



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 93 OF 2014

[Originally Industrial Court at Nairobi, Cause Number 1465 of 2010]

BETWEEN

KENYA PETROLEUM OIL WORKERS UNION CLAIMANT

VERSUS

1. GIEFCON LIMITED

2. LIBYA OIL [K] LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Raphael Olala Industrial Relations Officer for the Claimant

Mr. Wafula Advocate instructed by Cootow & Associates, Advocates for the 1st Respondent

Mr. Ouma Advocate instructed by Ochieng, Onyango, Kibet & Ohaga Advocates for the 2nd Respondent

ISSUE IN DISPUTE: RECOGNITION AGREEMENT AND TRADE UNION DUES

AWARD

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

1. The Claimant Trade Union filed this Claim at the Industrial Court in Nairobi, on the 1st December 2010. The matter was transferred to Mombasa on the order of the Court in Nairobi, on the 4th November 2014. The Claimant seeks the following orders against the Respondents:-

- a. The 1st Respondent to sign Recognition Agreement with the Claimant, with a view to negotiating a CBA in accordance with Section 54 of the Labour Relations Act 2007.
- b. The 1st and 2nd Respondent to effect check-off system as per Section 48 of the Labour Relations

Act.

- c. Costs to the Claimant.
- d. The Respondents be restrained from subjecting the Employees to discrimination and other forms of labour malpractices at the expiry of the 1st Respondent's contract in March 2011.
- e. Award is issued on other remedies the honourable Court may deem necessary and justifiable.

2. Simultaneous with the Statement of Claim, the Claimant filed a Notice of Motion asking the Court to issue orders restraining the Respondents from victimizing, or in any way terminating the services of any Employee at the premises of the 2nd Respondent. Secondly, the Court was prayed to restrain the Respondents from altering the terms and conditions of employment of these Employees, pending hearing and determination of the Claim.

3. The 1st Respondent filed a Replying Affidavit on 22nd December 2010, sworn by its General Manager Mr. Jacob Obiero on the 21st December 2010. Obiero also swore a Supplementary Affidavit on 1st February 2012, filed on 22nd February 2012. The Court has not been able to locate any Statement of Response filed by the 1st Respondent.

4. The 2nd Respondent filed Its Statement of Reply on 3rd June 2011. This was followed with a Further Statement of Reply, received by the Court on 22nd November 2011. The 2nd Respondent filed a Replying Affidavit answering the Claimant's Notice of Motion. The Affidavit was filed on 3rd June 2011, sworn by the 2nd Respondent's Legal Counsel, on the 3rd June 2011.

5. Thereafter the Parties indicated to the Court while the matter was still domiciled in Nairobi, that they were negotiating voluntary settlement. No agreement was reached. The matter was finally fixed for hearing of the substantive dispute. Hearing was slated for 20th March 2015.

6. The Records are comprehensive, and on the 20th March 2015, the Court directed Parties to move by way of Written Submissions, under Rule 21 of the Industrial Court [Procedure] Rules 2010. Highlighting was scheduled for 26th June 2015. The 1st Respondent filed its Submissions outside the period stipulated by the Court, and without any explanation or leave of the Court. Those Submissions were expunged from the record. The 1st Respondent did not even attend Court on the 26th June 2015, when the Claimant and the 2nd Respondent went on to highlight their arguments on their Submissions filed.

7. The Claimant's position is that it recruited the entire Unionisable Workforce of the 1st and 2nd Respondents. There were 35 Employees. The Claimant forwarded the Check-Off Forms to the 1st Respondent. It also forwarded the Draft Recognition Agreement. The Claimant met the 1st Respondent on 15th October 2010 and 10th November 2010. The 1st Respondent declined to effect the Check-Off, and sign the Recognition Agreement. The 1st Respondent's Director Mr. Enos Nyawata threatened the Employees to withdraw their union membership, or lose their jobs. All the Employees withdrew membership, except the Shop Steward Mr. Otwenyo who stood his ground and was immediately relieved of his job.

8. The Claimant Union submits it is the most relevant Trade Union in the Petroleum and Oil Industry, and suited to represent the Respondents' Employees. It recruited 35 Employees of the 2nd Respondent, who had been outsourced to the 1st Respondent. The 1st Respondent violated Section 4 of the Labour Relations Act by forcing Claimant's Members to forfeit their membership. The 1st Respondent went further and terminated the contracts of the Claimant's Members.

9. The Claimant explains in its Pleadings, Documents and Submissions that the 2nd Respondent was the Principal Employer of the Claimant's Members. It controlled nearly all the terms and conditions. It determined the wages payable to the Employees. It was the sole owner of the premises from which the 1st Respondent operated the business.

10. The 2nd Respondent terminated the contract it had with the 1st Respondent, in a letter dated 28th March 2011. It contracted a 3rd Party, Coast Sparkles and Supplies Limited, to discharge the role exercised by the 1st Respondent. The 2nd Respondent did not pay the Trade Union dues accrued while the arrangement with the 1st Respondent subsisted. The Claimant submits in the absence of the 1st Respondent, the 2nd Respondent must remain responsible for the accrued trade union dues. The Claimant submits it qualifies to be accorded recognition by the 1st and 2nd Respondent.

11. The Affidavit sworn by Obiero explains that the 1st Respondent is a Manpower Outsourcing Company. It is engaged by various Organizations on agency basis, from time to time, to provide labour. Its Employees are transferred to work for different Clients. These Clients are not in one industry. They are not necessarily in the Petroleum and Oil Industry. The 1st Respondent is paid commission by Clients who secure its services. The 1st Respondent therefore submits it has not interfered with the Employees right to join a Trade Union of their choice under the Constitution of Kenya and the Labour Relations Act. Furthermore the concerned Employees confirmed to the 1st Respondent in writing, that, they do not belong to the Claimant Union. The Claim against the 1st Respondent is misconceived.

12. The 2nd Respondent's position, from its Pleadings, Documents and Submissions, is that for a Recognition Agreement to be signed, it must be shown there is an employment relationship between an Employer and Employees. The Employees must be shown to have freely joined the Trade Union. The Trade Union must demonstrate it has recruited a simple majority of the Unionisable Employees.

13. The 2nd Respondent was not an Employer to the Employees claimed to be Members of the Claimant Union. The Claimant admits in paragraph 1.6 of Statement of Claim that, *the 1st Respondent operates as a contractor in the premises of the 2nd Respondent.* The Claimant explains that *'the 2nd Respondent outsourced its Plant to the 1st Respondent in April 2008. The 1st Respondent did not hire the workforce since the 2nd Respondent ordered for [retainance?] of the same who were absorbed and issued with contract letters by the 1st Respondent.'* The Employees, by the Claimant's own admission, were Employees of the 1st Respondent. The 1st Respondent was an independent contractor.

14. The relationship between the 2 Respondents was governed by a Service Outline Agreement. It was specified the 1st Respondent was an Independent Contractor, and not an Agent of the 2nd Respondent. Services would be performed under the supervision and control of the 1st Respondent. The 1st Respondent had the authority to supervise its Employees, Representatives and Subcontractors. The 2nd Respondent did not retain control over the Claimant's Members. The 1st Respondent paid the Employees salaries, employment taxes and contributions imposed by the law, including trade union dues. The Claimant was aware of the relationship between the Respondents, and engaged only the 1st Respondent, in negotiating recognition. In its prayer the Claimant sought recognition from the 1st Respondent, not the 2 Respondents as later on in the Submissions prayed.

15. The 2nd Respondent submits if there was an employer-employee relationship between the Claimant's Members and the 2nd Respondent, by virtue of the Service Outline Agreement concluded with the 1st Respondent, such relationship ended with the termination of the Agreement on 30th June 2011. The 2nd Respondent engaged another supplier, Coast Sparkles and Supplies Limited, to discharge the role performed by the 1st Respondent. This change was communicated to the Claimant by the 2nd Respondent, as early as 22nd November 2011. The 2nd Respondent urges the Court to dismiss the Claim with costs borne by the Claimant.

16. The central issues in dispute are:-

- a. *Whether the Claimant Union merits recognition from the Respondents or either of the Respondents.*

- b. *Whether the Claimant Union should have an order for deduction and remitting of trade union dues against the Respondents or either of the Respondents.*

The Court Finds:-

17. The first issue the Court would like to deal with is the emergence of a document introduced in the record by the Claimant, marked R.06, in the Claimant's Closing Submissions. This document is in the nature of evidence. The Court has emphasized in various decisions that Closing Submissions are not an avenue for Parties to adduce additional evidence or material. This was the holding in ***KUDHEIHA v. NORTH COAST BEACH HOTEL [2014] e-KLR***. Introduction of such material offends Rules 17 and 26 [1] of the Industrial Court [Procedure] Rules 2010. ***The document attached to the Claimant's Closing Submissions is expunged from the record.***

