



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 398 OF 2010**

**BAKERY, CONFECTIONERY, FOOD MANUFACTURING**

**AND ALLIED WORKERS' UNION (KENYA).....CLAIMANT**

**VERSUS**

**PROCTOR AND ALLAN (E.A) LIMITED.....RESPONDENT**

**JUDGMENT**

1. The substance of this dispute as pleaded by the claimant concerns the conclusion and signature of a collective bargaining agreement between the claimant and the respondent. According to the claimant, following the ruling of the Court delivered on 5<sup>th</sup> June, 2007 the parties herein signed a recognition agreement setting out the negotiating and collective bargaining procedure.

2. After signing the recognition agreement, the claimant on 19<sup>th</sup> September, 2007 forwarded to the respondent a proposed Collective Bargaining Agreement and proposed a joint meeting on 3<sup>rd</sup> October, 2007 to deliberate the matter. The respondent responded through Federation of Kenya Employers proposed 22<sup>nd</sup> October 2007 to enable them make consultations so as to prepare a meaningful counter proposal. At the meeting of 22<sup>nd</sup> October, 2007 the respondent had no counter proposal causing the meeting to abort however on 1<sup>st</sup> November, 2007 the respondent forwarded the counter proposals to the claimant. The claimant complained that respondent deliberately delayed the negotiations from November, 2007 to April, 2009 and out of twenty four joint negotiation meetings, the respondent only attended ten while giving what the claimant called flimsy or no reasons for the postponement of the others.

3. The claimant further averred that upon finalization of discussion on the entire content of the Collective Bargaining Agreement, the claimant prepared and forwarded a draft Collective Bargaining Agreement to the respondent on 14<sup>th</sup> May, 2009. Upon receipt of the draft and severally thereafter, the claimant complained that the respondent kept proposing changes and adjustments to several clauses and at times back-tracking on already agreed ones.

4. On 10<sup>th</sup> September, 2009 the responded proposed further and final adjustments to the Collective Bargaining Agreement which were incorporated by the claimant and the final draft prepared for the signature on 15<sup>th</sup> September, 2009. However by a letter dated 15<sup>th</sup> September, 2009 the respondent informed the claimant that it was not possible to sign the Collective Bargaining Agreement due to what the respondent described as unavoidable circumstances beyond their control and reset the date for signing

to 30<sup>th</sup> September, 2009 but once again this did not take place as the respondent failed to attend. The claimant further averred that thereafter the respondent resorted to dissuading its employees from maintaining their union membership and induced them by offering salary increments directly if they terminated their membership to the union.

5. The claimant therefore seeks from this Court an order to compel the respondent to execute the duly negotiated Collective Bargaining Agreement and further an order that the respondent take account and audit of the monetary arrears arising from the Collective Bargaining Agreement commencing from the effective date of the negotiated Collective Bargaining Agreement which is 1<sup>st</sup> September 2008.

6. The respondent on the other hand denied that it frustrated the efforts of signing the Collective Bargaining Agreement. It denied prolonging the process and failing to attend several meetings. The respondent averred that it was entitled to raise issues that required further discussions notwithstanding the rigid position constantly taken by the claimant and the haste at which the claimant wanted the negotiations without full concurrence by the respondent on all the issues.

7. The respondent further denied persuading its employees to terminate their union membership by offering salary increments or by any means whatsoever. It refuted the accusation that it influenced or caused its employees to write a joint letter to the claimant. According to the respondent, its employees made a decision to resign from the claimant voluntarily without any coercion.

8. In their closing submissions before Court, Mr. Amalemba for the claimant submitted that it was not in dispute that there was a recognition agreement between the claimant and the respondent. Clause 4 of the agreement provided for amendment or termination of the agreement yet the respondent had never invoked this clause to either amend or terminate the recognition agreement. According to Counsel, the respondent only wrote to the National Labour Board seeking the revocation of the recognition agreement however there was no evidence on record of any decision of the Board revoking the recognition agreement.

9. Further there was no evidence showing any correspondence to the Board by the respondent following up on the application for revocation of the recognition agreement. Counsel therefore submitted that revocation application was a premeditated scheme to forestall the conclusion and execution of the Collective Bargaining Agreement. Mr. Amalemba further submitted that under section 57(1) of the Labour Relations Act the respondent was under legal obligation to conclude the Collective Bargaining Agreement setting out the terms and conditions of employment of all unionisable employees. It was his contention that there was a recognition agreement in place, duly negotiated Collective Bargaining Agreement and a date set for execution on numerous occasions but the respondents had simply failed to execute the same while advancing unsustainable arguments for refusal to execute the Collective Bargaining Agreement.

10. Regarding the contention that the union does not have any members within the enterprise, Counsel submitted that the purported group resignation letter dated 1<sup>st</sup> October, 2009 was suspicious and a well-orchestrated strategy by the respondent to pre-empt the signing of the Collective Bargaining Agreement.

11. Concerning deduction of union dues from employee's salary under section 48 of the Labour Relations Act, Counsel submitted that the provision contemplates that a resignation emanates from an employee and does not envisage collective or group resignation. The purported group resignation letter was therefore, according to Counsel illegal hence null and void. Further even if the purported resignation letter were to be deemed proper in law, the respondent coerced the employees who had acknowledged membership with the union with a view to rid itself of union representation and defeat the execution of the collective agreement.

12. On the suggestion by the respondent that the Court orders conduct of a poll to establish the number of employees who have joined the claimant, Counsel urged the court to reject this submission since the same can only be done to establish whether a union has a simple majority which was not the issue in dispute before the Court. According to Counsel, the execution of the recognition agreement presupposes

that the statutory benchmarks have been satisfied including the question of simple majority.

13. Mr. Kabaiku for the respondent on the other hand submitted that the respondent reserved the right to raise its opinion on the draft Collective Bargaining Agreement since a Collective Bargaining Agreement is equivalent to a contract which legally binds the parties hence parties must be of equal mind but this was not the case as the claimant took a constantly rigid position and was in haste to have the negotiations concluded without taking in consideration the issues raised by the respondent. According to Counsel article 41 of the Constitution guarantees the right to fair labour relations and this right is enjoyed by both the employer and the employee. To support this submission counsel relied on the case of **KUCFAW v. Sanpac Africa Ltd (2015) eKLR.**

14. On the issue of recognition and signing of the Collective Bargaining Agreement, Counsel submitted that the respondent was obliged to recognize the claimant and conclude a Collective bargaining Agreement if the claimant obtained a simple majority of unionisable employees of the respondent as its members. But since all members of the claimant employed by the respondent had terminated their membership, it was in vain to conclude a Collective Bargaining Agreement with the claimant. Counsel refuted the submission that the respondent persuaded the employees to terminate their membership from the union by offering salary increment or by other means whatsoever and stated that the employees left their union voluntarily. Counsel further submitted that the claimant had not adduced any evidence to show the Union attempted to enter the respondent's premises to ascertain the voluntariness of the resignations and were refused entry. This Counsel submitted, was the claimant's statutory right under section 56(1) of the Labour Relations Act. In support of this submission Counsel relied on the case of **BIFU v. Taifa Sacco Ltd 2014 eKLR.**

15. As noted from submissions and pleadings the claimant and the respondent entered into a recognition agreement on 5<sup>th</sup> June, 2007.

16. Under section 54(1) of the Labour Relations Act, an employer is under obligation to recognize a trade union for purposes of collective bargaining if the trade union represents simple majority of unionisable employees. The Act is however silent on a recognition agreement entered into without attainment of the requisite simple majority. Since it is not expressly prohibited it can be done though not as obligatory as in the case where there is clear simple majority. The respondent in this matter contends that it entered into a recognition agreement with the claimant despite the fact that it had not attained the requisite simple majority. This was in compliance with the Court order. However, according to the respondent, it had 107 unionisable employees while the claimant only managed to recruit 22 members which was below the requisite simple majority. Further those members recruited, eventually resigned from the union. This was disputed by the claimant, arguing the resignations were involuntary and were intended to forestall the signing of the Collective Bargaining Agreement.

17. Section 54(5) of the Labour Relations Act provides that an employer or group of employees or employers' association can apply to National Labor Board to terminate or revoke a recognition agreement. What this implies is that once a recognition agreement is signed, the employer cannot walk out of it unless with the approval of the Board. The respondent wrote to the Board on 17<sup>th</sup> November, 2009 seeking revocation of the recognition agreement. However there is no response to the letter from the Board regarding the request for revocation of the recognition agreement. It therefore means the recognition agreement remained in force. The respondent was therefore bound to sign the Collective Bargaining Agreement.

18. Contentions by the respondent that the claimant has since lost simple majority of unionisable employees cannot however be ignored. A union has a right to represent and bargain on behalf of its members employed in any organization or enterprise only if such union has a simple majority of members in that organization or enterprise as provided under section 54 of the Labour Relations Act. The existence of a simple majority is a matter that fluctuates due to natural attrition, change of employment, increase or decrease in unionisable employees due to promotion or new recruitments. This is why under section 56(1) of the Labour Relations Act, an employer who has signed a recognition agreement with a union is obliged to allow officials of such union reasonable access to the employer's premises to pursue lawful

activities of the union. These should include continuous recruitment to ensure the union retains the requisite simple majority of unionisable employees.

19. The events in the dispute before me took place almost six years ago. Naturally circumstances must have changed. In order to align the matters in dispute before me with the lapse of time, I would therefore direct that within fourteen days of this judgment the respondent permits the claimant reasonable access to its premises for purposes of evaluating and updating its members in the respondent's employ and once it be ascertained that the claimant has the requisite simple majority, an up-dated Collective Bargaining Agreement be negotiated and concluded within 60 days from the date of such ascertainment.

20. Either party shall be at liberty to apply for any further directions.

21. It is so ordered.

Dated at Nairobi this 6<sup>th</sup> day of November 2015

Abuodha J. N.

Judge

Delivered this 6<sup>th</sup> day of November 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge