



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 160 OF 2013

(Originally Nairobi Cause No. 1679 of 2012)

KENYA UNION OF PRINTING, PUBLISHING, PAPER

MANUFACTURERS, PULP & PACKAGING INDUSTRIES

CLAIMANT

v

RAFFIA BAGS (EA) LIMITED

RESPONDENT

JUDGMENT

1. The Kenya Union of Printing, Publishing, Paper Manufacturers, Pulp & Packaging Industries (the Union) filed a Memorandum of Claim against Raffia Bags (EA) Limited (the Respondent) on 19 September 2012 and the issue in dispute was stated as *failure and refusal to accord union recognition*.
2. Together with the Memorandum of Claim was a notice of motion under certificate of urgency seeking *orders compelling the Respondent to refrain from interfering with the Claimants members and their freedom of association by coercing them to relinquish their union membership.... To sign a Recognition agreement with the Claimant since the Claimant had recognition with the former (Raffia Bags Ltd)..... order the Respondent to effect the check-off system and other ancillary orders*.
3. The motion was placed before Abuodha J on 19 September 2012, and he granted prayer 2 of the motion pending *inter partes* hearing. When the motion was placed before the judge for *inter partes* hearing on 3 October 2012, he directed the parties to attempt to amicably settle the matter out of court. The interim orders were extended. Subsequently, the parties informed the judge they had failed to settle the dispute and he ordered that the matter should proceed for hearing.
4. On 21 May 2013, upon the request of the parties the matter was transferred to this Court for determination.
5. In the course of time the Union applied to amend the Memorandum of Claim and the Court granted leave as a result of which an Amended Memorandum of Claim was filed on 10 September 2013. In the Amended Memorandum of Claim, the issues in dispute were stated as *failure and refusal to accord union recognition, unfair termination and victimisation/intimidation/threatening claimant's members and failure and or refusal to deduct and remit union dues*.
6. The Respondent filed a Defence Memorandum on 27 September 2013.
7. The Cause proceeded to hearing on 8 October 2013 with the Union calling 2 witnesses and the Respondent opting to rely on its preliminary objection filed on 19 August 2013 and filed written

submissions. The Union filed its submissions on 27 October 2013 while the Respondent filed its submissions on 18 December 2013 (the Respondent's submissions were filed outside the directed timeline).

Union's case

8. The Union's case is that it had a recognition agreement with an entity known as Raffia Bags Ltd dated 31 October 2011 and that this entity decided to change ownership and it entered into a retrenchment deal with the union on 10 October 2011.
9. After the retrenchments, the new entity, Raffia Bags (EA) Ltd freshly employed the retrenched employees forcing the union to submit new check-off forms on 13 June 2012 and 6 August 2012 for the continuation of deduction of union dues. As a prelude to the signing of a new recognition agreement the union had recruited 91 out of 146 unionisable employees of the Respondent.
10. The Respondent however refused to hold a meeting to sign a recognition agreement despite the Union being the rightful union representing the Respondent's employees/sector/industry. The denial, according to the Union was contrary to the right of association and to belong to a union.
11. Further, the Respondent on 14 September 2012 unfairly and discriminatively terminated the services of 5 shop stewards and 29 employees because of their participation in union activities in contravention of the applicable laws. The terminations were against sections 5, 35, 41, 43, 45 and 46 of the Employment Act and sections 4, 5, 48 and 57 of the Labour Relations Act. The terminations were to deny the union members the right to bargain collectively.
12. The Union's first witness was Amos Nyambati. He stated that had been employed by Raffia Bags (K) Ltd in 2008 and was dismissed on 5 March 2012 after which he was engaged by the Respondent as a Quality Checker on a 6 month contract and the contract expired on 15 September 2012, but was not renewed. He was also a chief shop steward.
13. Regarding the intimidation of employees for their involvement in union activities, the witness stated that the Respondent's Managing Director Diamond Lalji called the shop stewards and told them to inform the employees to withdraw from the union otherwise certain benefits would be withdrawn. As a result some employees wrote letters withdrawing from the union and were re-employed and the 34 who remained in the union had their services terminated or contracts not renewed.
14. In cross examination, the witness confirmed all the employees were on 6 month contracts and that at the end of the contract he was paid Kshs 5,156/-. He further stated he did not know whether the union reported a trade dispute to the Minister for Labour.
15. The second witness called by the union was Zainab Abdallah Nechesa. She stated that the Respondent employed her on 15 March 2012 and that previously she had been employed by Raffia Bags (K) Ltd. She also served as shop steward. On 15 September 2012 she was dismissed without reasons. The witness confirmed attending the meeting mentioned by the first witness.
16. The witness also informed the court that Raffia Bags (K) Ltd held a meeting with the Union in November 2011 regarding the declaration of redundancies.
17. In cross examination, the witness confirmed that the Respondent employed her after she made an application, on a 6 month contract which was not renewed when it ended and that the employees were paid.
18. The Union in the Amended Memorandum of Claim sought orders compelling the Respondent to effect check-off system, grant of recognition, reinstatement of terminated employees or alternatively twelve months compensation and costs.

Respondent's case

19. As stated earlier, the Respondent filed a Preliminary Objection on 19 August 2013, basically on the grounds that the Claim was incompetent, fatally defective and an abuse of the court process because it had been brought prematurely in contravention of sections 54(6) and (7), 62 and 74 of the Labour Relations Act, section 15 of the Industrial Court Act and rule 6(3) of the Industrial Court (Procedure) Rules, 2010.
20. The Respondent submitted that the Union should have reported a trade dispute to the Minister for Labour and exhausted the pre industrial court conciliation mechanisms before moving to court.

21. For these contentions the Respondent cited 9 decided cases.
22. In the Defence Memorandum, it was pleaded that the Union had failed to demonstrate that it was the appropriate union because it had not exhibited a copy of its constitution.
23. Further, the Respondent pleaded and submitted that it was a different entity from Raffia Bags (K) Ltd. A certificate of incorporation of Polycem Bags Ltd dated 6 September 2011 and a Certificate of Change of name from Polycem Bags Ltd to Raffia Bags (East Africa) Ltd dated 15 December 2011 were exhibited. A Taxpayer Registration Certificate dated 28 October 2011 in the name of the Respondent was also exhibited. According to the Respondent, it bought the assets of Raffia Bags (K) Ltd but not the employees who had been declared redundant and paid. Some of the employees were recruited afresh by the Respondent.
24. On the issue of unfair terminations, the Respondent's case was that the employees were on 6 month contracts which ended but were not renewed due to reduced business. According to the Respondent, all dues were paid to the employees on expiry of the contracts.
25. On recognition, the Respondent pleaded and submitted that the Union had only recruited 47% of the unionisable employees (91 out of 192) and thus had not attained a simple majority.
26. On the issue of deduction of union dues, the Respondent exhibited monthly reports for union deductions and copies of payment cheques from September 2012 to January 2013.
27. On harassment and intimidation of the employees, the Respondent exhibited letters written by the employees signaling their withdrawal from the union.

Questions for determination

28. From the parties pleadings, evidence and submissions the main issues arising for determination are self evident. These are whether conciliation is mandatory in recognition disputes before moving to court, whether the union is entitled to recognition, whether the Respondent has failed to deduct and remit union dues, whether the Respondent unfairly terminated the union members, and whether the Respondent is the same entity as Raffia Bags (K) Ltd.

Whether conciliation is mandatory in recognition disputes before moving to court.

29. The bigger part of the Respondent's case was that the Cause was filed prematurely before the parties had exploited alternative dispute resolution processes set out in sections 54, 62 and 74 of the Labour Relations Act and section 15 of the Industrial Court Act and rule 6(3) of the Industrial Court (Procedure) Rules, 2010.
30. It was the Respondent's contention that the union should have reported a trade dispute to the Minister (Cabinet Secretary) for Labour. The Respondent sought to rely on several authorities. In Nairobi Cause No. 436 of 2010, *Kenya Engineering Workers Union v Maisha Mabati-Ruiru*, Kosgey J (as he was then) considered the implications of sections 62 and 74 of the Labour Relations Act and was of the view that

a dispute concerning recognition and redundancy may be referred to the court urgently only where the claimant has referred the dispute to the Minister for Labour for conciliation under section 62(4) of the Labour Relations Act 2007.....if the conciliation process fails to resolve the matter then either the Minister or any of the parties may refer the dispute to the court for arbitration. Since the dispute is exclusively on recognition, the union ought to have referred it to the Minister first. It is only after failure of the conciliation efforts that the claimant could rightly present the claim before the court....consequently the court cannot take cognizance of the dispute because of the said procedural lapses.

31. The Union on the other hand relied on Nairobi Cause No. 99 of 2010, *Kenya Union of Printing, Publishing, Paper Manufacturers & Allied Workers Union v Color Creations Ltd* where Rika J held that conciliation under section 54 and 62 of the Act is not a mandatory procedure and reasoned that the law provides that a trade union **may** refer the dispute for conciliation in accordance with the provisions of Part 8.
32. In my view, the correct legal position is the one expressed by Rika J. Section 54(6) of the Labour

Relations Act as read with Part VIII and the provision in section 74 on urgent referral of recognition disputes to the Industrial Court has not made it mandatory for conciliation. But once the parties have taken the route of pre industrial court conciliation, the process should be exhausted before the parties move to court.

33. I state so, well aware that alternative dispute resolution has been given constitutional underpinning in Article 159(2)(c) of the Constitution as well as statutory recognition in the Industrial Court Act. The Court is enjoined to promote conciliation as one method of alternative dispute resolution. It is quick and inexpensive and rests on sound judicial policy. Besides the social partnership between labour and capital in Kenya has always had conciliation between the partners as a cardinal method of resolving both individual rights and collective interests' disputes.
34. On this question, the Court therefore is of the view that conciliation is not mandatory in recognition disputes before moving to court, but it should be encouraged and promoted.
35. The Cause was therefore not prematurely filed and does not offend the cited statutory provisions.

Whether the union is entitled to recognition

36. According to the Amended Memorandum of Claim, the union recruited and sent to the Respondent check-off forms in respect of 83 employees on 13 June 2012 and a further 13 employees on 6 August 2012. However according to Appendices 4 and 7 in the initial Memorandum of Claim, the check-off forms have names of 78 and 13 employees respectively. The Amended Memorandum of Claim also asserted that the Respondent had a total unionisable workforce of 146.
37. On its part, the Respondent asserted and exhibited a list of 201 which it pleaded formed its workforce with 9 of them being in management. Assuming the assertion by the Respondent is correct, it had 192 unionisable staff and therefore if the Union had recruited 91 employees this translated to only 47% of the unionisable staff and thus had not attained a simple majority.
38. In the circumstances, it is clear that the Union had not met the statutory threshold set out in section 54 of the Labour Relations Act to be entitled to grant of recognition.
39. It is also necessary to discuss briefly the question whether the Union is the right union for employees of the Respondent. According to the Union, the issue of the right union was determined in Nairobi Cause No. 728 of 2010(2011?), *Kenya Shoe & Leather Workers Union v Raffia Bags (K) Ltd*. Unfortunately the Union did not exhibit a copy of the award in which the determination that it was the right union was reached but instead it exhibited a ruling relating to an application for review (which was rejected).
40. In the light of the fact that the Court has reached the conclusion that the union had not attained a simple majority it is not necessary to make any definitive findings on the question whether the union is the right union.

Whether the Respondent has failed to deduct and remit union dues

41. The Respondent exhibited monthly reports on deduction of union dues during the period September 2012 to January 2013 together with the requisite cheques. The Union did not dispute this and therefore the complaint in this regard cannot be sustained.

Whether the Respondent unfairly terminated the union members

42. The Union pleaded that 5 shop stewards and 29 union members were discriminatively and unfairly terminated against their wishes and because of participation in union activities. This claim if proved would lead to serious penalties against an employer as it implicates employees constitutionally guaranteed rights.
43. The witnesses called by the Union and the uncontroverted documents presented by the Respondent leave no doubt that the 34 employees as indeed all the other unionisable employees were on fixed term contracts of 6 months. According to clause 2.1 of all the contracts, the employment contracts were effective 16 March 2012 and were to lapse automatically on 15 September 2012.
44. Further, the contracts were signed by the employees. The Court is unable to come to the

conclusion that the 34 employees were either discriminatively or unfairly terminated. The contracts lapsed and were not renewed immediately thereafter.

45. Before leaving the discussion on the issue of unfair terminations, I believe it is worth reiterating the view the Court took in Nairobi Industrial Cause No. 1435 of 2012, *Transport Workers Union (K) vs. Ideal Logistics Ltd* regarding whether a claim for recognition agreement should be mixed with other claims and this was that

21. More often than not disputes emanating from collective agreements will run simultaneously with allegations of breach of the Employment Act which defines the fundamental rights of employees.

22. The statutory provisions and legal principles applicable in determining recognition disputes and disputes on the conditions and terms of service emanating from collective agreements and the rights of employees defined in the Employment Act are different and in my humble opinion should not be mixed together. Recognition disputes concern union interests at the primary level whilst collective agreement and Employment Act disputes concern employee rights. I say recognition disputes concern union interests at the primary level because individual employees cannot commence litigation seeking an employer to recognise a union s/he has joined.

23. Mixing or combining litigation over disputes rooted on recognition agreement and collective agreements together is likely not only to cause prejudice to the Respondent but also conflate the issues for determination by the Court which is not proper.

24. This is a defect which cannot be cured in the course of proceedings and must be dealt with by the Court at the very onset of a Claim.

46. Parties should not mix these claims as it is likely that the affected employees and the Respondents may be prejudiced.

Whether the Respondent is the same entity as Raffia Bags (K) Ltd.

47. The case for the union was that there was only a change in name/managerial ownership and that the employees and the type of work they were doing remained the same. The Union had also asserted that by virtue of it having entered into a recognition agreement with Raffia Bags (K) Ltd, it was entitled to *ipso facto* recognition by the Respondent.

48. The change of name, it was pleaded did not deny the employees earlier representation since it was only managerial ownership change and the recognition agreement with Raffia Bags Ltd was still applicable to the Respondent.

49. For the Respondent, a Certificate of Incorporation of Polycem Bags Ltd dated 6 September 2011 was exhibited. Polycem Bags Ltd then changed its name and a Certificate of Change of name to Raffia Bags (East Africa) Ltd dated 15 December 2011 was issued.

50. It is trite law that a registered company has its own juristic personality. For the union to succeed in its argument, it was required to do more than it did. It is not clear whether it intended to pierce the corporate veil of the 3 companies Raffia Bags (K) Ltd, Polycem Bags Ltd and Raffia Bags (EA) Ltd to demonstrate that it was in reality one entity.

51. However, one thing has disturbed the Court regarding the relationship between these 3 entities. Polycem Bags Ltd changed its name to Raffia Bags (East Africa) Ltd legally on 15 December 2011, but a Taxpayer Registration Certificate issued to Raffia Bags (East Africa) Ltd by Kenya Revenue Authority and exhibited by the Respondent is dated 28 October 2011. It appears the Taxpayer Registration Certificate was issued before the Respondent was legally in existence, under the name of Raffia Bags (East Africa) Ltd.

52. Before concluding, the Court notes that the Union does not appear to know its correct and legal name. In the initial and Amended Memorandum of Claim and some documents, it referred to itself as *Kenya Union of Printing, Publishing, Paper Manufacturers, Pulp & Packaging Industries* while in other documents it exhibited, referred to it as *Kenya Union of Printing, Publishing, Paper*

Manufacturers and Allied Workers.

53. The Court further notes that the Union commenced Nairobi Cause No. 2179 of 2012, *Kenya Union of Printing, Publishing, Paper Manufacturers, Pulp & Packaging Industries v Raffia Bags (EA) Ltd* in which the issue in dispute was stated in the Memorandum of Claim as failure and refusal to accord union recognition. Although this Court is not privy to the status of this latter Cause, parties must be discouraged from filing multiple suits in which the subject matter is the same. In this regard, I direct the Deputy Registrar to bring to the attention of the Deputy Registrar, Nairobi, a copy of this judgment with a view to placing Cause No. 2179 of 2012 before the Principal Judge for further directions.

Conclusion

54. The conclusion that the Court reaches based on the foregoing discussion is that the Cause was not incompetent, fatally defective or an abuse of the court process and thus was not filed prematurely.

55. 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.

56. 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.

Delivered, dated and signed in open Court in Mombasa on this 21st day of March 2014

Radido Stephen

Judge

Appearances

Mr. Kivale instructed by Kenya Union of Printing,

Publishing, Paper Manufacturers, Pulp & Packing Industries for Union

Mr. Molenje, Senior Legal Officer,

Federation of Kenya Employers for Respondent