



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

CAUSE NO. 643 OF 2013

KENYA NUT COMPANY LIMITED.....CLAIMANT

VERSUS

**THE KENYA PLANTATION & AGRICULTURAL
WORKERS' UNION LIMITED.....RESPONDENT**

**KENYA UNION OF COMMERCIAL,
FOOD AND ALLIED WORKERS.....INTERESTED PARTY**

Mrs Wetende for the claimant/employer

Mr Khisa for the respondent union

Mr Owiyo for interested party

JUDGEMENT

1. This is a recognition dispute between three parties. The issue in dispute between the claimant employer and the respondent union is whether the claimant is entitled to be recognized as the union representing the unionisable employees of the respondent. The respondent has declined to sign a recognition agreement with the claimant union on the basis that, the respondent already has a signed recognition agreement with the interested party, Kenya Union of Commercial, Food and Allied Workers Union.
2. In terms of section 54(1) of the Labour Relations Act, 2007, the prerequisite for an employer to recognize a registered union is that the union must demonstrate it has recruited at least 50 + 1 of all unionisable employees of the respondent as its members by the time application for recognition is made.
3. The claimant employer has brought before this court its entire list of employees as at 8th May 2013 at page 7 - 31 of the claimants list of documents.
4. The claimant employer submits that the total number of employees, who were members of the respondent union as at 8th May 2014, was 546 members. In contrast the claimant submits that the rival union, the Kenya Union of Commercial, Food and Allied Workers had 1039 members as at 8th May 2014.
5. The claimant employer further submits that these figures tally with the figures of the respondent's

union documents attached to the memorandum of Reply marked 'KNCL 4'.

6. The claimant submits also that the total number of unionisable employees, employed by the claimant are 1585 and therefore, it is clear that the claimant has only attained 34.44% of the total number of employees which figure is far short of the required threshold in terms of section 54(1) of the Labour Relations Act 2007.

7. The claimant submits that it was wrong and unlawful for the respondent union to incite its members to go on strike to demand for recognition when the union had not satisfied the legal requirements.

8. That the dispute will only be resolved in respondent's favour if the respondent attains the requisite simple majority.

Response by Union

9. The respondent in its response to the claim states as follows:-

“that it is a duly registered trade union to represent employees in the plantation and agricultural industry in Kenya and the claimants agricultural activities fall within respondent's area of representation by virtue of rule 3 (ii) and (v) of the respondent's constitution produced and marked “KNCL 1”.

10. That in terms of appendix 'KNCL2' of the respondent's memorandum of reply in cause 643 of 2013 the respondent recruited 1039 employees out of 1585 workers of the claimant at Hatwara farm, Kihene farm, Kibuko farm and Nando farm.

11. The respondent submitted the check off forms duly signed by workers to the claimant for deduction and remittance of union dues.

12. The claimant commenced deductions of union dues from about 800 employees and continued remitting the same to the respondent until February 2013 when they stopped remittance.

13. In March and April 2013, the claimant deducted union dues from union members and withheld the cheques without giving reasons.

14. That on 7th September 2012, the respondent forwarded copies of recognition agreement to the claimant to counter sign but the claimant refused and or failed to sign.

15. On 31st September 2012, the respondent reported a trade dispute in respect of the claimant's refusal to recognize the respondent.

16. The Minister, failed to appoint a conciliator within 21 days as provided under section 65(1) of the Labour Relations Act 2007 but did so after two and a half months on 1st February, 2010. A meeting to conciliate was scheduled for 17th May 2013 four months later. The delay caused anxiety on the members of the Respondent and when the Claimant withheld union dues, a strike notice was issued.

17. The claimant started to intimidate members of the respondent directing them to withdraw membership with the respondent and join the rival union (the interested party).

18. On 6th May, 2013 there was a standoff at Hatwara farm and the respondent sent assistant general secretary to calm the situation. The claimant human resource officers and the farm manager declined to discuss the matter with the respondent with a view to sign a return to work formula.

19. That the respondent moved to court to stop a lock out of members on 7th May 2013.

20. The respondent did not at any one time call unprotected strike nor did the union incite members to go on strike. The respondent did not issue a strike notice as alleged by the claimant or at all.

21. That the application by the claimant is incompetent and lacks merit and is founded on the same subject matter in the respondent's **application No. 637 of 2013** hence overtaken by events.

Reply to the statement of response

22. The claimant in response to respondent memorandum of reply filed on 8th May 2013 reiterates the contents of the memorandum of claim and joins issue with the respondent.

23. The claimant asserts its willingness to resolve the dispute via conciliation. That the recognition agreement only reached its office on 29th January 2013.

24. That the claimant has not unreasonably refused to sign a recognition agreement with the respondent. That the Respondent has not met the threshold set under section 54(1) of the Labour Relations Act. That the interested party holds majority membership of the employees of the claimant. That signing a recognition agreement with a union that has minority members will only cause rivalry and chaos at the shop floor which is not good for production and labour relations.

Interested Party

25. The interested party, Kenya Union of Commercial Food and Allied Workers submits that it was granted recognition by the claimant upon attaining majority of the claimant's employees as its members. That the interested party's constitution allows the Union to operate in the sector in which the claimant is involved. That the claimant is involved in production and processing of agricultural produce which falls within the domain of commercial, food and related activities. That the respondents submissions have no merit and the same be disregarded by this court.

Determination

- (i) Which is the correct union to operate in the sector in which the claimant operates?
- (ii) Has the respondent satisfied the preliquisites under section 54(1) and 58 of the Labour Relations Act to qualify for recognition by the claimant?
- (iii) Is the claimant entitled to the relief sought?

Issue 1

26. It is not in dispute that the interested party has a recognition agreement with the claimant. Currently, the interested party is the duly recognized union to represent all unionisable employees of the claimant in collective bargaining and to sign collective bargaining agreement, setting out the terms and conditions of service of the employees be they members of the interested party or not.

27. It is also apparent that substantial number of employees have shifted allegiance from the interested party and have become members of the respondent union. These workers are mainly situated in Hatwara farm, Kihena farm, Kibuko farm, and Nando farm.

28. The court is satisfied that the operations in these farms are agricultural in nature and not commercial and that employees in those farms are engaged purely in agricultural activities and nothing to do with commerce and franchise.

29. The court is also satisfied that a large number of employees of the claimant elsewhere are involved in commerce and franchise.

30. It is inevitable, where there is agricultural production there will be commerce in relation to the processing and sale of the produce.

31. Section 54(1) of the Labour Relations Act, duly requires a union to obtain a simple majority of all unionisable employees of a given employer to qualify to be recognized by the employer.

32. The particular union must be authorized by its own constitution to operate in the particular sector the particular employer operates in.

33. It is apparent that the respondent and the interested party are authorized by their own constitutions to operate in the sector in which the claimant operates. Both are the right union for the mixed operations by the claimant which is partly agricultural and partly commerce. The answer to this question is that both Unions qualify to operate in the domain of the claimant employer.

Issue 11

34. From the facts presented in court the respondent has not recruited 50+1 of all unionisable employees of the claimant employer. The respondent has mainly targeted the farms and wishes to be recognized to operate solely in the areas of the claimant which are purely agriculture. The employees have the freedom to join a union of their choice in terms of section 4(1) (b) of Labour Relations Act and Article 41 of the constitution of Kenya, 2010 which provides for freedom of association.

35. However, the law regulates, recognition of trade union by an employer and for good reasons, which in the main include:-

(i) ensuring that the recognized union represent majority of unionisable employees for representation purposes;

(ii) minimizing industrial disharmony at the workplace by not recognizing more than one union;

(iii) ensuring that the concluded collective bargaining agreements provide equal terms for equal work and equal terms for work of equal value by negotiating with one union but not several unions *interalia*.

36. The respondent must demonstrate that it has majority of unionisable employees of the claimant as its members. It is not sufficient for the respondent to recruit employees in specific areas within the domain of the claimant and purport to hold majority of unionisable employees in those specific units in the large empire of the employer's operation.

37. This is not what is contemplated under section 54(1) which reads:-

“an employer including an employer in the public sector shall recognize a trade union for purpose of collective bargaining if that trade union represents the simple majority of unionisable employees.”

38. The court is not satisfied that the respondent union has proved on a balance of probability that it had recruited a simple majority (50+1) of all unionisable employees of the respondent. The court is satisfied that the interested party which is the rival union still holds majority of membership of the employees of the claimant and is entitled therefore to retain the recognized status by the claimant for purposes of collective bargaining and signing of a collective bargaining agreement for all unionisable employees of the claimant.

Injunctive Reliefs

39. The claimant seeks a permanent injunction to restrain the respondent from inciting its workers and calling a strike by the claimant's employees. The respondent as a registered union has the right to operate within the sector the claimant operates in. In terms of section 4(2) of the Labour Relations Act, 2007;

“every member of a trade union has the right subject to the constitution of that trade union to (a) participate in its lawful activities.”

40. The claimant has not proved on a balance of probabilities that the respondent has in the past caused its members to engage in unlawful activities and that the respondent is likely to continue inciting its members to engage in unlawful activities.

41. The court is careful not to hamstring lawful activities by the respondent Union or any other action for that matter within the domain of the claimant. The respondent must ensure that it doesn't infringe on the right of the claimant employer protected under Article 41 of the constitution to have freedom of association with a union of choice subject to the conditions set out under section 54 (1) of the Labour Relations Act.

42. In the final analysis the court finds;

(i) the respondent union has not met the prequisites to be recognized as the right union for purposes of collective bargaining to set the terms and conditions for all unionisable employees of the claimant;

(ii) the interested party remains the recognized union by the claimant;

(iii) the claimant has not satisfied the threshold for grant of a permanent injunction against the respondent union there being no indication that the respondent union is about to engage in unlawful activities in the employment domain of the claimant.

43. Each party to bear their own costs.

Dated and Delivered at Nairobi this 18th day of Dec. 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE