



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 543 OF 2012

BANKING, INSURANCE &
FINANCE UNION (KENYA)CLAIMANT

VERSUS

ELIMU CO-OPERATIVE SAVINGS
& CREDIT SOCIETY LTD.....RESPONDENT

JUDGMENT

The Memorandum of Claim herein was filed by the Claimant Union on 2nd April 2012 together with a Notice of Motion under certificate of urgency. The issue in dispute was violation of the parties recognition agreement and Collective Bargaining Agreement (CBA) by unprocedurally and unlawfully promoting all unionisable employees to Managerial Cadres.

After hearing the Notice of motion exparte, Justice Mukunya (as he then was) issued the following orders:-

- i. There was no urgency in the application
- ii. Issues raised in the application are consolidated with the issues raised in the memorandum of Claim and will be heard and determined together.

The Respondent filed its Memorandum of Reply on 21st June 2012.

On 26th July 2012 the dispute was stood over generally to allow the parties attend conciliation meetings following the appointment of a conciliator by the minister for Labour in response to the Claimant's report of the dispute.

The conciliator's report was filed in court on 5th June 2013.

The parties did not agree on the conciliator's report on 24th June 2013.

On 19th June 2013 the Claimant applied for leave to file supplementary Memorandum of Claim. The application was granted with corresponding leave to the Respondent to file supplementary Memorandum of Reply. The Claimant filed the Supplementary Memorandum on 24th June 2013 while the respondent filed the Supplementary Reply on 18th July 2013.

The case was heard on 19th February 2014. Mr. Tom Odera, the Organizing Secretary for the Claimant appeared for the Claimant while Ms. Nyika holding brief for Ms. Latiff, instructed by the firm of Rachier & Amollo Advocates, appeared for the Respondent.

Mr. Odera proceeded by way of oral submissions while the Respondents called two witnesses, **Cyrus Njuguna Kanyita RW1** and **Joseph Okoth, RW2**.

The parties thereafter filed written submissions.

The Claimant, which is a registered trade Union, entered into a recognition agreement with the Respondent on 6th June 1995. In Paragraph 2 (a) of the recognition agreement the Claimant is recognized as the sole labour organization representing the interests of workers in the employment of the Respondent in all negotiable matters concerning rates of pay, overtime, hours of work, method of wage and salary payment, principles of promotion among others.

The parties have negotiated several CBA'S, with the last one at the time of filing this dispute having been signed on 21st February 2012.

At the time of signing the CBA the Respondents had about 46 employees out of whom 16 were members of the Claimant.

On 24th February 2012, just three days after signing the CBA 10 out of the 16 members of the Claimant received letters of promotion to management cadres, leaving the claimant with only 6 members.

The Claimant alleges that the promotions were carried out without consultation as provided in the recognition agreement and is bad labour practice. That the promoted employees continued to carry out the same duties and the salaries given to them were those negotiated by the Claimant in the CBA. That only allowances were enhanced. The Claimant further alleges that the promotion is a gimmick to deny the affected employees their right to Union representation.

Mr. Odera submitted that the Respondents stopped remittance of Union dues in March 2012 long before the employees resigned from the Union in November 2012, and that the letters of resignation from the Union were couched in identical terms, which confirms that the employees did not resign voluntarily from membership of the Claimant. He further submitted that the letters of promotion do not contain the positions to which the employees were promoted.

Mr. Odera urged the court to find that the promotions are not a bar to union membership and that the grades to which the employees were promoted are unionisable. He further urged the court to uphold Article 41 of the Constitution to the effect that the workers are free to join the Union for the protection of their interests.

Mr. Odera further urged the court to find that reduction of Unionisable members from simple majority of 25 or 24 member's to 6 members by the Respondent is illegal and violates the parties agreement. He prayed that the court maintains the rule of simple majority.

The case of the Respondent is that the Recognition Agreement was not meant to place any restrictions upon the Respondent with regard to running the society and its relationship with its employees. That the agreement only empowered the Claimant to regulate terms of service and conditions of unionisable employees. The Respondent further avers in the supplementary Reply that it was not under any obligation to consult the Claimant with regard to effecting promotions and that the promotions were being considered before negotiations of the Collective bargaining agreement. That employee are free to leave the Union and cannot be compelled to join the union. The Respondent also averred in the supplementary Reply that the employees who were promoted had their basic salaries, house and transport allowances increased and in addition were granted a telephone allowance following the promotions. That only one employee objected to the promotions, that the main reason for promotions was to reward the long serving

employees. The Respondent denied breaching the provisions of Article 41 of the Constitution as alleged by the Claimant.

At the hearing the Respondent called two witnesses, **CYRUS NJUGUNA KANYITA** (RW1) and **JOSEPH OKOTH** (RW2), both of whom were beneficiaries of the promotion which is the subject matter of this dispute.

