



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO. 58 OF 2013

(Formerly Nairobi Cause No. 722 of 2012)

BANKING, INSURANCE FINANCE UNION (KENYA).....CLAIMANT

VERSUS

TAIFA SACCO SOCIETY LTD.

.....RESPONDENT

JUDGMENT

1. The claimant in this dispute is a registered trade union representing unionisable workers in the money market sector while the respondent is a Saving and Credit Co-operative Society.
2. The dispute concern allegations by the claimant that the respondent has failed and or refused to negotiate a new collective bargaining agreement (CBA) following the expiry of an earlier one in June, 2006. The respondent on its part has maintained that although it had a valid recognition agreement with the claimant union, the same lost substratum as over the years, the membership to the claimant union has dwindled and that by January, 2007 the claimant had only twelve members in the employ of the respondent and further that as at the time of filing the present action, the claimant had no members in the respondents employ.
3. Concerning the dwindling of claimant's members in the respondent's employ, the claimant has alleged that the respondent's Deputy General Manager threatened to sack all its unionisable workers if they did not leave the union and further the claimant arranged a meeting with the unionisable staff of the respondent at the latter's premises but the respondent preferred a meeting at a hotel as the respondent's Deputy General Manager had already warned the unionsable workers over involvement in Union activities.
4. Apart from these broad yet fundamental points of difference the claimant has set out in its memorandum of claim the several issues in the CBA over which it desired they negotiate with the respondent and stated what in its view is the reasonable position concerning those points of dispute.
5. On 27th November, 2013, I directed that considering the numerosity and possible duplication over points of dispute, the parties representatives meet, summarise and frame points of dispute for the determination by the court. Pursuant to this direction the respondent framed and filed five issues along which I directed that the parties structure their final submissions.
6. The four main issues in summary were framed as follows:-

(a) Whether the court can order the respondent to sign the CBA in light of termination notice of

the recognition agreement dated 6th September, 2012.

(b) Whether the signing of the CBA can be ordered in light of the fact that the claimant has no members with the respondent.

(c) Whether court can negotiate a CBA on behalf of the parties.

(d) Whether court can order the signing of a CBA that is contrary to the Employment Act.

7. The fifth issue is a point by point comment on the disputed clauses in the draft CBA which the court for reasons to be stated later in the judgment, would not consider.

8. Concerning the 1st and 2nd issues, Mr. Munoru for the claimant submitted that the issue of termination of the recognition agreement is not before the court. The issue before court is an economic dispute on terms and condition of service of all unionsable staff covered by the existing recognition agreement signed on 14th February, 2004. According to Mr. Munoru, clause 4 of the 2004 CBA provided that it shall remain in force and continue until amended or terminated. He further submitted that clause 7 of the 2004 CBA provided that either party wishing to terminate the agreement shall give six (6) months written notice to the other party within which the affected party may contest the notice of termination by filing a trade dispute. Mr. Munoru therefore submitted that the termination of recognition agreement by an employer can only take place after subjecting the same to vigorous procedures as provided for under section 54(5) of the Labour Relations Act. It was his submission that termination of a recognition agreement has to be submitted to the National Labour Board and cannot be casually brought up in court as the respondent did.

9. Mr. Munoru further submitted that at the time the Union was making proposals on the disputed CBA (the 2006 one), it had sufficient members in the respondent's employ and further that the respondent did forward counter proposals because it had unionisable employees in its employment.

10. Concerning the issue whether the court can negotiate a CBA on behalf of the parties, Mr. Munoru denied the claimant had made any such request. He submitted that the court derives its absolute jurisdiction on labour and employment matters from article 162(2) of the constitution and section 12 of the Industrial Court Act. Further that the court has the jurisdiction to determine any trade dispute on terms and conditions of service as provided under section 15(5) of the Industrial Court Act and that the CBA is an economic dispute which the court can determine if the parties fail to agree at their own level.

11. Regarding the issue whether the court can compel the respondent to sign a CBA contrary to the Employment Act,

Mr. Munoru submitted that the respondent did not indicate which provisions of the CBA are repugnant or contrary to law hence the allegation remained a mere statement.

12. Ms Nderitu for the respondent on her part submitted that the court cannot force the parties to negotiate after they failed to negotiate the CBA. According to her the respondent has always been willing to negotiate with the claimant but could not continue doing so as the claimant no longer had members in the respondent's employment as they had all withdrawn.

13. She submitted further that whereas the respondent has attached letters showing its employees expressing their wish to withdraw from the claimant union, the claimant has not put in anything to show that indeed it still has members in the respondent's employment. Ms. Nderitu thus submitted that court orders cannot be made in vacuum. According to her, the orders sought if made will be in vain as the claimant wants the court to negotiate for it the CBA and have the respondent ordered to sign it but this according to her would be in futility as there are no persons for whom the CBA is being negotiated or signed. In support of her submission, counsel urged me to be persuaded by the decision of my brother Justice Rika in the case of **Kenya Union of Printing, Paper Manufacturers and Allied Workers Vs. Packaging Industries Limited & Another [2014] eKLR.**

14. The determination of this dispute revolves around deciding whether the respondent still has in its employment a simple majority of unionisable employees with membership to the claimant to sustain a recognition agreement with the claimant, second whether in the absence of a simple majority of unionisable employees with the claimant's membership, the respondent procedurally and effectively terminated the recognition agreement with the claimant. The court will leave in abeyance issue No. 5 which is detailed comments on the disputed clauses in the CBA pending the outcome of the issues framed above.

15. The 1998 ILO Declaration of Fundamental Principles and Rights at work affirms the importance of the effective recognition of the right to bargain collectively. The right of workers to bargain freely with employers is an essential element in freedom of association. It is however important to note that collective bargaining is a voluntary process through which employers and workers unions discuss, negotiate and agree on the terms and conditions of employment of their unionisable members.

16. In order to achieve the desired results and sustain cordial labour relations, the emphasis has always been that the parties negotiate in good faith. This implies among others that either side make deliberate and conscious effort to reach agreement, negotiations are carried out genuinely and constructively, avoidance of unjustified delays, respecting agreements concluded and applying them in good faith.

17. Where parties are unable to reach agreement, dispute settlement procedures as set in legislation and any pre-existing CBA or recognition agreement may be invoked. Concerning referral to court, this ought to be the last resort since more often than not disputes over terms and contents of CBAs revolve around wages and allowances which have financial implications yet judges, if at all can claim expertise, are experts in law and legal questions not economic and finance which form the backbone of economic disputes in CBAs. In resolving CBAs disputes, the best a court can do is to set the legal framework within which negotiations should take place and leave bread and butter issues to the protagonists. It is for the foregoing reasons and more that the court is reluctant to delve into and kept in abeyance issue number 5 framed by the respondent.

18. The above having been said, the respondent in this suit has maintained that it did not refuse to negotiate with the claimant. Its position is that such negotiation would be futile since the claimant no longer enjoys the necessary simple majority of unionisable members in the respondent's employment to sustain recognition and negotiate on their behalf. In fact by a letter dated 6th September, 2012 the respondent gave notice to the claimant of the former's intention to de-recognize the claimant.

19. The chronology of events as can be gleaned from the pleadings and documents filed by the parties are as follows:

(a) On June 16th, 2006 the claimant wrote a letter to the respondent forwarding the draft CBA to them for perusal and counter proposal within a month.

(b) On 21st December, 2006 the respondent forwards to the claimant draft terms and conditions of service of its unionisable employees to the claimant.

(c) On 19th June, 2007 the respondent wrote to the Executive director of FKE informing him that a meeting that was scheduled for 27th March, 2007 was adjourned to 28th March, 2007 (i.e the next day) to enable the unionisable employees elect their officials for purposes of participating in the negotiations. The letter further goes on to inform the Executive Director – FKE that the resumed meeting for the next day at 2.00 pm failed since by 5.00 pm no unionisable employee had attended the meeting. The letter further informs the Executive Director that the unionisable employees thereafter withdrew their membership to the union and advised the respondent to cease making deductions for union dues.

(d) On September 5, 2006, the claimant writes back disputing the contents of the letter dated 19th September, 2007 to Executive Director – FKE and accuses the respondent's Deputy GM of threatening the unionisable members of the claimant with a sack unless they leave the

membership of the union after the failed meeting of 27th March, 2007.

(e) On 21st July, 2007, the conciliator writes to the claimant and Executive Director FKE informing them of failure of the conciliation process and advising them move to court for the determination of the dispute.

