



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 460 OF 2015

KENYA CHEMICAL & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

BASE TITANIUM LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for recognition by the claimant under section 54(1) of the Labour Relations Act (LRA). The claimant alleges that she has recruited as her members, more than a simple majority of the respondent's unionisable employees and therefore claims that she is entitled to be accorded formal recognition by the respondent for purposes of collective bargaining under section 54 of the Labour Relations Act.

2. The respondent has however denied that the claimant has at any time recruited a simple majority of her unionisable workforce as required by Section 54 (1) of the Labour Relations Act and avers that the claim for the grant of recognition is premature and in appropriate at this time. She therefore prays for the suit to be dismissed with costs.

3. The suit was heard on 23.6.2016 when the claimant called her Coast Region Secretary, Mr. David Kenga as Cw1, while the respondent called her HR Manager, Ms Pennie Lonise Warren as Rw1. In addition both parties produced their respective documents as exhibits and thereafter filed written submissions.

Summary of Claimant's case

4. Cw1 testified that he recruited as members from the respondent's unionisable workforce, 93 on 7.7.2014, 128 on 22.7.2014, 43 on 8.8.2014, 6 on 19.9.2014, 14 on 24.9.2014, 9 on 12.1.2015, 25 on 20.4.2015, 3 on 21.5.2015 and 1 on 10.7.2015. That the total of the recruited members were 337 out of 540 unionizable staff of the respondent equaling 62% of the said staff and which was more than the simple majority required by the law for purposes of according recognition. However, according to Cw1, the respondent has since refused to sign a Recognition Agreement in her favour even after recommendation by a Reconciliator lawfully appointed by the Cabinet Secretary (C.S) Ministry of Labour.

5. On cross examination, Cw1 maintained that all the members recruited were working for the respondent at the time of recruitment. He did not object to the names of the respondent's employees filed in court on

3.9.2015 and indeed admitted that 546 out of 648 employees were unionizable as at February 2015.

Summary of defence case

6. Rw1 stated that in June 2014 the claimant sought access to the respondents' premises for purposes of recruiting members and on diverse dates between July 2014 and July 2015, the claimant delivered to the respondent check-off forms allegedly signed by her employees who had been recruited as members of the union. That as at 13.7.2015, when this suit was filed the respondent had 637 employees out of which 534 were unionisable staff. That as at that date the total members recruited by the check-off forms delivered were 336.

7. Rw1 contended that after reviewing the signed check-off forms, it was clear that some 13 employees had signed twice more than one form; some signatures and names on the check-off forms did not match with the details in the respondents' records; 5 of the listed employees were non-unionisable employees. 24 had resigned from the union and 52 of the people listed were former employees. Rw1, further contended that the said 94 names out of the 336 recruited members were not eligible for consideration in determining whether the claimant had recruited a simple majority of the Respondents' unionisable staff as at 13.7.2015 when this suit was filed.

8. Rw1 further contended that the genuinely recruited union members from the respondent's unionizable staff were 242 out of 534 which represents 45.32%. She therefore maintains that the claimant has not yet recruited a simple majority of the respondents' unionizable work force and as such the respondent's failure to accord formal recognition to the claimant under section 54 of the Labour Relations Act is lawful and justified.

9. On cross examination, Rw1 contended that the Industrial Relations Charter bars supervisors from joining the union although she admitted that Article 41 of the Constitution and Section 4 of the Labour Relations Act allows workers to join and exit union. She however denied that after the respondent increased her staff after the claimant reported the recognition dispute to the Labour office under Section 62 of the Labour Relations Act. She clarified that the 537 unionised employees excluded the former employees and supervisors. She concluded by contending that even if the supervisors and former employees were to be included in the number of the recruited union members, the number would still fall below the simple majority required by the law to warrant recognition of the claimant by the respondent.

Analysis and Determination

10. After careful consideration of the pleadings, evidence and the submissions tendered before the court, I find no dispute in the fact that as at 13.7.2015, the claimant had presented to the respondent check-off forms with 337 names and that the dispute was referred for conciliation by the C.S. Labour but it was not resolved. The issues for determination are:

(a) Whether all the 337 members were valid members for purposes of recognition under section 54 of the Labour Relations Act.

(b) Whether the claimant has recruited as her members, a simple majority of the respondent's unionisable workforce.

(c) Whether the reliefs sought by the suit should issue.

337 Valid Members

11. Cw1 contended that the Constitution of Kenya grants every worker the freedom to join a trade union regardless of his rank. He further contended that some of the employees were dismissed by the respondent after they joined the union. On the other hand, Rw1 contended that not all the 337 names in the check-off forms were valid members of the union and must be removed from the list. That the invalid members included 5 supervisors who are management staff and 52 former employees.

12. The claimant did not rebut the foregoing contention in evidence. I therefore find that the claimant has not proved on a balance of probability that all the 337 recruited members were unionisable employees still in service as at the 13.7.2015 when this suit was filed in court. On the other hand, I agree with the respondent 5 supervisors and 52 former employees were among the 337 names of union members contained in the check-off forms presented to the respondent by the claimant. In reaching at the foregoing view I have considered the defence exhibit BT5 which is a detailed analysis of the status of the respondent's establishment. Consequently and on a balance of probability, I find and hold that 57 names including 5 supervisors and 52 former employees were not valid members recruited by the claimant between July 2014 and July 2015 and as such only 280 were valid members recruited during the said period.

Simple Majority

13. Under section 54(1) of the Labour Relations Act, a trade union is accorded recognition by an employer if it represents the simple majority of the unionisable employees. In this case the claimant alleges that she has recruited 337 out of 540 unionisable employees of the respondent from 7.7.2014 to 10.7.2015 which represent 62%, and which is above the simple majority required by the law for purposes of recognition.

14. On the other hand the respondent contends, and the claimant has admitted, that as at 13.7.2015 when this suit was brought, she had 534 unionisable staff. She further contends that the claimant did not represent a simple majority of the said 534 unionisable workforce as at the 13.7.2015 because after reviewing the check-off forms presented to the respondents, she discovered that 95 of the said members, 13 had signed twice, 5 were management staff, 52 were no longer in employment while 21 had voluntarily resigned from the union in writing. That considering the said 95 names which were erroneously listed in the check off forms, the respondent submitted that only 242 out of 534 of her unionisable employees were valid members of the claimant union as at 13.7.2015 when this suit was filed. That the said valid union membership represented 45.32% which was below the simple majority required for a union to get recognition under section 54 of the Labour Relations Act.

15. In the **Amalgamated Union of Kenya Metal Works vs Ms Jaykay Mechanical Ltd [2014]eKLR**, cited by the respondent, I held that:

“Under section 54 of the Labour Relations Act, an employer is required in mandatory terms, to recognize a trade union for purposes of Collective bargaining if the Trade union represents the simple majority of the unionisable employees. In the present case, as earlier observed, there is no dispute that the claimant recruited 22 out of 30 unionisable employees of the respondent. The said members definitely represented 73.3% of the unionisable staff. As per Appendix JK6 (for the defence), 4 of the members resigned before the suit was filed on 15.11.2014 leaving 18 members out of the 30 unionisable staff, which represents 60% which is more than the simple majority required under section 54 of the Labour Relations Act.”

16. The respondent has urged me to follow the cited precedent and hold that the members who resigned from the union before the filing of the suit should be excluded from the list of the members while assessing whether the claimant has recruited a simple majority provided for by section 54 of the Labour Relations Act. No reasons have been shown by the claimant that warrants departure from the cited precedent. Consequently, I maintain the same reasoning that recruited members who resign from the union or fairly lose their employment before a suit for recognition is filed must be excluded by the court while assessing whether the union has met the statutory threshold of representing a simple majority of the employers unionisable workforce as at the date when the suit is commenced.

17. In my view the focus of the court must always be on the *status quo* when the suit was brought because time is of essence in determining recognition disputes and that is why under section 74 (a) of the Labour Relations Act, such disputes are to be treated with urgency. Consequently, I agree with respondent's evidence and submissions that the 25 members who resigned from the union before 13.7.2015 when the

suit was filed must be excluded in my determination as to whether or not the claimant represents a simple majority of the respondent's unionisable workforce.

18. Also to be excluded are: 52 employees who had fairly lost their employment and are not challenging it in court; 5 supervisors who were management staff; and the 13 names in respect of the 13 members who had signed the check-off forms twice. The excluded 95 names reduces the 337 members to 242 valid members recruited as at 13.7.2015 out of 534 unionisable staff of the respondent which represents 45.32%. Consequently I agree with the respondent that the claimant has not met the statutory threshold of representing a simple majority of the respondent's unionisable workforce required by section 54 of the Labour Relations Act for her to be accorded Recognition.

Reliefs

19. In view of the foregoing finding that the claimant has not met the threshold of representing a simple majority of the respondent's unionisable workforce, I decline to grant the orders sought. Instead, I will advise the claimant to do a little more effort of recruiting other members because going by the numbers presented herein, the simple majority required is not a mammoth task. In conclusion I wish to honour and appreciate the parties and their counsel for assisting the court to resolve this dispute in the manner I have done.

Disposition

20. For the reasons stated above, the suit is **dismissed**. Each party shall bear her own costs.

Dated, signed and delivered at Mombasa this 25th day of November 2016.

O.N. MAKAU

JUDGE