



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 74/2013

(Before Hon. Justice Hellen Wasilwa on 25th February, 2014)

KENYA ENGINEERING WORKERS UNION CLAIMANTS

-VERSUS-

ABYSSINA IRON AND STEEL LTD RESPONDENTS

JUDGMENT

The claimants Kenya Engineering Workers Union filed their Memo of Claim on 3.4.2013. They contended that the respondents herein had refused to sign a recognition agreement with them.

It is the claimants case that they are a registered trade union and the rightful union to represent the interest of unionisable employees of the respondent's company. That there is also no rival union claiming to represent unionisable employees. The claimants further contends that their relationship with the respondents has not been ordeal. They have attempted to seek out the respondents and sign a recognition agreement with them without success. The dispute between the parties arose immediately after the claimants' union recruited respondents company's unionisable employees as stipulated under Section 48 of the Labour Relations Act 2007. The claimant presented a check off system form duly signed by 259 employees on 27.6.2012 as per **App 1** to the respondents to effect payments. On 29.6.2012 claimants submitted again a check off form with 230 unionisable employees as per **App 1(a)**. In both instances the respondents failed to effect the deductions. The claimants requested for a meeting with the respondents on 5.7.2012 to sign a recognition agreement as per **App 2**. The agreement was never signed.

The claimants formerly reported the existence of a trade dispute to the Minister for Labour as provided for under Section 62 of the Labour Relations Act 2007. A conciliator was duly appointed by the Minister on 16.7.2012 to concile the parties as provided for under Section 65(1) of the Labour Relations Act 2007 (**App 4(a) (b)**). The conciliator invited parties to a meeting on 23.7.2012 but the respondents wanted the meeting pushed forward. Another invite for 23.7.2012 failed again and this prompted the conciliator to refer the parties to court for redress as provided for under Section 73 of the Labour Relations Act 2007.

It is the claimants submission that they have recruited 489 employees as per **Appendix 1** and **1(a)** against a staff of 512. The claimants further submitted that they have recruited over 51% of the employees as required by Section 54 of Labour Relations Act 2007. They therefore ask court to order the respondents to recognize them and enter negotiations leading to the signing of a Collective Bargaining Agreement.

The respondents on their part filed their response on 6.5.2013 through the firm of L. G. Menezes & Co. Advocates. Their contention is that some of the workers the claimants allege are their members, have

denied this for instance RW1. RW2 stated that he has not been prevented from joining the union by his employer. RW3 on the other side stated that they have outsourced their employees to a company called Jokali and basically the claimants members are not their employees.

The parties however after doing their respective submissions, agreed to have the matter referred back to the conciliator. After a fact finding mission by the conciliator, it was established that there was a poll conducted at the respondents premises. The results were that; 261 people voted to join the union, 25 voted not to join the union, 9 votes were spoilt. Total votes were 295. The report of the poll was confirmed by the parties present on 23.1.2014 and signed by one Naresh Sutar for the management, Joseph Omolo and Tom Owuor for the union. It was witnessed by Hellen Maneno and Alphonse Matogo from the County Labour Offices.

Having heard the parties, having considered their submissions and also upon considering the report of the County Labour Officer, the issues for consideration are as follows:-

1. **Whether the claimants have fulfilled the requirements of Section 54 of the Labour Relations Act to have them recognized by the respondents.**
2. **Whether the employees, the respondents allege are outsourced by the company Jokali are rightfully so outsourced for purposes of recognition.**
3. **Whether the claimants are entitled to the prayers they have sought.**

On 1st issue, the claimants annexed their annex 1 and 1(a) as proof of recruiting the members to the union. The poll conducted by the labour officer and witnessed by the respondents and claimant's representatives show that a total of 261 members against 295 voted to join the union. Section 54(1) of the Labour Relations Act 2007 states:-

“54(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.”

The gist of this provision is that the claimants must establish that they have recruited a simple majority. The result of the poll show a recruitment of over 84% of the unionisable employees which show that the claimants have met the threshold required by law. Article 41(2) of the Constitution also gives a right to the claimants members to form and join a trade union. The Article provides that:-

(2) Every worker has the right:-

(a) to fair remuneration,

(b) to reasonable working conditions,

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike.

After this recruitment, it is important that deductions must be made towards the union as provided for under Section 48(6) of the Labour Relations Act 2007. The gist of my findings is that indeed the claimants have fulfilled the requirement to be recognized as provided under Section 54(1) of Labour Relations Act.

On the 2nd issue, there is an interested party called JOKALI who chose to be enjoined in this case albeit late indicating that they be allowed to be part of the polls conducted by the labour officer. This court allowed them to be part and parcel of this process. This stemmed from the fact that the respondents had in their evidence stated that they had outsourced some labour to JOKALI and therefore some of the employees alleged by the claimant to be respondents were infact under JOKALI.

Jokali Hardling Services Limited came in as an interested party. They had filed an application to be enjoined in this case. They had stated in their application that they had some employees who were under their control and were likely to be affected by the outcome of a vote counting exercise ordered by the conciliator. The issue of outsourcing has become a very sensitive issue in employment relationships.

In determining whether an employment relationship exists between the employees and JOKALI or between the said employees and the respondents herein, the provision of **ILO Recommendations 198, 2006 Employment Relationship Recommendations** become very hardy. Companies outsource primarily to avoid certain costs e.g peripheral on non-core businesses. This should not however be used to deny a worker their right to union representation or to subject the worker to unfair labour practices.

That is why ILO Recommendations 198 sets out parameters to guide whether or not an employment relationship exists or not. Under Recommendations 198 Part II of the ILO Recommendations 198 Article 13:-

“Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:-

(a) the fact that the work; is carried out according to the instructions and under the control of another party, involves the integration of the worker in the organization of the enterprise, is performed solely or mainly for the benefit of another person, must be carried out personally by the worker, is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work, is of a particular duration and has a certain continuity, requires the worker's availability, or involves the provision of tools, materials and machinery by the party requesting the work;

(b) Periodic payment of remuneration to the worker, the fact that such remuneration constitutes the worker's sole or principal source of income, provision of payment in kind, such as food, lodging or transport, recognition of entitlements such as weekly rest and annual holidays, payment by the party requesting the work for travel undertaken by the worker in order to carry out the work, or absence of financial risk for the worker.

From these provisions, it is clear that no evidence was placed before court by JOKALI that the employees alleged are under their control or direction. However, the employees showed that they are paid by the respondents and are under their control. The contention that these employees are outsourced is a falsehood which was meant to avoid certain obligations and in this case recognition of the claimants by the respondents.

Having stated as above, it is apparent that the claimants are entitled to the prayers sought and I therefore order that the respondents do forthwith recognize the claimants and enter into negotiations within 30 days leading to the signing of a recognition agreement in default execution to issue.

HELLEN WASILWA

JUDGE

25/2/2014

Appearances:-

Joseph Omolo for the Union present

Omondi h/b Menezes for respondents present

CC. Wamache