



**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 12 OF 2014**

**Consolidated with**

**PETITION NO.14 OF 2014**

**P.J. DAVE FLOWERS LIMITED**

**P. J. DAVE FLORA LIMITED ..... PETITIONERS**

**VERSUS**

**KENYA PLANTATION AND AGRICULTURAL**

**WORKERS UNION ..... RESPONDENT**

**AND**

**AGRICULTURAL EMPLOYERS ASSOCIATION ..... INTRESTED PARTY**

**JUDGEMENT**

**P.N. Mureithi for the Petitioners**

**M. Khisa Advocate for the Respondent**

**PM Kinyanjui for the Interested Party**

1. The Petitioner, P. J. Dave Flowers Limited filed Petition No. 12 on 7th March 2014 together with a Notice of Motion application seeking for urgent orders of restraint against the Respondent from carrying on, participating in or holding an intended illegal strike on 8th March 2014 pending the hearing of the application and the Petition. The application was supported by the affidavit of **Hitesh Pravin Dave** and on the grounds that the Respondent had not issued adequate strike notice, Respondent had not supplied the Petitioner with an updated register of their members and that unless the strike is stopped if undertaken as threatened it would cripple operations at the petitioner's firm and cause great loss.

2. The Petitioner in Petition No. 13 is P.J. Dave Flora Limited, seeking similar orders like Petitioner in Petitioner No.12 and the application under this Petition is supported by the affidavit of **Pravinkumar Jaychandra Dave**.

3. the Respondent filed their reliefs to the applications and Petitions herein through the Replied Affidavit sworn by Thomas Kipkemboi on 14th March 2014 and another filed on 19th May 2014.
4. Both petitions were consolidated under Petitioner No. 12 of 2014.
5. On 2nd March 2014, Agricultural Employers' Association (AEA) filed their application seeking to be enjoined as Interested Party.

### **The petition**

6. The Petitioners being private limited liability companies registered under the Companies Act operate a farm at Isinya in Kajiado County while the Respondent is Trade Union representing workers in the agricultural sector and the Interested Party is a federation of employers in the floriculture industry where the Petitioners are members.
7. The petition is that the Respondent has failed and or neglected to invoke the correct procedure using the appropriate legal mechanism in calling for an intended strike that was to take place on 8th March 2014 noting the petitioner has in the past been forced to apply extra-legal mechanisms in resolving disputes as there is no Collective Bargaining Agreement (CBA) between them and the respondent. Under these circumstances, the Respondent issued a strike notice on 3rd March 2014 falling short of the legal provisions, where the Respondent should have referred their dispute to the Industrial Court as under section 73(1) of the Labour Relations Act, and thus not entitled to call for a strike as they have not complied with section 76(c) (i).
8. The dispute between the Petitioners and the Respondent has a long history in that on 26th June 2013, the Petitioners wrote to the Chief Industrial Relations Officer seeking to promote good industrial relations but when given the chance, the Respondent officers took the opportunity to incite the petitioner's employees. On 10th July 2013 both parties agreed that the Respondent was to supply the petitioner with check off forms with names of their members from the Petitioners farm to enable the Petitioners comply and effect deductions. The petitioner was however having challenges implementing this which was notified to the Respondent but on 3rd March 2014, without prior notification the Respondent issued a strike notice noting that there was a CBA in force between them and the Petitioners, which was not the case.
9. The Petitioners are not members of the Interested Party having pulled out on 22nd July 2013 and any CBA in force between the Respondent and Interested Party does not apply with regard to the Petitioners. The operative CBA between the Respondent and Interested Party was registered on 24th February 2014 and did not relate to the Petitioners.
10. The Petitioners have made effort to identify the members of the respondents in their employ so as to affect Union dues and agency fees but the Respondent has failed to facilitate. The call for strike is malicious meant to injure the economic standing of the Petitioners and reputation. The Petitioners cannot be compelled to be bound by a CBA they are not party to or its terms applied indiscriminately upon them by the respondent. They should be left to choose which association to join and the time of such association. Unless the Respondent are stopped from calling for a strike, this will affect the Petitioners operations as they are in a sector that is sensitive to the needs of their clientele with products booked for airspace and airlifting to overseas markets.
11. The prayers sought are that;

