



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 289 OF 2014

UNION OF KENYA CIVIL SERVANTS.....APPLICANT

VS

KENYA COUNTY GOVERNMENT

WORKERS UNION.....1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI.....2ND RESPONDENT

RULING

Introduction

1. On 28th February 2014, the Applicant came to Court under certificate of urgency seeking orders restraining the 1st Respondent from taking industrial action and the 1st and 2nd Respondents from signing a recognition agreement. I granted a temporary order restraining the threatened industrial action and set an *inter partes* hearing for 10th March 2014.

2. When the parties appeared before me on 10th March 2014, Counsel for the Applicant sought and was granted leave to amend the Applicant's application in view of the fact that a recognition agreement between the 1st and 2nd Respondents had since been signed. The Applicant subsequently filed an amended application on 17th March 2014 from which this ruling flows.

The Amended Application

3. The Applicant's Amended Notice of Motion seeks the following orders:
- a. That the recognition agreement signed between the 1st and 2nd Respondents be stayed pending the final determination of this application and the accompanying Claim;
 - b. That in the alternative the recognition agreement entered between the 1st and 2nd Respondents dated 27th February 2014 be declared a nullity and be revoked;
 - c. That during the hearing and determination of this application *inter partes* and the accompanying claim, the Respondents by themselves, their agents or employees be prohibited from entering and signing any recognition agreement and further, the 1st Respondent be prohibited from entering into any recognition agreement with any other County Government.

4. The application which is supported by the affidavit of Tom Odege sworn on 17th March 2014 is based on the following grounds:
- a. That prior to the devolved system of government, the Applicant had been accorded and still enjoys full recognition by the Government as the only properly constituted body competent to represent employees in the civil service excluding uniformed personnel in the Police Force, Prisons Department, Armed Forces, Administration Police, National Youth Service, teachers under the Teachers Service Commission and National Intelligence Service;
 - b. That the Applicant has always had membership strength;
 - c. That the recognition of the Applicant has never been revoked in any manner and the Applicant continues to enjoy recognition by the National Government;
 - d. That upon transitioning to the devolved system the Applicant sought to be recognised by the County Governments in the same way it is recognised by the National Government;
 - e. That prior to the devolved system there was a union representing Local Government workers in the name of Local Government Workers Union ;
 - f. That the 1st Respondent is believed to be a replacement of the Local Government Workers Union;
 - g. That the Respondents have entered into and signed a recognition agreement despite being aware of a rationalisation programme;
 - h. That upon transitioning into the devolved system there has been a mix up in the membership and structure of the various trade unions representing employees in the County Governments necessitating a rationalisation process;
 - i. That 66,000 out of the Applicant's membership of 78,000 have been transferred to the County Governments;
 - j. That the Local Government Workers Union only has 33,000 registered members;
 - k. That there is a rationalisation programme aimed at determining membership of various trade unions and therefore the membership strength legally required for recognition by the National and County Governments;
- That the recognition agreement between the Respondents was entered into and signed in bad faith, in total disregard of the rationalisation programme and the suit herein;
 - m. That the said recognition agreement is unconstitutional as it infringes on the Applicant's right to fair labour practices and is therefore a nullity;
 - That by dint of the ongoing rationalisation programme the said recognition agreement does not meet the requirements of law for recognition agreements as it is unclear if the 1st Respondent enjoys a simple majority;
 - That the recognition of the various trade unions was to follow the completion of the rationalisation programme;
 - p. That the recognition is therefore also premature for the reason of the ongoing rationalisation programme;
 - q. That the recognition of the 1st Respondent by the 2nd Respondent is ulterior as it was meant

to forcibly transfer members of the Applicant to the 1st Respondent which amounts to unfair labour practices;

- r. That the 1st Respondent is being fronted by another organisation with the ulterior motive of abolishing the office and functions of the Applicant which is against fair labour practices.

The 1st Respondent's Reply

5. In a replying affidavit sworn by the 1st Respondent's Secretary General, Roba Duba on 31st March 2014 it is deponed:

- a. That the 1st Respondent's members were all derived from the Ministry of Local Government ;
- b. That pursuant to the enactment of the Constitution, 2010 the Local Government was entirely dissolved and all its workers transferred to the Counties. This did not however mean that the 1st Respondent had lost its members;
- c. That the 1st and 2nd Respondents executed the recognition agreement in question rightfully and lawfully;
- d. That the Local Government workers were seconded to the County Governments not Central Government and the Applicant should therefore concentrate on its members working for the Central Government and not interfere with the workers of the County Governments;
- e. That the recognition agreement between the 1st and 2nd Respondents is valid. There is a collective bargaining agreement between the 1st and 2nd Respondents that is in force. Furthermore, the 1st Respondent has more than 99% of unionisable members working for the 2nd Respondent meeting the threshold for a recognition agreement;
- f. That only the 1st and 2nd Respondents are privy the recognition agreement between them and does not concern the Applicant;
- g. That the Applicant is a stranger with no legal right to frustrate a mutual agreement between the 1st and 2nd Respondents;
- h. That out of 11,500 workers seconded to and/or employed by the 2nd Respondent the 1st Respondent has more than 11,000 as its members.

The 2nd Respondent's Reply

6. In a replying affidavit sworn by the 2nd Respondent's Director, Legal Affairs Department, Karisa Iha on 10th March 2014, it is deponed that execution of the recognition agreement between the 1st and 2nd Respondents was informed by the fact that the 1st Respondent is a registered trade union.

Determination

7. The single issue for determination in this ruling is whether the Applicant has made out a case for orders staying and/or revoking the recognition agreement signed between the 1st and 2nd Respondents and barring the 1st Respondent from entering into recognition agreements with any other County Government. The orders sought by the Applicant are within the province of injunctive orders. The conditions upon which such orders may be granted are well articulated in the well known case of **Giella Vs Cassman Brown & Company Limited[1973] EA 358** as follows:

- a) That the applicant must show a *prima facie* case with probability success;

b) That the applicant must demonstrate that if the orders sought are not granted they will suffer irreparable injury which would not adequately be compensated by an award of damages;

c) That if the court is in doubt it will decide the application on a balance of convenience.

8. The Applicant's contention is that if the recognition agreement between the 1st and 2nd Respondents is allowed to operate, then the rights of its members under Articles 36 and 41 of the Constitution would be violated. The 1st Respondent on the other hand maintains that the Applicant has no business interfering with an agreement to which it is not privy.

9. The question then is whether the Applicant has a recognisable stake in the recognition agreement signed between the 1st and 2nd Respondents or in any other recognition agreement that may be signed between the 1st Respondent and any other County Government. Counsel for the 1st Respondent, Mr. Katunga Mbuvi referred the Court to authorities on the doctrine of privity of contract which limits the operation and effects of contracts to its parties. This remains good law as far as commercial contracts are concerned.

10. However, as was held by **Rika J** in the case of ***Kenya Union of Journalists and Allied Workers Vs Nation Media Group and Another (Industrial Court Cause No 799 of 2010)*** collective bargaining agreements are not like commercial contracts where doctrines such as privity of contract apply strictly. I agree with my brother Judge and add that recognition agreements on the basis of which collective agreements are negotiated would fall under the same ambit.

11. Once a recognition agreement is concluded between a trade union and an employer, all other trade unions with members within the unionisable establishment of the employer are downgraded to the level of representation without recognition and consequently without collective bargaining power.

12. In fact under Section 49(1) of the Labour Relations Act, it may be possible for the recognised trade union to demand agency fees from members of other trade unions who do not enjoy recognition status. This in my view, means that all trade unions with members within the establishment of an employer have a direct stake in the recognition agreement. For this reason, it is not legally correct to say that the Applicant is a stranger to the recognition agreement concluded between the 1st and 2nd Respondents.

13. Section 54(1) of the Labour Relations Act provides that an employer shall recognise a trade union that represents the simple majority of unionisable employees. Recognition is therefore a matter of evidence based on real numbers. The Applicant's position is that because of an on going rationalisation programme as between the National and County Governments, it is not possible to tell with certainty which union enjoys a simple majority within the 2nd Respondent and other County Governments for purposes of recognition.

14. Mr. Ligunya for the Applicant submitted that because of the on going rationalisation programme, it is not possible to confirm which trade union enjoys a simple majority within the 2nd Respondent's establishment at this stage. The recognition agreement signed by the 1st and 2nd Respondents was therefore in violation of Section 54(1) of the Labour Relations Act.

15. In support of the 1st Respondent's contention that it enjoys a simple majority status within the 2nd Respondent's establishment, a document titled *IPPD-Payroll by product: Social Welfare Ass. cont. for the month of March 2014* was produced. This document is however clearly marked as a temporary reference copy not authorised for any official transaction. Its probative value is therefore doubtful.

16. On the question of whether there is indeed a rationalisation programme in place, the

Applicant produced a letter dated 3rd February 2014 from the Cabinet Secretary, Ministry of Devolution and Planning inviting the Applicant's Secretary General to join an inter-agency technical committee of the rationalisation programme. The Respondents did not challenge the authenticity of this letter but Counsel for the 1st Respondent submitted that the rationalisation programme could not be used as a bar to trade union activities.

17. This Court is fully aware of the rights of trade unions to organise and negotiate on behalf of its members. Nevertheless, it seems to me that as things stand, the actual membership status of the various trade unions with members working in the County Governments cannot be ascertained.

18. To this extent, I agree with Counsel for the Applicant that the recognition agreement between the 1st and 2nd Respondents dated 27th February 2014 is premature. The devolved system of government set out in the Constitution, 2010 which is yet to fully evolve has major implications on trade unions and their members. It is therefore too early in the day to determine which trade union has achieved a simple majority status for purposes of recognition and collective bargaining.

19. Consequently, I have arrived at the conclusion that the Applicant has made out a case for interlocutory injunctive orders and now make the following orders:

- a. That operationalisation of the recognition agreement between the 1st and 2nd Respondents dated 27th February 2014 be and is hereby stayed pending the final determination of the claim herein or further orders of this Court ;
- b. That no collective bargaining agreement may be negotiated pursuant to the said recognition agreement dated 27th February 2014 and no such collective bargaining agreement shall be registered by this Court during the subsistence of order (a) above;
- c. That the 1st Respondent be and is hereby prohibited from entering into any recognition agreement with any other County Government pending final determination of the claim herein or further orders of this Court.

I make no order for costs at this stage.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF MAY 2014

LINNET NDOLO

JUDGE

In the Presence of:

.....*Applicant*
.....*1st Respondent*
.....*2nd Respondent*