Union

Ms. Opolo Advocate instructed by the Federation of Kenya Employers [FKE] for the Respondents

Mr. Egesa Deputy General Secretary for the Interested Party

ISSUE IN DISPUTE: RECOGNITION AGREEMENT

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant Union and the Interested Party Union are both registered Trade Unions. The Interested Party and the Respondents have a Recognition Agreement. This Agreement was signed on 17th March 2003. The Recognition Agreement is still in place. It has not been revoked by the Interested Party and the Respondents. The Court has not given any order for de-recognition of the Interested Party by the Respondents. There is no decision made by the National Labour Board, revoking the Recognition Agreement.

2. The Claimant Union nonetheless recruited a substantial number of Respondents' Unionisable Employees. Upon doing so, the Claimant forwarded Check-Off Lists to the Respondents, demanding the Respondents grant the Claimant recognition as the sole collective bargaining agent. The Respondents declined, basing their refusal on the presence of the Recognition Agreement with the Interested Party. This is the background against which the Parties have sought the intervention of the Court.

3. The dispute was originally filed at the Industrial Court in Nairobi, alongside another dispute which relates to redundancy, and victimization of Employees on account of their associating with the Claimant Union. The files had been consolidated. On 24th June 2015 the Court directed the files be de-consolidated, with the issue of recognition considered and determined on its own. Parties agreed further to have the dispute on recognition considered and determined on the strength of the record. They confirmed the filing of their Submissions at the last mention on 8th February 2016.

CLAIMANT'S POSITION

4. In summary the Claimant submits it has recruited a majority of the Respondents' Unionisable Employees. It is the most relevant Trade Union to represent the Respondents' Industry. *Rule 3 of its Constitution opens up membership of the Union to Unionisable Employees in among other Industries, Grain Mills involved in the production of flour. The Respondents are engaged in such industry.*

5. The Claimant submits the Interested Party's Constitution does not extend membership to Grain Mills involved in production of flour. *Rule 3 of Interested Party's Constitution allows the Union to recruit and represent Employees in distributive and commerce group. This is different from food processing which is the area represented by the Claimant.* According to the Claimant, the Interested Party has continually encroached on an area of economic activity which should solely be represented by the Claimant Union. The Claimant has concluded Recognition Agreements with other industry players such as United Millers Limited and TSS Grain Millers Limited.

6. Past decisions of the Court have reaffirmed the Claimant's right to exclusively represent food processing industry. The Claimant relies on among others, ***Industrial Court at Nairobi Cause Number 469 [N] of 2009 between Bakery, Confectionery, Food Manufacturing and Allied Workers Union [K] v. Sameer Agriculture & Livestock [K] Limited***; and ***Industrial Court at Nairobi Appeal No. 1 of 2008 between Bakery, Confectionery, Food Manufacturing and Allied Workers Union v. Ministry for Labour & Others***, which upheld the Claimant's position as the most relevant Union in the food manufacturing industry.

7. At the Mombasa Branch, the Claimant recruited 172 out of 314 Unionisable Employees; at the 2nd Respondent in Nairobi, 323 out of 470 Employees were recruited; while at Kisumu, the Claimant recruited 33 out of 40 Employees. In all, the Claimant exceeded the simple majority threshold required under Section 54 of the Labour Relations Act, in granting recognition.

RESPONDENTS' POSITION

8. The Respondents submit they do not have a Recognition Agreement with the Claimant; they signed an Agreement with the Interested Party, on 17th March 2003. They have since concluded a number of Collective Agreements. The Respondents received Check-Off Forms of Employees allegedly recruited by the Claimant. The recruited Employees were not Employees of the Respondents, but of an outsourcing Company, Ready Consultancy Limited. The Respondents consequently rejected the demand for

recognition made by the Claimant.

9. Relying on ***Industrial Court at Nairobi Cause between KUDHEIHA v. Commissioner for Higher Education [2013] e-KLR*** the Respondent submits that the principles applicable in considering trade union recognition are: whether the Trade Union is the right Union to represent Workers in line with its Constitution; whether such Union has recruited a simple majority; whether there is a rival Trade Union claiming to represent the same Employees.

10. The Claimant Union amended its Constitution in 1995, to include food manufacturing as part of the industries to be represented by the Claimant. The Interested Party had already signed Recognition Agreement with the Respondents in 2003, and earlier on with the Grain Millers in 1963. The Claimant was only registered in 1977. The Respondents' core business is wheat and maize milling, which is part of food processing.