*(a) A declaration that the strike called by the respondent on 8th March 2014 herein is illegal as the requisite notice period has not been adhered to.*

*(b) A declaration that the strike called by the respondent on 8th March 2014 is not a*

*protected strike under section 79 of the Labour Relations Act.*

*(c) An order of injunction restraining the respondent and its officials from instigating, engaging in and or continuing with their illegal strike.*

*(d) An order of injunction restraining the respondent and their members from participating in or continuing with their illegal strike.*

*(e) A declaration that the respondent is not entitled to call a strike in the absence of a collective bargaining agreement with the Petitioners.*

*(f) An order directing the respondent and the petitioner to commence the process of entering into a collective bargaining agreement with the petitioner.*

*(g) Any other order that the court may deem expedient to grant. (h) That the respondent to bear the costs of this petition.*

### **Response to the petition**

12. The Respondent as a Trade Union covering the agricultural sector has members in the employ of the Petitioners. The allegations that the strike notice was not made in pursuance to the law, section 76(c) of the Labour Relations Act apply, where the Respondent was seeking to implement judgement in Cause 363 of 2011 between the Petitioners and the Respondent and thus the notice. Also, allegations that the Petitioners employees are not members of the Respondent is misleading as material facts have not been disclosed as there has been a relationship between the parties since 2011 where employees joined the Respondent Union and there has been deductions remitted to the Respondent until November 2013 when this was abruptly stopped without notice.

13. In **Cause No. 363 of 2011** the court directed the Petitioners and the respondents to sign a Recognition Agreement and to sign a CBA within 8 weeks but instead of compliance, the Petitioners enlisted its membership with the Interested Party which has a Recognition Agreement and a CBA with the respondents. After concluding the CBA dated 15th November 2011 between the Interested Party on behalf of its members and the respondent, it was registered by the court as RCA No.343 of 2011. Vide Gazette Notice No.13212 on 26th October 2010, Interested Party was directed by the minister to make deductions of Union dues and agency fees to the respondent. The Petitioners were therefore bound by the Notice following the CBA covering the period of 2011-2013.

14. The Respondent fully complied with the provisions of section 48 and 49 of the Labour Relations Act by filing check-off forms with the Petitioners. There is no requirement to serve the Petitioners with an updated list of register of employees and this is not a valid reason to use and refuse to remit Union dues. There is evidence that on 19th November 2011, 587 check-off forms were served upon the Petitioners

following a memorandum of understating dated 19th November 2011. In January

2012 the Petitioners enlisted their membership with the Interested Party and in the same month 615 employees from the petitioner's farm joined the Respondent union. The Petitioners with knowledge of the existing CBA through their membership with Interested Party went ahead and increased salaries indiscriminately contrary to the CBA forcing the Respondent to file Cause No.182 of 2012 seeking for orders to have

the Petitioners implement the CBA in full. The petitioner took the option of intimidating members of the Respondent forcing the Respondent to seek restraining orders vide Industrial Cause No.576 of 2012. The Petitioners have persisted in their efforts to force the Respondent members to revoke their membership which prompted industrial action. On 15th March 2012, the Petitioners moved to court in Industrial Cause No.363 of 2012 to restrain the respondent's industrial action and on

15th March 2012, the parties drew a return to work formula Agreement and the court

ruled on 4th April 2012, that parties were to have a Recognition Agreement within 4 weeks and a CBA in 8 weeks. On 2nd April 2012 the respondents served the Petitioners with a Recognition Agreement and CBA to enable parties commence negotiations.