RW1 testified that he was promoted from driver to senior driver while RW2 testified that he was in customer care, a position he held from 2004. Both witnesses stated that they resigned from the Union of their own volition because they had been promoted to management cadre.

I have considered the pleadings and the documents attached to them, the testimony of the witnesses, the oral and written submissions. The issues for determination are whether the promotion of the 9 employees from Unionisable to Management cadre is valid and whether the Claimant is entitled to its prayers.

Both issues revolve around level of Union representation and the procedure for promotion of Unionisable employees to management cadres.

In the recognition agreement between the Claimant and the Respondent attached to the Claimant's memorandum as appendix 1 the parties agreed that the Claimant shall be the sole labour organization representing the interests of the Unionisable employees. Among the issues agreed to be negotiated with the union are the principles of negotiations of the Collective bargaining agreement and the principles of promotion.

The Collective agreement signed by the parties sets out the categories of employees subject to the Collective agreement at the preamble thereof as follows:-

<u>Category</u>	<u>Job Grade</u>
Cleaners/messengers	E 1
Senior Cleaners/Senior messengers	E 2
Clerks	E 3
Senior Clerks	E 4
Accounts Clerks	E 5
Accounts Assistants	E 6

Both parties submitted that job groups E7 and above are in management cadre. Unfortunately none of the parties submitted the categorization of jobs in Management to the court. The court therefore does not have the advantage of knowing what cadre of staff are in Management. For this purpose the court will make reference to Appendix C1 of the Industrial Relations Charter which sets out the categories of employees who cannot join a Union, in other words, the level of Union representation.

The Union contends that the promotions were not genuine but were intended to defeat the principle of Union membership and deny the employees the right to be members of the Union. To demonstrate this the Union has pointed out that the salaries paid to the promoted employees were the same as those that had been negotiated in the Collective agreement signed on 21st February 2012. 10 employees received letters of promotion. The letters of promotion do not state the position to which the employees were promoted. Union dues were stopped immediately yet the employees did not resign from the Union until 31st October 2012, 8 months later. In the Conciliation report filed in court on 5th June 2013, it is indicated that the Respondent submitted at the conciliation meeting that the employees were promoted as follows:-

<u>NAME</u>	<u>UPGRADING</u>
1. MARY ACHOLA	CLEANER - REGISTRY OFFICER
2. FRANCIS KIOKO	CLERICAL OFFICER - LOANS OFFICER
3. MARY MABALE	CLEANER - TELEPHONE - OPERATOR
4. JOSEPH OKOTH	CLEANER - HEAD MESSENGER
5. JOHN KITHURE	GENERAL CLERK - ACCOUNT ASSISTANT
6. SILAS NJUGUNA	DRIVER - SENIOR DRIVER
7. KIOKO MUSAU	CLERK - ACCOUNT ASSISTANT
8. HELLEN CHESANG	MESSENGER - SNR. COPY TYPIST
9. ABRAHAM MACHARIA	GENERAL CLERK - ASST.BRANCH MANAGER

The Industrial Relations Charter provides that the persons holding the following positions shall not be members of the Union.

1. (i) *Executive Chairman; Managing Director; General Manager (and his Deputy) and Functional Heads – that is – Departmental Heads (and their Deputies).*

(ii) *Branch Manager (and his Deputies)*

(iii) *Persons in-charge of Operation in an area (and their Deputies)*

(iv) *Persons having authority in their organizations to hire, transfer, Appraise, suspend, promote, reward, discipline and handle grievances provided that such persons fall within the Industrial Relations Charter Clause No. 11-1*

(v) *Persons training for above positions (including understudies).*

2. (i) *Personal Secretaries to persons under 1 above.*

(ii) *Persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties.*

3. *Any other category of staff who may, in the case of any particular undertaking, be excluded from union representation by mutual*

agreement.

In their Appendix 2 of the Supplementary Memorandum of Reply the Respondent has attached a schedule of Staff Salaries before and after promotion. It shows that the employees were promoted as follows:-

<u>NAME</u>	<u>FROM JG</u>	<u>TO JG</u>
1. J.KITHURE	5	7
2. C. NJUGUNA	5	7
3. J. OKOTH	5	7

4. M. ACHOLA	5	7
5. F. KIOKO	4	7
6. K. MUSAU	4	7
7. M. MABALA	5	7
8. H. CHESANG	5	7
9. A. MACHARIA	5	7

The Salaries were as follows after negotiation of CBA and after promotion:-

<u>NAME</u>	<u>SALARY AFTER CBA</u>	<u>SALARY AFTER</u>
	<u>NEGOTIATION</u>	<u>PROMOTION</u>
1. J.KITHURE	24,119.00	24,119.00
2. C. NJUGUNA	18,985.00	18,985.00
3. J. OKOTH	18,985.00	18,985.00
4. M. ACHOLA	18,985.00	18,985.00
5. F. KIOKO	21,800.00	21,800.00
6. K. MUSAU	19,700.00	19,700.00
7. M. MABALA	18,985.00	18,985.00
8. H. CHESANG	18,985.00	18,985.00
9. A. MACHARIA	18,985.00	22,519.00

All the employees were paid allowances as follows before and after promotion.