18. As to whether the Court should ignore the introduction of the prayer for recognition of the Claimant by the 2nd Respondent, the Court adopts a more generous interpretation. This Court has the latitude to consider whether the 2nd Respondent should recognize the Claimant, based on the Claimant's prayer for *"other remedies the honourable Court may deem necessary and justifiable in the interest of justice."* Even without such a blanket prayer, the Court is not limited in considering the full array of possible remedies available to a Party, based on the evidence and material placed before the Court, the objective being to dispense justice fairly and reasonably. Lastly, the 2nd Respondent has given evidence and submitted on the subject. It would be wrong if the Court finds the position by the 2nd Respondent unfounded, not to affirm the right of the Claimant Union to be accorded recognition by the 2nd Respondent, on the ground that the Claimant did not expressly pray for such an order in its Pleadings.

19. The law by which an Employer is obliged to recognize a Trade Union is written under Section 54 of the Labour Relations Act 2007 as submitted by the Parties. The relevant subsections are the following:

[1] *" An Employer, including an Employer in the public sector shall recognize a Trade Union for purposes of collective bargaining, if that Trade Union represents the simple majority of Unionisable Employees.*

[2] *A group of Employers, or Employer's Organization, including an Organization in the public sector, shall recognize a Trade Union for the purposes of collective bargaining, if the Trade Union represents a simple majority of Unionisable Employees employed by the group of Employers, or the Employers who are Members of the Employers' Organization within a sector.*

[3] *An Employer, a group of Employers or an Employers' Organization referred to in subsection 2, and a Trade Union shall conclude a written Recognition Agreement recording the terms upon which the Employer or Employers' Organization recognizes a Trade Union."*

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[8] *While determining a dispute under this Section, the Industrial Court shall take into account the sector in which the Employer operates, and the Model Recognition Agreement."*

20. These provisions would require the Claimant to demonstrate it is a Trade Union, and that the Respondents are Employers who have employed Claimant's Members. The terms used with respect to the presence of a simple majority in the collective bargaining unit, is *'represents.'* The Claimant needs to show there are Employees of the Respondents currently, who are represented by the Claimant. The

purpose of recognition is to collectively bargain. If there are no Employees, represented by the Trade Union, then it would be purposeless to grant recognition.

21. The Claimant submits under paragraph 6 of its Submissions that “ *the 1st Respondent went ahead and terminated the services of Claimant’s Members.*” It goes on to submit that “*the Members of the Claimant are deeply in fear of losing their employment upon coming to deliver witness [evidence?] on this matter.*” Somewhat vaguely, the Claimant concludes its submission with the statement that, “*disputes relating to recognition agreement where Members are still in employment of the Respondent as the present case must be considered and determined on the basis of ‘is as’ [as is?] and all the factors prevailing then and even now qualifies the Claimant to be accorded recognition by the 1st and 2nd Respondent.*”

22. These statements leave considerable doubt in the mind of the Court whether there are Employees working presently for either of the Respondents, who are Members of the Claimant Union. The Claimant Union submits its Members contracts were terminated. That was way back in the year 2010. At the same time, it is suggested there are Members still in employment. The Claimant then suggests that if it had at one time recruited a simple majority that must be relevant, regardless of the situation as prevailing today.

23. This argument is flawed, considering the purpose of recognition is to enable the Trade Union collectively bargain for an existing bargaining unit. The Claimant has not shown there are current Employees of the Respondents, subscribing to its membership, so as to confer the right of the sole collective bargaining agency on the Claimant Union. The Claimant has not shown it has Members who are working for the Respondents. Secondly, no numbers, beyond the 35 names given 5 years ago, and who may all have left employment through termination, as suggested in the Claimant’s Submissions, has been mentioned. The requirement to show there is simple majority recruitment has not been met.

24. The second angle militating against the claim for recognition under Section 54 above, is the requirement for a pre-existing employment relationship. The 1st Respondent Giefcon Limited was in a Service Outline Agreement with the 2nd Respondent Libya Oil Limited. The 1st Respondent under that agreement was the Employer of the Employees alleged to have joined the Claimant Union. Those Employees were contracted, controlled and remunerated by the 1st Respondent to the exclusion of the 2nd Respondent. Their contracts were terminated by the 1st Respondent in 2010. It is common ground that the 1st Respondent left the scene on 30th June 2011. Another company Coast Sparkles and Suppliers Limited was contracted in the place of the 1st Respondent, by the 2nd Respondent.

25. The 1st Respondent cannot therefore be an Employer today, with whom the Claimant Union can engage in any industrial relations. The Claimant appears to have misperceived the nature of the 1st Respondent, which is a manpower outsourcing company, not aligned to any industry. It would not be possible to order the 1st Respondent to sign a Recognition Agreement with the Claimant Union. Outsourcing companies can only be called to account on the subject of trade union recognition, collective bargaining and workers’ representation, if there is a law specifically regulating the outsourcing industry with regard to the subject matter. There should be in place a trade union specifically engaging the outsourcing industry. The Claimant Union should be actively involved in lobbying for such a law. Engagement with the umbrella Employers’ Organization relevant in the Petroleum and Oil Industry would also ensure the Trade Union has a role in formulating triangular relationships common in the industry. The danger in unregulated outsourcing is that it can be used by different industries in evading labour laws, as outsourcing companies and their Employees are not located in specific and identifiable industries. Outsourcing ought to be isolated, and looked at as an industry on its own.

26. As the law stands it cannot be said that the 1st Respondent, a generalist outsourcing outfit, should grant the Claimant Union, a Trade Union confined to the Petroleum and Oil industry recognition.

27. The position of the 2nd Respondent is much clearer. It was not an Employer of any shade, a fact acknowledged by the Claimant in its Pleadings and Submissions. The Claimant was aware the 1st

Respondent was the Employer and pursued negotiation on recognition with the 1st Respondent. The Check-Off Forms were submitted to the 1st Respondent. The Draft Recognition Agreement was sent to the 1st Respondent. It was drawn with the names of the 1st Respondent and the Claimant Union as Parties to the proposed Agreement. The Claimant Union attempted to draw in the 2nd Respondent in a second Draft Recognition Agreement, by including the 2nd Respondent's name, in the document contained in the Claimant's Closing Submissions which has been expunged from the record. This attempt underlines that the Claimant Union is aware the 2nd Respondent cannot legally be asked to grant the Claimant Union recognition. It did not employ the Claimant's Members said to have been recruited back in 2010.

28. The Court finds neither of the Respondents can be ordered to recognize the Claimant Union. The conditions for recognition under Section 54 of the Labour Relations Act, have not been shown to exist. Parties do not have a relationship which would justify recognition. It would not be possible for the Claimant to collectively bargain in the absence of an Employer, and a collective bargaining unit. An order for recognition would amount to the Court asking the Claimant to clap with one hand.

29. The payment of Trade Union dues does not depend on the particular Employer's grant of recognition to the Trade Union. Employees can remit Trade Union dues under the Check-Off system under Section 48 of the Labour Relations Act, or pay those dues directly. Where an Employer has received Check-Off Forms, the Employer should deduct trade union dues from the named Employees' salaries, and remit to the Trade Union. There is no reason to wait until the Trade Union is granted, or finally denied, recognition. Statutory deductions and other deductions from an Employee's wages which the Employee has authorized in writing are permissible under Section 19 of the Employment Act 2007. Employers have no right to direct Employees on disposal of wages and salaries. The Employer has no justification in rejecting an Employee's request for Check-Off deductions, so long as such deductions do not violate wage protection granted under Part V1 of the Employment Act 2007.

30. Giefcon Limited states in the Supplementary Affidavit filed by its General Manager sworn on 1st February 2012, that the 1st Respondent, proceeded to release the Employees as their services were no longer required. The letters of termination were effective 1st October 2011. It has been shown from the arguments above that the 1st Respondent was the Employer of these Employees, up to this date. The Court would not have hesitated to grant the prayer for payment of trade union dues against the 1st Respondent, up to the 1st October 2011, had the Claimant Union persuaded the Court that the Employees were still its Members on the date of termination.

31. The Employees however wrote to the Employer on 12th November 2010, just 2 days after the Claimant had forwarded the Check-Off Forms. They recanted membership. The Court cannot assume their withdrawal was involuntary. The Claimant offered no evidence to contradict the voluntariness of the forfeiture of membership. Section 4 of the Labour Relations Act allows for association and dissociation. The Employees were free to join the Union today and leave tomorrow. If the Employees contracts were terminated in 2011, why would they hesitate in giving evidence for the Claimant in 2015? Why was not the lone employee, shop steward Mr. Otwenyo, who stood his ground refusing to withdraw from the Claimant Union and thereby losing his job, not called by the Claimant Union to shed light on the issue? If there was evidence that withdrawal from the Claimant was involuntary, the Court would not have hesitated in granting the order for payment of trade union dues, up to 1st October 2011.

32. *The Court comes to the conclusion, not without sympathy to the Claimant, that the Claim fails. No order on the costs.*

Dated and delivered at Mombasa this 31st day of July 2015

James Rika

Judge