15. Following the ruling of the court on 4th April 2012 the respondents sought the intervention of Federation of Kenya Employers (FKE) to act as a neutral chair to facilitate an amicable resolution of the matter on 8th June 2012. FKE invited both parties to sign a Recognition Agreement to commence negotiations on 12th July

2012 and an Agreement was reached that both parties were to implement the Interested Party CBA in full as the Petitioners had joined the membership of Interested Party. The Petitioners however failed to implement the Interested Party CBA in full forcing the Respondent to file a complaint with FKE and an Agreement was reached don 12th September 2012. The Petitioners have since been remitting Union dues and agency fees tot eh respondents but abruptly stopped without notice forcing the Respondent to invoke section 76(c) of the Labour Relations Act.

16. The effect of the Petitioners pulling out their membership with Interested Party does not affect the employees terms and conditions of employment which terms and conditions are in the CBA in operation at the time of such withdrawal.

17. That in the circumstances of the case, the strike notice issued was legal, check-off

1. The Plaintiff's Notice of Motion application dated 11<sup>th</sup> February 2013 and filed on 16<sup>th</sup> October 2013 was brought under the provisions of Order 2 Rule 15(1) (a), (b), (c) & (d) of the Civil Procedure Rules 2010. It sought the orders that the Defendants' Statement of Defence be struck out and judgment be entered in favour of the Plaintiff as prayed in the Plaintiff's application.
2. The said application was supported by the Plaintiff's Affidavit and Supplementary Affidavit sworn on 11<sup>th</sup> February 2013 and 7<sup>th</sup> November 2013 and filed on 16<sup>th</sup> October 2013 and 9<sup>th</sup> November 2013 respectively. In response thereto, on 24<sup>th</sup> October 2013, the 2<sup>nd</sup> Defendant filed a Replying Affidavit sworn on the same date.
3. The Plaintiff's written submissions were filed on 17<sup>th</sup> June 2013 while those of the Defendant's (sic) were filed on 25<sup>th</sup> June 2014. Both sets of written submissions were undated.

#### **PLAINTIFF'S CASE**

4. A perusal of the Plaintiff's documentation placed before the court reveals that her case was that on or about 1995, she entered into an oral agreement with the Defendants where she was to purchase and the Defendants were to sell to her a parcel of land measuring 0.5 of an acre that was to be hived from L.R. No 12144/5/4 for a consideration of a sum of Kshs 3,500,000/=. Upon paying a sum of Kshs 3,510,835/= to the Defendants, they gave her a title deed of the said parcel of land now known as L.R. No 12144/102.
5. Acting on the belief that the said title was genuine and valid, she entered into an agreement with one Boniface Okwach for the sale and purchase of the Defendants' parcel of land hereinbefore identified as L.R. No 12144/102 for a consideration of Kshs 17,500,000/=.
6. The Plaintiff submitted that when the said Purchaser's advocates conducted due diligence on the property, it emerged that the certificate of title number 121325 was not genuine as the Defendants had not transferred any title to the Plaintiff or at all and that the said title was a worthless piece of paper as it related to L.R. No 4871/178 situated in Kikuyu and was registered in the name of one Michael Gichora Mugo.

#### **DEFENDANTS' CASE**

7. In their Defence dated 1<sup>st</sup> February 2013 and filed on 4<sup>th</sup> February 2013, the Defendants denied

the Plaintiff's assertions in the Plaint. They denied the said contentions in the Defendant's (sic) aforesaid Replying Affidavit and in particular the fact that there was no oral contract or otherwise for the sale of the aforementioned parcel of land by the Defendants to the Plaintiff as she had alleged or at all.