(f) The court has noted that the withdrawal letters by the unionisable employees except for four were mostly done in April and May 2007 (i.e four in 2003 and six in April/May, 2007). Further apart from one or two of the letters which cited unavoidable circumstances none of the letters attempted to give any reason for withdrawal from the membership of the claimant.

20. As stated earlier in this judgment, collective bargaining is a voluntary process and no one can be forced to enter into one. Further union membership is voluntary and no person can be forced to join or remain in one against their wish. Article 41 of the Constitution protects the right to fair labour practices which include the right to join or participate in the activities and programmes of a Trade Union. Further section 4(1) of the Labour Relations Act gives every employee the right to join or leave a Trade Union.

21. Whereas the foregoing are the general propositions of the law and the constitution, union membership and collective bargaining constitute fundamental principles and rights at work place protected both by the ILO conventions and the Kenya Constitution. To refuse an employee membership to a trade union or threaten or discriminate or in any other manner subject an employee to any kind of disadvantage constitutes unfair labour practice hence contrary to ILO conventions and the Kenya Constitution, article 41 thereof.

22. As much as there is no obligation to provide reasons for withdrawal from Union membership, good practice would require that some measure of background is available to explain the sudden withdrawal. An allegation of incompetent representation or movement to a more relevant union due to change of job field or promotion to management, would perhaps suffice. Apart from the earlier four unionisable members who withdrew in 2003, the withdrawal of the six in April/May, 2007 under unexplained circumstances and against a background of a stalemate over negotiations on a new CBA raises eye brows. The claimant may well be right that they were forced to do so. However assuming their withdrawal was voluntary and it had the effect of de-recognizing the claimant, then the claimant would have no right to insist on negotiating a CBA with the respondent as then there would either be less than simple majority as contemplated by Section 54 of the labour Relations Act or no one to represent in such negotiations.

23. Section 11 of the Labour Relations Act places the burden of proof on the person who alleges that a right or protection conferred by the Act has been infringed. Apart from reading mischief in the withdrawal letters, the claimant has not shown by way of affidavit or correspondence any attempt to enter the respondents premises around the time of this alleged forceful withdrawal to verify the fact. Section 56(1) of the Labour Relations Act permits the claimant to enter the respondent's premises to carry out lawful union activities. Nothing has been demonstrated either by way of correspondent or at worst, an allegation in pleadings that such attempt was made but refused by the respondent. Further, section 54(7) requires that disputes over recognition which are not resolved as per subsection 6 of the Act should be referred to court under certificate of urgency. Nothing has been shown either by way of correspondence or affidavit that an attempt was made to refer the issue of de-recognition of the claimant to the National Labour Board as required under section 54(6). Further there was nothing to show that a referral was attempted to this court upon failure to resolve the dispute by the National Labour Board, if at all it was placed before it.

24. Regarding the letter dated 6th September, 2012 giving notice by the respondent to claimant of the intention to de-recognize the latter, the procedure adopted by the respondent contravened the provisions 54(5) which requires an employer who wishes to terminate or revoke a recognition agreement to apply to the National Labour Board. The Act talks of application to the Board which means the decision to de-recognize a union cannot be unilaterally taken. The rationale here is to circumvent unfair labour practice and ensure stable labour relations. To that extent the court declares the letter of 6th September, 2012

purporting to give six months notice of de-recognition to the claimant, inconsequential, null and void.

25. In conclusion and to answer the two main questions of whether the respondent can enter into a CBA with the claimant under the circumstances in which the respondent is of the opinion that the claimant no longer have members in its employ and whether court can order the respondent to sign a CBA under the foregoing circumstances, the court makes a finding that essential dispute resolution mechanisms for recognition disputes were not adhered to by the parties. That being the case, negotiations as to the terms of the CBA could not by law be properly embarked on prior to resolving the recognition dispute.

26. The court therefore orders that the parties refer the issue of recognition to the National Labour Board for determination as required by Section 54(5) of the Labour Relations Act within 60 days from the date hereof. Either party be at liberty to apply for any facilitative or consequential orders.

27. It is so ordered.

Dated at Nyeri this 26th day of September, 2014.

ABUODHA J. N.

JUDGE

Delivered in open Court in the presence of Mr. Ombongi h/b for Ms. Nderitu Advocate for the Claimant and in the presence of Mr. Ngugi h/b for Mr. Munoru Advocate for the Respondent.

ABUODHA J. N

JUDGE