REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 321 OF 2015

AGRICULTURAL EMPLOYERS ASSOCIATION **CLAIMANT**

v

KENYA PLANTATION & AGRICULTURAL WORKERS UNION **RESPONDENT**

RULING

1. This ruling concerns an interesting legal issue which may appear not only frivolous and straightforward but which actually is not frivolous. The issue implicates the principle of good faith in industrial relations/collective bargaining.

2. The Agricultural Employers Association (Association) on behalf of several employers involved in the flower growing business and the Kenya Plantation & Agricultural Workers Union (Union) entered into a recognition agreement on 6 September 1999. Thereafter the parties have concluded several collective bargaining agreements, the last one which expired on 31 July 2015, and which is still only in operation because of a default clause, pending negotiations over a new agreement.

3. According to the Association, the flower growing employers have in excess of 60,000 employees.

4. Between 15 May 2015 and 17 July 2015, the Association invited and submitted its proposals for a fresh collective bargaining agreement to the Union to enable them embark on negotiations for a new agreement.

5. After several correspondences including one in which the Union made counter proposals, a meeting was agreed to be held on 11 August 2015.

6. It appears the meeting on 11 August 2015 aborted when it was called to order. The Union representatives walked out of the meeting.

7. The reason leading to the meeting aborting, both parties agree, is that the Union objected to the composition of the persons representing the Association.

8. The Union specifically objected to the presence of one Mr. Issa Wafula. The said Mr. Wafula is the Group Human Resources Manager for a group of companies under the name of East African Growers Ltd.

9. Both parties also agree that East African Growers Ltd is not one of the 57 employers in respect of whom the expired collective bargaining agreement applied and that in his previous career, Mr. Wafula

was an official/employee of the Union.

10. The Union took and still takes the position that it could not commence negotiations in the presence and with the attendance of a stranger, Mr. Issa Wafula because the employer for which he works, the East African Growers Ltd was not a signatory to the expired collective bargaining agreement, and further that the Union had direct engagements with 2 companies (Shalimar Flowers Ltd and Mahee Flowers Ltd) falling under the East African Growers Ltd stable pursuant to distinct recognition agreements.

11. In the view of the Union, the collective bargaining agreement under negotiation would not bind East African Growers Ltd and therefore it/or its agent could not participate in the negotiations.

12. This is the imbroglio which forced the Association to move to Court on 26 October 2015 to seek orders

> 1. ….
>
> 2. *That this Honourable Court to hereby order the Respondent to embark on the CBA negotiations for the period 2015/2017 and conclude the same within 30 days.*
>
> 3. That the Claimant is entitled to freeze deductions and remittance of union dues until a new CBA is negotiated and registered.
>
> 4. That the Respondent is not entitled to demand salary arrears for the period between the expiry of the outgoing CBA and effective registration of a new CBA.
>
> 5. That cost of this Application be provided for.

13. The Court informed the parties that orders 3 and 4 as sought could not be granted on the papers at an interlocutory stage and the Court will in effect only discuss order 2 as sought.

14. Although the Association has couched the order sought in general terms, the real dispute between it and the Union is whether the Union or for that matter, any of the 2 social partners can dictate who sits in the negotiations team.

15. Section 57 of the Labour Relations Act creates a positive obligation upon an employer or group of employers that has recognised a union to conclude a collective bargaining agreement with the union.

16. The parties were therefore acting in furtherance of that statutory requirement as well as the contractually agreed provision in the expired collective bargaining agreement to embark on negotiations to conclude a new collective agreement.

17. But the Union threw a spark in the works when it objected to the participation of Mr. Wafula.

18. None of the parties cited any precedent or statutory provision relevant to the determination of the real issue in contention.

19. But the starting point must be Article 36 of the Constitution on the freedom to associate and Article 41(3) & (4) on the right of an employer to form, join and participate in the activities and programmes of an employer's organisation, and to determine its own administration, programmes and activities.

20. These freedoms and rights are given statutory impetus in sections 6 and 8 of the Labour Relations Act.

21. The broad principles which I can deduce from the referred to provisions of the Constitution is that either of the social partners can be represented by persons of its choice during the process of collective bargaining.

22. My understanding of both the constitutional and statutory provisions is that either the employer or the union is free to select its own bargaining representatives without interference from the other party and one side should not refuse to negotiate because of objections to the composition of the other partner's team.

23. But that is on broad/general principles. Ordinarily there are exceptions to general principles.

24. My research did not find any domestic decision or authority on the point in issue neither did the parties bring any domestic case law to my attention. But I found a few decisions from comparative jurisdictions.

25. The first case is *Botswana Breweries Distribution Staff v Botswana Breweries (Pty) Ltd* 1997 BLR 312 in which the Industrial Court, Botswana dealt with a situation where the employer objected to negotiating with anyone other than the Union. The Union countered that the management of the employer could not choose for it who to represent it during negotiations in whatever form. Certain employees had insisted on negotiating with the employer directly on a dispute which predated a recognition agreement.

