



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 21 OF 2014
KENYA UNION OF COMMERCIAL,
FOOD & ALLIED WORKERS.....CLAIMANT

v

FLAMCO LIMITED.....RESPONDENT

JUDGMENT

1. The Kenya Union of Commercial, Food & Allied Workers (Union) recruited employees of Flamco Ltd (Respondent) for purposes of realising its and members' organisational and collective bargaining rights.
2. On 11 January 2013 and 22 February 2013, the Union forwarded to the Respondent form S (check-off forms) with the names of the employees (78) who had joined it with a view to entering into a recognition agreement.
3. In the course of the process, the Respondent laid off some 23 employees and this prompted the Union to report a trade dispute on 25 June 2013 and the issue was stated as *refusal to pay terminal dues* to the 23 employees.
4. The Respondent did not respond to the Union's overtures on recognition agreement and on 4 July 2013, the Union reported another trade dispute to the Cabinet Secretary, Ministry of Labour. The issue in dispute was stated as *recognition agreement*.
5. The Cabinet Secretary accepted the dispute and in a letter dated 25 July 2013 by the Chief Industrial Relations Officer to the Union and the Respondent, they were informed of the appointment of a conciliator. They parties were requested to submit written submissions on the dispute within 7 days.
6. On 28 August 2013, the Conciliator called both the Union and Respondent to a joint conciliation meeting to be held on 25 September 2013.
7. The Conciliator again, through a letter dated 30 September 2013 called for a conciliation meeting to be held on 14 October 2013.
8. It appears there was no resolution and the Conciliator through a letter dated 14 November 2013 called for another meeting on 3 December 2013. The parties were advised to carry along relevant records.
9. On 21 November 2013, the Union forwarded a further check-off form to the Respondent with 38 names of employees.
10. After the conciliation process, the Conciliator issued a report dated 16 December 2013.
11. The Conciliator expressly made findings to the effect that the Union had recruited 78 employees out of a workforce of 226 as at the date of the dispute and that this fell short of the statutory threshold for grant of recognition (simple majority).
12. The Conciliator therefore recommended that the dispute be vacated and the Union continue with recruitment to meet the threshold and then report a fresh trade dispute if the Respondent refused it

- recognition.
13. The Union felt aggrieved with the Conciliator's report and it expressed the dissatisfaction through a letter dated 8 January 2014.
 14. The reason for the dissatisfaction, according to the letter, was that the Conciliator had not considered the 38 employees recruited during the course of conciliation.
 15. In the view of the Union, the 38 members ought to have been considered in terms of section 54 of the Labour Relations Act.
 16. Seeing no solution to its plea, the Union moved Court on 29 January 2014 contending that it had recruited a simple majority of the Respondent's employees and merited recognition; that ignoring members recruited during conciliation was contrary to section 54 of the Labour Relations Act; that a ballot ought to have been ordered as a matter of practice and tradition because the Respondent's records were unreliable and that the Respondent had violated Article 41 of the Constitution and ILO Convention No. 87.
 17. The Memorandum of Claim was filed together with a motion under certificate of urgency seeking some injunctive reliefs but because the file was reconstructed after the initial file got lost, it is not clear what orders were made on the motion.
 18. The Union sought various orders in the Memorandum of Claim.
 19. The Respondent filed its Memorandum of Response on 28 February 2014 through the Federation of Kenya Employers in which it asserted that the Union had not met the statutory threshold for recognition as at time of reporting the trade dispute or at time of conciliator's report as some employees had resigned or been dismissed (highest percentage attained was said to be 45.56%) and therefore the Union's claims should be rejected.
 20. The Respondent conceded that a ballot could be conducted under the supervision of the office of the Commissioner of Labour.
 21. On 9 July 2014, the parties consented before Court that a balloting exercise be carried out.
 22. A balloting was conducted on 29 August 2014, and the results filed in Court on 6 October 2014 (dated 30 September 2014) show that 77 employees were in favour and 91 were against the Union, but the Union refused to accept the results.
 23. On 7 October 2014, the firm of Murimi, Ndumia, Mbago & Muchela Advocates filed a Notice of Appointment to act alongside the Federation of Kenya Employers for the Respondent.
 24. On 20 November 2014, the Respondent filed another Statement of Defence (it is not clear under what circumstances this was done).
 25. When the Court made an order for the reconstruction of the Court file on 5 November 2015, it also set the Cause for hearing on 1 March 2016. During the appearance Mr. Masese from the Federation of Kenya Employers and Mr. Murimi from the firm of Murimi, Ndumia, Mbago & Muchela Advocates for the Respondent were present in Court.
 26. However, and for reasons which are not known to the Court, both counsels did not turn up for the hearing.
 27. The Union called 2 witnesses after which the Union filed its submissions on 21 March 2016.
 28. The Union identified 3 issues for determination by the Court in its submissions.

Whether Union had recruited a simple majority at time of filing dispute in Court

29. In the Court's view the gravamen of any dispute relating to recognition is whether a Union has met the threshold set out by section 54 of the Labour Relations Act.
30. However, what the section has not explicitly set out is the timeline for determining whether the Union has met the simple majority threshold.
31. The Union in this case seems to suggest that recruitment is a continuous process and employees recruited after a trade dispute has been reported to the Cabinet Secretary or Court action commenced ought to be included in assessing whether a simple majority threshold has been obtained.
32. The Court agrees with the Union that recruitment is a continuous process, but in the humble view of the Court, for purposes of recognition, there must be a cut-off date especially in a case such as this where a Union has felt confident enough to report a trade dispute or commence court action.
33. And that cut-off date should be at the point where the Union formally writes to the employer and requests for recognition of the union as the entity representing the interests of the workers.

34. In the instant case, the Union did not disclose either through an affidavit or letter the exact time or date it sought recognition from the Respondent.
35. What the Court has are dates when check-off forms were forwarded and when a trade dispute was reported to the Minister.
36. Because the exact date when recognition was sought cannot be discerned from the material placed before Court, the Court would assume because of the default that the cut-off date would be 4 July 2013.
37. The Union also alleged that the Respondent had not disclosed the number of unionisable employees it had.
38. At least from the Conciliator's report, a figure of 226 employees was mentioned, and the Conciliator made a finding to that effect, and the Court has no factual basis to disturb that finding.
39. The Court, based on the material at hand agrees with the Conciliator and finds that as of 4 July 2013, the Union had not met the threshold for the grant of recognition by the Respondent.
40. In this respect, the Conciliator was right in rejecting members recruited after the trade dispute had been reported, unless the Respondent consented to the inclusion of such employees.

Whether ballot exercise was conducted within the confines of the law

41. The consent between the parties was that the ballot exercise be conducted on 8 August 2014.
42. On 5 August 2014, the Federation of Kenya Employers on behalf of the Respondent wrote to the County Labour Officer indicating that 8 August 2014 was not convenient to conduct the ballot as one of the Respondent's directors would be out of the country.
43. The date suggested was 29 August 2014, and there is indication in the letter that the Union had been consulted, and further that a meeting was held in Nairobi before a Labour Officer, Mr. Barrack Owango on 22 August 2014 to work out the logistics of the ballot.
44. The postponement of the ballot, therefore in the Court's view was not exactly unilateral and was known to the Union and it cannot without more be a ground for voiding the ballot exercise conducted on 29 August 2014.
45. The Union also contested the balloting exercise on the ground that unqualified employees were allowed to vote.
46. The Union's Branch Secretary testified on this aspect of the challenge and it is unfortunate that the Respondent did not appear in Court to challenge or controvert the testimony.
47. Allowing non-qualified persons or employees who are not unionisable to participate in such ballot as was conducted here would vitiate the exercise but in light of the conclusions reached by the Court on the statutory threshold question, the Court is of the view that a decision on this question of balloting will not be decisive of the substantive dispute as presented in the main pleadings.

Whether Union is entitled to recognition

48. The answer to this question must be self-evident by now. The Union did not demonstrate that it had met the statutory threshold by time of reporting trade dispute to be granted recognition.
49. And in this regard, the Court would note that the Union having recognised that recruitment is continuous, it should endeavour to continue recruiting and then make a fresh attempt at seeking recognition.

Conclusion and Orders

50. Arising from the above evaluation, the Court can only conclude that the Memorandum of Claim filed in Court on 29 January 2014 be dismissed with no order as to costs considering the anticipated social partnership between the parties, a relationship of good faith.

Delivered, dated and signed in Nakuru on this 29th day of July 2016.

Radido Stephen

Judge

Appearances For Union Mr. Atela, Assistant General Secretary, Kenya Union of Commercial, Food & Allied Workers

For Respondent Federation of Kenya Employers

Court Assistant Nixon