	After CBA	After
	<u>Negotiations</u>	<u>Promotion</u>
1. House Allowance		
Job Group 5	7,990	13,000
Job Group 4	6,655	13,000
2. Transport Allowance	2,000	2,000
3. Leave Allowance	Nil	1,000

From the above analysis, it is evident that the basic salaries before promotion and after promotion remained the same which was as negotiated by the Claimant except for Mr. A. Macharia whose salary as negotiated was Shs. 18,985 and after promotion was Shs. 22,519. Transport allowance also remained the same as negotiated at Shs. 2000. What changed was the leave allowance from Shs. 4000 to Shs. 7000 and a new telephone allowance was introduced of Shs. 1000. House allowance was also increased from Shs. 7,990 and Shs. 6,655 respectively for job grade 5 and 6 to Shs. 13000.

Based on level of unionization under Industrial Relations Charter, all the jobs to which the employees were promoted are unionisable. The salaries are the same as what was negotiated for them before the alleged promotion except for Mr. A. Macharia whose salary was increased by Shs. 3534.

Another observation I have made is that the employees were promoted from job group 4 and 5 to 7. Even the person alleged to have been promoted to the position of Registry Officer and Assistant branch Manager were promoted to the same job group 7 with telephone operator, senior driver and head messenger.

RW1 and RW2 testified that they carried out the same duties as they did before the promotions.

From the foregoing I am inclined to agree with the Claimant that there was no promotion. What the Respondents did was to carry out a cosmetic exercise to remove the employees from unionisable categories and call them Managers which in actual sense they are not.

The minutes attached as Appendix 1(a) of Supplementary Memorandum of Reply at MIN/ECM/25/3/2012 (a) confirm that seven staff members were moved to management cadres after the implementation of the CBA while Appendix 1 (b) at MIN/ECM/150/22/2012 confirm that the Respondent was advised by FKE to revoke the promotions. The minute further confirms that the staff were promoted then later made to choose between remaining in the Union and having the additional benefits paid to them after their promotion deducted from their salary or resigning from the Union and retaining the additional benefits. RW2 stated during cross-examination that he was told to write the resignation letter by Mary Kinyua the General Manager of the Respondent and that his colleague Francis Kioko who does the same job wrote a letter declining the promotion and retained his union membership.

I find that the employees who were promoted by the Claimants are unionisable as their jobs are not management jobs. I further find that the Respondent stopped union deductions in February 2012 without authorization by the employees and further that the employees were coerced into leaving union membership by being so advised by the Respondent's General Manager and the threat of reduction of their salary and recovery of the amounts so far paid to them. This is in violation of Section 5 (1) and 5 (2) of the Labour Relations Act which provides as follows:-

5 (1)

No person shall discriminate against an employee or any person seeking employment for exercising any right conferred

in this Act.

5 (2)

Without limiting the general protection conferred by sub-section (1) no person shall do or threaten to do any of the

following.

a. Require an employee or person seeking employment not to be or become a member of a trade union or to give up membership of a trade union:

- b. **Prevent an employee or person seeking employment from exercising any right conferred by this Act or from participating in any proceedings specified in this Act:**
- c. **Dismiss or in any other way prejudice an employee or a person seeking employment:**
 - i. **Because of past, present or anticipated trade union membership;**
 - ii. **For participating in the formation or the lawful activities of a trade union;**
 - iii. **For exercising any right conferred by the Act or participating in any proceedings specified in this Act: or**
 - iv. **For failing or refusing to do something that an employee may not lawfully permit or require an employee to do.**

5 (3)

No person shall give an advantage, or promise to give an advantage, to an employee or person seeking employment in exchange for the person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.

Provided that nothing in this section shall prevent the parties to a dispute from concluding an agreement to settle that dispute.

The same amounts to unfair labour practice and is therefore a contravention of Article 41 (1) of the Constitution which provides that every person has a right to fair labour practices.

For the foregoing reasons I make the following orders:-

1. **I declare the promotions of the unionisable employees of the Respondent from unionisable to management cadres unlawful, unfair in breach of the parties CBA and Recognition agreement, an unfair labour practice and therefore void.**
2. **I declare the letters of resignation written by the 9 employees to null and void.**
3. **The employees shall be deemed to be union members unless they resign of their own volition without inducement with an offer of payment of better benefits or threat of denial of benefits.**
4. **The employees shall retain the salaries and allowances that they have been receiving since the purported promotions.**
5. **The Respondent shall with effect from July 2014 resume deduction of union dues.**

Orders accordingly.

Dated and delivered at Nairobi this 30th day of May 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Mwaura Ngare holding brief for Odero Tom for Claimant

Otieno holding brief for Laila for Respondent