26. The Botswana Court cited with approval the holding in the South African Industrial Court case of *Ntshangani & Ors v Golden Lay Farms Ltd* (1992)13 ILJ 1199 that when management negotiated with union officials, it was not for the employer's representatives at the meeting to dictate to the union who should represent the union and the workforce in the negotiations.

27. In *First National Bank of Botswana Ltd v Botswana Bank Employees' Union* (1997) BLR 1177, the brief facts of the case were that the Bank had raised an objection to inclusion in the Union's negotiating team of employees of its rival banks. The bank feared that disclosure of confidential bank material in the presence of its rival's employees would prejudice its case during the negotiations.

28. The Industrial Court of Botswana held that

> If an employer had good and valid grounds to object to the composition of a union's negotiating team, the court could find such objection was fair and lawful: it therefore followed that a union did not necessarily always have the unfettered right to determine without qualification the composition of its negotiating team.

29. The Industrial Court in this instance approved the earlier decisions in *Botswana Breweries Distribution Staff v Botswana Breweries (Pty) Ltd* (1997) BLR 312 and *Ntshangani & Ors v Golden Lay Farms Ltd* (1992) 13 ILJ 1199 (both already cited)

30. The decision went on appeal and the Court of Appeal in its decision reported as *First National Bank of Botswana Ltd v Botswana Bank Employees' Union* (1998) BLR 403, held, dismissing the appeal that an employer may lawfully and successfully object to the inclusion of a member of a union's negotiating team, but each case has to be decided on its own merits.

31. Having outlined what I believe is the legal framework in place here in Kenya and a glimpse of comparative jurisprudence, I can say that the general rule/broad principle is that a social partner is free to determine members of its negotiating team but where lawful reasons are advanced, objecting to a particular member, the Court can determine the objection depending on its peculiar circumstances. There are exceptions to the broad principles.

32. In the present case, the objection to the participation of Mr. Issa Wafula was primarily 2 pronged, that he had served as an official of the Respondent at some point in time and secondly, that his employer East African Growers Ltd was not part of the 57 companies in respect of whom the collective bargaining agreement was being negotiated, and therefore it would not be bound by such an agreement.

33. As to the first reason, I do not find merit to it as no prejudice/injustice likely to be suffered was demonstrated. It was not even remotely suggested that Mr. Wafula was privy to information which would adversely affect the position of the Union.

34. On the second reason, it is true that the organisation that Mr. Wafula represented would not be bound eventually with the ensuing agreement (although it was stated from the bar that East African Growers Ltd would join the 57 at some stage).

35. No sufficient or reasonable right or interest by Mr. Wafula or his principal, the East African Growers Ltd in the contractual talks between the parties herein was demonstrated.

36. It was not suggested that Mr. Wafula was an expert either in law or industrial relations. His participation was hinged on an anticipated membership of the body of employers with whom the collective bargaining agreement was being negotiated.

37. To my mind that right or interest on his part or the part of East African Growers Ltd stable is not only tenuous but also inchoate. It is an imperfectly developed right or interest. Allowing such an employer or person with an inchoate interest to participate would not further the good faith expected in industrial relations. Such party may only sit out as an observer, if mutually allowed by the parties, but not participate in the negotiations.

38. In any case, the Union has recognition agreements with 2 of the employers under the East African Growers Ltd stable and he would be more properly in place when the right time arrived.

39. In my view when an objection such as the one which was raised here comes up, the party on whose behalf such person is serving should demonstrate some interest/right such as legal expertise or industrial relations expertise which the person would contribute to the negotiations. None was demonstrated here.

40. The Court would urge parties in cases with novel issues such as presented here to do a little bit more, in research, rather than leaving it to Court to discuss cases which parties have not addressed it on.

41. For these reasons, it is clear that the Union had legitimate and lawful objections to the participation of Mr. Wafula in the negotiations.

42. The order sought by the Association was imprecisely worded and it did not bring out or reflect the real issue in dispute. Whether it was by design or otherwise, the Court cannot tell. That is why it appeared to Court, on the surface to be frivolous.

43. In lieu of granting the order as worded in the motion, the Court orders the Association and the Union to resume negotiations with a view to concluding a new collective bargaining agreement, in good faith, and without the participation of Mr. Wafula or his principal East African Growers Ltd.

44. Because of the social partnership between the parties, each party should bear its own costs.

Delivered, dated and signed in Nakuru on this 4th day of December 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kinyanjui, Legal Officer, Agricultural Employers Association

For Respondent Mr. Muli, Legal Officer, Kenya Plantation & Agricultural Workers Union

Court Assistant Nixon