



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 483 OF 2013

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

NAIVAS LIMITED RESPONDENT

JUDGEMENT

Mr Nyabena for Claimant Union

Mr Kiiru for Respondent

1. The Claimant brought this suit vide a Memorandum of Claim dated 5th April, 2013 on 8th April, 2013 seeking for orders that the Respondent;
 - a. Recognizes the Claimant Union as a properly constituted and a representative body and the sole Labour Union representing labour interest of their employees.
 - b. To deduct and remit union dues from all unionisable employees who have signed the Claimant's check off forms thereby acknowledging membership.
 - c. Not to victimize, intimidate, harass or coerce or otherwise dismiss or terminate any of the union members as a result of their Trade Union activity.
 - d. To order the Respondent to engage the Claimant in collective bargaining within thirty (30) days upon signing Recognition Agreement.
 - e. To meet the cost of this suit in favour of the Claimant.
2. The suit is opposed vide a memorandum of reply dated 21st February, 2014, in which the respondent avers that the Claimant Union has not met the requisite threshold in terms of section 54(1) of the Labour Relations Act, No 14 of 2012 (LRA).
3. The parties rely on the papers filed of record and written submissions. The issues in dispute are as follows:
 - i. Whether the Claimant had obtained a simple majority to attain recognition in terms of section 54(1) of LRA.
 - ii. If the answer to (i) above is in the affirmative what remedy is available to the claimant Union.

Issue i

4. Section 54(1) of LRA provides;

“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”

5. The question the court must answer is how many unionisable employees does the Respondent employ and how many out of that have become members of the Union. This is a question of fact which in many cases is difficult to fathom where verifiable data is not readily available from the parties.

Claimant's submissions

6. The Union submits that it is the appropriate union for the distribution and commercial group in terms of Section 54(8) of LRA. That the Union had obtained a simple majority by recruiting 1375 employees out of a possible 2207 unionisable employees which constitutes 62.3% of the unionisable workforce of the Respondent.

7. The Union referred the Court to the decision of the Hon. Rika J in Industrial **Cause No 257 of 2011, Kenya Union of Commercial Food and Allied Workers Vs Auto Express Kenya Ltd**, where the Judge stated;

“The Labour Relations Act Section 54(1) enjoins an employer including an employer in the public sector to recognize a trade union for purposes of collective bargaining if that trade union represent the simple majority of unionisable employees. Section 57 states that an employer who has recognized a trade union shall conclude a collective bargaining agreement with the recognized trade union. The recognition right ushers in the right of collective bargaining. The trade union becomes the sole bargaining agent at the employment place. But before these two rights are conferred on the trade union it must establish that it has recruited a simple majority of the respondent's employees. The problem with the simple majority rule is that the exact number of unionisable employees at the work place is not always known. Labour is mobile and the numbers keep changing. Employers who are custodians of the employment records, are not always ready to reveal the numbers. It is commonly argued sometimes correctly and at other times with the purpose of muddying the mathematics that some employees have died or left employment or even become none unionisable. The simple majority rule, even where court has ordered a ballot is not always precisely established. This is more so in work places with large numbers of unionisable employees. Recruitment on the other hand is not a one off; it is a continuous process. There is no one time when it will be said that recruitment is at end and the numbers should now be added up. The court must therefore approach the simple majority rule with circumspection”.

8. The Claimant Union has annexed check lists authenticating the numbers it has recruited. The question is whether or not that number constitutes a simple majority for purposes of the employer according to the union recognition.

9. The Claimant alleges that the Respondent has continued to intimidate, harass, transfer and dismiss employees who joined the union to defeat this suit.

Response

10. The Respondent filed a Replying Affidavit of Francis Maswili sworn on 3rd July 2013 in which he avers that the Claimant Union has not met the threshold under **Section 54(1)** of LRA in that a list of 1,375 members is attached to the memorandum of claim. That there is no evidence that the 1,375 alleged members have signed any document to authenticate their membership.

11. That the Respondent operated 26 branches with a total workforce of 3,487 at the time. That out of that number 200 employees are in the management leaving a total of 3,287 unionisable employees. The witness further states that the union list has 1,375 members out of which 226 have since resigned leaving 1,049. That those who have resigned or disowned the Union have sworn affidavits annexed to the Replying Affidavit and marked 'FM1'.
12. That it is particularly clear according to the Respondent that the Claimant Union has failed to meet the requisite threshold of 50+1% since 1,047 members translate to 31.9%. That 1,644 members constitute 51+1% and the Claimant Union should continue to recruit to comply with the Law.
13. The Respondent denies that the total unionisable employees of Naivas Limited were 2,207 as at 8th April, 2013, as alleged by the Claimant stating that it had 3,482 employees out of whom 200 were in management and thus not unionisable.
14. The Respondent appended a list of its employees as at 8th April 2013 totaling 3,485. The Respondent submits that the claimant Union has misled the court on the actual number of employees and should not be taken seriously.
15. Respondent relies on **Industrial Cause No 160 of 2013 Kenya Union of Printing, Publishing, Paper Manufacturers Pulp & Packaging Industries Vs Raffia Bags (EA) Limited** in which Radido Stephen J held;

“Further the Union has not demonstrated that it has attained the statutory threshold for grant of recognition or that the 34 employees were unfairly terminated thus entitled to compensation. The cause is therefore dismissed with no order as to costs with the rider that the Union is at liberty to initiate fresh recruitment with a view to collective bargaining”.

For the submission that this suit be dismissed with costs.

Determination

16. The Court appreciates the effort by the Claimant Union in recruiting 1,375 employees out of a possible number of 3,287 unionisable employees in very difficult circumstances described in the various applications filed by the claimant Union to protect its members from intimidation, harassment, hasty transfers and even dismissals. This is conduct which amounts to unfair labour practice.
17. Though these allegations have not been sufficiently proved, the court enjoins the parties to embrace good labour relations and foster respect for constitutional rights and fundamental freedoms of the employees and employers enshrined in The Constitution of Kenya 2010.
18. Having said that, the court inevitably finds that the Claimant Union has not recruited sufficient members to satisfy the requirements under section 54(1) of the Labour Relations Act 2007 of attaining 50+1 members out of a total unionisable workforce of 3,287.
19. The application for recognition of the claimant Union by the Respondent employer is not successful. The Union should continue recruiting more members and remain vigilant to avoid undue hindrance in its pursuit to attain recognition from the Respondent.
20. The Court considers this an appropriate case for the parties to meet their own costs of the suit in the spirit of fostering healthy labour relations between the parties.

Dated at Nairobi this 16th Day of July 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE

Dated and Delivered on 17th Day of July 2015

HELLEN WASILWA

JUDGE