### **LEGAL ANALYSIS**

8. Particulars of loss suffered by the Plaintiff and those of the Defendants' fraud were itemised in the Plaintiff's Plaint dated 20<sup>th</sup> November 2012 and filed on 22<sup>nd</sup> November 2012.
9. As a result of the said loss and fraud, the Plaintiff prayed for the following reliefs:-

- a. **Kshs 3,510,835/= being the principal purchase price.**
- b. **Kshs 11,936,839/= being interest at 20% per annum from 1998 to the date of filing suit.**
- c. **Interest at court rates on (a) and (b) above till payment in full.**
- d. **Costs of the suit.**

10. Evidently, the nature of the Plaintiff's claim was one of interest over land. This was pursuant to an implied or constructive trust created in her favour as she had paid the purchase price for the purchase of a parcel of land from the Defendants. In her written submissions, the Plaintiff stated that she was not seeking specific performance but rather she was seeking a refund of all the monies that she paid the Defendants in addition to interest.

11. In their written submissions, the Defendant (sic) identified the following issues for consideration by the court:-

- a. **Was it possible to effect a transfer of land without any written agreement?**
- b. **Were the monies sent for the purchase of land?**
- c. **Was the sale of land concluded within the stipulated period?**
- d. **Did the interest claimed by the Plaintiff have any a basis?**

12. It is clear from the Plaintiff's advocates' letter dated 29<sup>th</sup> January 2013 to the Deputy Registrar High Court of Kenya Civil (sic) and Admiralty Division that when the Plaintiff requested for judgment in its Request for Judgment dated 29<sup>th</sup> January 2013 and filed on 4<sup>th</sup> February 2013, the said Deputy Registrar declined to enter interlocutory judgment against the Defendants herein. This was premised on the ground that this was a matter that should have been heard in the Environment and Land Court Division.

13. In the Practise Directions on the proceedings relating to the Environment and the use and occupation of, and title to land contained in Gazette Notice No 13573 dated 20<sup>th</sup> September 2012, it was expressly stipulated as follows:-

**“6. All new cases relating to the environment and occupation of, and title to land shall be filed in the nearest Environment and Land Court for hearing and determination by the said court.”**

14. This was the same direction that was contained in the Practise Direction Gazette No 1617 dated 9<sup>th</sup> February 2012 which was subsequently superseded by Gazette Notice No 13573 cited hereinabove.

15. Practise Directions on the proceedings relating to the Environment and the use and occupation of, and title to land contained in Gazette Notice No 16268 relating to the Environment and Land Court Act No 19 of 2011 dated 9<sup>th</sup> November 2012 subsequently superseded Gazette Notice No 13573 cited hereinabove. The same provided as follows:-

**“ 4. All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence shall be transferred to the Environment and Land Court as directed by the Chief Registrar.**

**12. All new cases relating to the environment and the use and occupation of, and title to land not falling under paragraph 7 (being those that had been filed at the Magistrates' courts)-(emphasis court) shall be filed at the nearest Environment and Land Court for hearing and determination by the said court."**

16. This court could not therefore have agreed more with the Deputy Registrar of the High Court of Kenya Commercial and Admiralty Division that this a matter that squarely falls within the jurisdiction of the Environment and Land Court Division as the dispute related to an interest over land. The suit herein was filed on 22<sup>nd</sup> November 2012 when the Chief Justice, the President of the Supreme Court of Kenya, had already made very concise Practise Directions. Parties ought not to file matters in courts which are convenient to them but rather they must follow the clearly laid down procedures for the sake of good order to avoid forum shopping.

17. In light of the foregoing and having looked at the pleadings placed before the court and those on the court record, it is very clear that there is no commercial element in this matter. The same should never have been filed in the High Court of Kenya Milimani Law Courts Commercial and Admiralty Division in the first place.

### **DISPOSITION**

18. Accordingly, the court will not consider the merits of the Plaintiff's present application but it will instead transfer this file to the Environmental and Land Court Division for determination.

19. As the Plaintiff's advocates did not heed the advise of the aforementioned Deputy Registrar when he gave the same, the court hereby directs that parties take a date at the Environment and Land Court Division registry when this matter will be mentioned before the Presiding Judge High Court of Kenya Milimani Law Courts Environment and Land Court Division for her further orders and directions herein.

20. There will be no order as to costs as the court did not hear the substantive issues herein.

21. It is so ordered.

**DATED and DELIVERED at NAIROBI this 16<sup>th</sup> day of September 2014**

**J. KAMAU**

**JUDGE**

forms were served upon the Petitioners and thus aware of Respondent members and should thus remit all dues inclusive of those outstanding and that the Petitioners are bound by the CBA for the period of 2012-2013 between Interested Party and respondents. In the alternative, where the Petitioners do not wish to be bound by the Interested Party CBA, to sign a Recognition Agreement and CBA in 30

days and in the absence of these orders, the respondents are at liberty to commence a strike.

18. On 10<sup>th</sup> March 2014, both the Petitioners and the respondents where they made presentations with regard to the applications before court. The Court made the following directions;

(1) There be stay of the Strike notice issued by the respondents and dated 3<sup>rd</sup>

March 2014 until further orders of the court;

(2) Parties herein to commence collective bargaining Agreement (CBA)

negotiations immediately;

(3) The Chief Industrial Relations Officer at the ministry of Labour and Social Services to facilitate and expedite the process of having the parties herein having a CBA within the next 45 days; and

(4) Mention on 5th May 2014 for further court directions.

19. On 5th May 2014, the Court enjoined the AEA as an Interested Party herein. Parties had not been able to negotiate on the basis that the Interested Party had joined the process midway. Therefore, no CBA was ready for registration. On 18th June 2014 parties herein appeared in court and developed a list of issues with regard to the petition upon which each was to file their written submissions.

20. The list of agreed issues;

**Whether the Petitioners by membership of Interested Party can negotiate a direct CBA with the respondent;**

**Whether the CBA between the Interested Party and Respondent is binding upon the Petitioners;**

**Whether the CBA between the Interested Party and the Respondent binds the Petitioners from the date of admission as an implementation of the CBA or the effective date of the CBA; and**

**Whether the Petitioners is under obligation to deduct and remit Union dues or agency fees to the respondent.**

21. On the above issues each party filed their written submissions.

#### **Petitioner's submissions**

22. The petitioner submitted that in early March 2014, the Respondent issued Strike notice to the Petitioners forcing them to come to court to seek urgent restraining orders and the Court on 7th March 2014 gave interim orders. The parties commenced negotiations of a CBA and were to report back to court in 45 days. The Petitioners being members of the Interested Party invited the Interested Party to negotiate with the Respondent on their behalf. However the respondents wanted to negotiate directly with the Petitioners which would defeat the fact of the petitioner's membership of the Interested Party.

23. When the court gave directions on 10th March 2014, the Petitioners invited the respondents to a meeting on 5th April 2014 and another dated 14th April 2014. For the negotiations the petitioners joined membership of the Interested Party on **17th April 2014** for the reasons that there was a right to associate as under section 6 of

the Labour Relations Act and Article 41(3) (e) of the Constitution and by so joining, this was a recognition that the Petitioners had fully accorded recognition to the respondent. There was pressure to conclude the CBA within 45 days and instead of renegotiating a new CBA, by joining the Interested Party to have their CBA apply was the most efficient way to address the matter. Other reasons for joining the Interested Party were that they already had a CBA with the Respondent which the petitioners were willing to adopt as the most ideal in the flower industry.

24. On 22nd April 2014, the Interested Party thus notified the respondent that they would attend negotiations as a representative of their member, the Petitioners. The respondents however refused to sign the Certificate of Agreement as drafted as they expected a direct CBA with the Petitioners. This refusal was in disregard of the fact that the petitioners by joining the Interested Party were committed to recognising the respondent and having the CBA in force apply to them and by virtue of their membership could not negotiate a direct CBA with the respondent as the CBA in force was binding them from the date they joined the Interested party. In the absence of the respondents giving them an updated list of their members in their employ, the Petitioners are unable to deduct Union dues or the agency fees.

25. Under Section 59 of the Labour Relations Act, where there is a CBA between parties the same become binding on both party and no third party can force a party

bound by a CBA out of it. The CBA between the petitioner and the Interested Party exists as the Interested Party is the one correctly governing the floriculture industry and the mandate given to the Interested Party by its members is to negotiate CBA for their members. The Interested Party gives service to its members who have a right to these services. The respondents cannot therefore engage in direct negotiations of a CBA where the Petitioners have notified them of their membership with the Interested Party. No direct CBA can result as between the Petitioners and the Respondent noting petitioner's membership with AEA/Interested Party

26. To negotiate a CBA outside what the Petitioners have with the Interested Party would be punitive on the Petitioners. When court directed parties to commence CBA negotiations, there was an implied term that there was a CBA that was to be concluded. This CBA has to take effect from the date of judgement and not any date before. Such commencement date will affect any dues payable to the Respondent with regard to Union dues in arrears and agency fees.

27. The petition is based on the grounds that the Petitioners do not have an updated list of registered members of the respondent. To make orders that are retroactive would be punitive on the Petitioners.

28. The Respondent on their part submitted that there is a valid CBA between the Petitioners and the Respondent covering the period of 2011-12 and 2013-2015. The court in Industrial Cause No.363 of 2011 directed the Petitioners to sign a Recognition Agreement and a CBA. The Petitioners chose to join the Interested Party who had a CBA with the Respondent covering the period from 14th December

2011. In July 2013, the Petitioners withdrew their membership from the Interested

Party during the review of the 2013-2015 CBA; which fact did not affect the CBA in force at the time with term and conditions that were replicated in the CBA now registered under **RCA No. 68 of 2014** for 2013-2015 despite the withdrawal of the Petitioners from the Interested Party and later re-joining.

29. The Respondent and the Interested Party have a Recognition Agreement with provisions to enter into negotiations on agreed matters part of which provisions is when the Respondent can directly negotiate with a member of the Interested Party. Several such members have engaged the Respondent directly to negotiate new CBA

without any objections by the Interested Party as with the case herein for the

Petitioners.

30. The Respondent is therefore seeking that the terms of the CBA for the period of 2011-2012 and 2012-2013 between the Interested Party and the Respondent be held as binding between the respondents and the Petitioners despite petitioner's withdrawal from the Interested Party. An order that the Petitioners to implement the CBA with regard to 2012-2013 in full. The respondents are seeking alternative orders, that where the cost of implementing the CBA is too high, the Court to direct the Petitioners and the respondents to negotiate a new CBA within 30 days and that the petitioner do remit all Trade Union dues from unionisable employees together

with agency fees in accordance with Gazette Notice No. 31212 dated 26th October 2010.

31. The Interested Party on their part submitted that on the issue as to whether the petitioner being a member of the Interested Party can negotiate a direct CBA with the respondent, clause 2(b) of the Recognition Agreement between the Interested Party and the Respondent make provision that there should be no negotiations with any other party on matters listed therein. The Respondent is precluded from negotiating with Interested Party members directed due to the Recognition Agreement between them. However the Respondent has violated the clause giving rise to litigation one such being Cause No.116 of 2013 where the respondent, as the claimant filed a claim seeking for orders that negotiations be commenced and a CBA be concluded, with a member of the Interested Party . The court held that where a CBA was registered with a member out of a federation that had a Recognition Agreement with

the union, such CBA was invalid. Where an Interested Party member is placed at a unique situation, they have an option of entering into a separate Recognition Agreement with the Respondent to facilitate them addressing such an issue but where such Recognition Agreement does not exist and the employer remains a member of the Interested Party, such a member cannot be forced to directly negotiate with the respondent.