11. In sum the Respondents argue the Claimant is not the right Union to represent the particular industry; there is already a recognized Trade Union representing Employees in this industry; the Claimant has recruited Employees of an outsourcing Company, not of the Respondents; and there is already a Union representing Employees sought to be represented by the Claimant. The orders for recognition and payment of union dues cannot be granted. The Claimant has not met the requirements of Section 54 of the Labour Relations Act 2007.

INTERESTED PARTY'S POSITION

12. The Interested Party submits it is the right Party to represent Respondents' Employees. Rule 3 of its Constitution covers Respondents' Employees. It has a Recognition Agreement with the Respondents and has represented the industry since 1963. It registered its first Recognition Agreement with the Grain Millers in 1963. The Claimant was only registered in 1977.

13. The Claimant amended its Constitution belatedly, to encroach on the Interested Party's sphere of representation. Before the amendment, the Claimant was confined to representation of Bakeries and Confectionery Employees. The Interested Party urges the Court to ignore the amendment of the Claimant's Constitution, and uphold the demarcation existing before such amendment.

14. The Interested Party explains that Respondents are engaged in food processing. Maize milling is part of food processing. It does not belong to food manufacturing. Manufacturing happens only when the floor is baked and turned into baked bread, biscuits and confectionery. This distinction was endorsed in ***Industrial Court at Nairobi Cause Numbers 19, 20 and 21 of 1988 between Bakery, Confectionery, Manufacturing and Allied Workers Union v. Unga Feeds Limited & Others***. Justice Saeed Cockar, in dismissing the Claimant's prayer for recognition by the Unga Companies stated:

“ The Claimants have made a good case for creation of a Trade Union for the food manufacturing industry. They have however not convinced the Court, that after starting as a ‘bakeries’ Union, they can speak for the whole of the food manufacturing industry as a result of the said September 1985 amendment.”

The right of the Interested Party to represent the industry was similarly upheld in the latter decision in ***Industrial Court at Nairobi Cause Number 106 of 2009 between KUPRIPUPA v. Mombasa Millers***.

13. The Interested Party submits its Recognition Agreement with the Respondents is still valid. The Agreement has not lapsed, and the Respondents therefore, have no capacity to recognize other Trade Unions. The Respondents have not violated the rights of the Employees to associate. On union dues, the Interested Party submits it would be punitive to the Employees, to have dues recovered from the 2 Unions.

14. The Interested Party urges the Court to find the Claimant is bent on disorganizing Workers. The Interested Party urges the Court to dismiss the Claim.

15. The issues, as understood by the Court, are:

- a) Whether the Claimant has met the criteria under the Labour Relations Act for recognition by the Respondents.
- b) Whether the existing Recognition Agreement between the Respondent and the Interested Party should be invalidated.
- c) Whether the Respondents should deduct and remit trade unions dues in favour of the Claimant.

The Court Finds:-

15. The test to be applied in considering whether a Trade Union should be granted recognition is as set out under Section 54 [1] and 54[8] of the Labour Relations Act. Firstly the Trade Union must satisfy it has recruited a simple majority of the Employees it seeks to represent. Secondly, the Trade Union must be relevant to the sector which the Employer operates in. The Court should always consider the model recognition agreement prepared by the Minister for Labour. These are the statutory considerations in granting recognition.

16. On numbers, the Claimant states it has recruited more than the required simple majority, in all of the respective Respondents' enterprises. The Respondents hold that the recruited Employees are not their Employees; they are Employees of a Human Resource Outsourcing Company called Ready Consultancy Limited.

17. The Court has examined the Check-Off Lists submitted to the Respondents by the Claimant. There is no indication from the Lists or other documents exchanged between the Parties, that the Employees, who enlisted as Members of the Claimant Union, were Employees of any other Company or Companies, other than the Respondents herein. No outsourcing Company has given any evidence claiming to have employed recruited Employees. Even assuming there is an outsourcing Company involved, it is not clear from the record, why a majority of Unionisable Employees should be outsourced. Why would a Company outsource 33 out of 40 of its Employees?

18. The Court is satisfied the Claimant Union recruited more than a simple majority of Unionisable Employees working for the Respondents. The Interested Party did not suggest there is any outsourced Employee, even from among the Employees it currently represents. The next question is whether the Claimant should have recruited from the Respondents, while there are labour contracts already signed between the Respondents and the Interested Party.

19. The Interested Party was first granted recognition by Grain Millers in 1963. It executed a Recognition Agreement with the Respondents in 2003. Its relationship with the Respondents has become entrenched over the years. The Parties have negotiated and concluded Collective Agreements after recognition.

20. 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.

21. The Interested Party under Rule 3 on Membership covers distributive and commerce group. It goes on to list the subgroups to include Employees in all conceivable areas of economic activity- all Employees engaged in warehouse and merchandise, flour, coffee and spice mills, food processing, banks, insurance, watchman organizations, financial institutions, statutory boards etc. This wide coverage would have the Interested Party encroach on other Trade Unions areas. It is known for instance that there are different Trade Unions representing Employees in banks, private security, and in the civil service.

22. The Claimant amended its Constitution in 1985, to comprise representation of Employees in food

manufacturing. It was previously confined to bakery and confectioneries. Rule 3 on Membership specifically covers Grain Mills producing flour, meal and dry stock feeds. This includes production of the actual flour, as well as processing of such flour into products such as biscuits and breakfast cereals. It includes manufacturing and processing.

23. The inescapable conclusion is that both Trade Unions are allowed by their Constitutions, to recruit from the Respondents. The Respondents are involved in milling of grains. Neither the Claimant, nor the Interested Party can be prevented from recruitment of the Respondents' Employees based on their Constitutions. Trade Unions have ceased to operate on strict industrial classification of economic activity. It is true with the Claimant and the Interested Party, as it is with KUDHEIHA and KHAWU two Trade Unions which operate in the hotel industry.

24. In *Cause Numbers 19, 20 and 21 of 1988* mentioned above, the Court agreed with the Claimant that things cannot remain static, and change is inevitable. The old Trade Unions no doubt have through the years established for themselves strong areas of representation. But new Trade Unions have come up, and economic activities are mutating, calling on redefinition of areas of representation. The laws have changed from 1988 widening the scope of associational freedoms.

25. 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.

26. The Court has taken the position that it is not barred from declaring a Recognition Agreement invalid and void, in appropriate circumstances. The Employer may apply to the National Labour Board to derecognize a Trade Union under Section 54 [5] of the Labour Relations Act. The Agreement may come to an end through its own terms. It may be ended through an order of the Court. The Trade Union must remain relevant and most representative, and retain a majority of current Employees as its Members. Recruitment has no end.

27. That the two Unions are actively representing this industry is shown by the Claimants' association with United Millers Limited and TSS Grain Millers Limited. The Claimant has Recognition Agreements with these Companies. The question whether it should have recruited in the Respondents in the view of the Court, is that, yes, it is allowed by its Constitution to do so. The Labour Relations Act and the Constitution of Kenya allow Respondents' Employees to associate with either the Claimant or the Interested Party. The Court cannot ignore Employees who are alleged to have been recruited by the Claimant Union, but cannot also disregard the existing relationship between the Interested Party and the Respondents.

28. The Interested Party has not informed the Court whether it still retains a simple majority of the Respondents' Employees as its Members. It has said nothing of the Employees recruited by the Claimant Union. Employees who worked in the Grain Mills in 1963 or 2003, are not all likely to still be working in the same places. The intention of the Employees can only be known through balloting. Only they can say they belong to one Union or the other. Through balloting, the strength and relevance of the two Unions can be gauged. The Court cannot at the moment declare if the Claimant should be granted recognition, or declare the longstanding relationship between the Interested Party and the Respondents ended. The question whether Respondents should deduct and remit trade union dues in favour of the Claimant, shall be answered after balloting. Ultimately, it is the voice of the Employees, not the Claimant's, the Interested Party's or the Respondents', that the Court shall pay heed to. In Sum the Court ORDERS:-

a) Balloting shall be conducted in all of the 3 Respondents' businesses at Mombasa, Nairobi and

Kisumu.

b) Unionisable Employees to elect which between the two Unions, they wish to be represented by.

c) The exercise to be overseen by the respective County Labour Officers.

d) Returns and accompanying reports by the Labour Officers shall be filed with the Court within 90 days of this order.

e) The County Labour Office Mombasa to coordinate balloting.

f) Costs of the exercise shall be met by the two Trade Unions equally.

g) Parties to move the Court for further orders at the end of the exercise.

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

James Rika

Judge