32. On whether the CBA between the Interested Party and Respondent are binding upon the Petitioners, the Interested Party submitted that the CBA covering the period 2013-2015 between the Interested Party and Respondent expressly lists the Interested Party members, which does not include the Petitioners. There cannot therefore be legal obligations flowing from this CBA upon the Petitioners as they are not bound by it. The CBA cannot be used upon the Petitioners without their express authority.

33. On whether the CBA between the Interested Party and Respondent binds the Petitioners from the date of admission or from the effective date, the Interested Party submitted that where a CBA does not exist between parties, no party is bound by it and where a CBA exists with regard to any party that excludes another, that other party can only be bound with their express authority. In this case there exists no CBA between the respondents and the Petitioners and in the event the petitioner's wishes to voluntarily use the CBA with the Interested Party with regard to their relationship with the respondents, such intention must be filed and the date of taking effect is the date of admission. The Petitioners should therefore be allowed to apply the provisions of the existing CBA between the Interested Party and Respondent from the date the date of their admission and not before.

34. Deduction of Union and agency fees is regulated by the law and not up for negotiations. The Petitioners have offered to implement the 2013-2015 CBA which make provision for Union dues deductions. Once the Respondent is able to agree on the admission of the Petitioners, the issue of agency fee will also be resolved. The Petitioners therefore have a right to association as under article 36 and 41 of the Constitution and to enter into collective bargaining as under section 54(2) of the Labour Relations Act and cannot be forced into either relationship. The Petitioners by joining the Interested Party are exercising their constitutional rights. There are no valid reasons why the Respondent is not willing to exercise their right to unionise by accepting the CBA applicable to the petitioner through their membership in Interested Party.

### **Determination of the issues**

35. The principle of freedom of association is at the core of labour relations in Kenya. This has its basis in international conventions, regional treaties and Constitution of Kenya. The basic International Labour Organisation's (ILO) values are enshrined in the ILO Constitution of 1919, the ILO Declaration of Philadelphia of 1944, and the ILO Declaration on Fundamental Principles and Rights at Work of

1998. The right to associate is furthered given strength as a right proclaimed in the Universal Declaration of Human Rights of 1948 and follow up Covenants specifically the Covenant on Civil and Political Rights. . the rights to associate and organise at the workplace and within labour relations is also recognised under the African charter on Human and Peoples' Rights of 1981 as approved by African member states seating in Nairobi in 1981. This then gives a firm basis to the right to associate and for workers and employers to unionise and confederate as under Article 36 and 41 of the Constitution. Statutes have also been enacted by Parliament on how workers and employers are to enjoy the right to associate, organise and form their own Union or federations as under the Labour Relations Act.

36. For this purpose, the Labour Relations Act defines a Recognition Agreement at section 2 as;

*“Recognition agreement” means an Agreement in writing made between a Trade Union and an employer, group of employers or employers’ organisation regulating the Recognition of the Trade Union as the representative of the interests of unionisable employees employed by the employer or by members of an employers’ organization;*

37. Further, the Act defines a Collective Agreement as;

*“collective agreement” means a written Agreement concerning any terms and conditions of employment made between a Trade Union and an employer, group of employers or organisation of employers;*

38. Therefore, where there is a Union such as the Respondent herein and an employer such as the Petitioners herein, for there to be a legal relationship binding upon the parties, an Agreement in writing, regulating the Recognition of the Trade Union as the representative of the interests of the unionisable employees employed by the employer is imperative. Once there is such Recognition, a Trade Union becomes the legal entity to enter into written Agreement concerning the terms and conditions of employment for the member/employees of the employer they represent. Such agreements must be registered with the Industrial Court to take effect as under section 59 of the Labour Relations Act. Such representation is further regulated by the provisions of Part VII of the Labour Relations Act.

39. Recognition of a Trade Union is therefore crucial, as with this Recognition other rights flow. These rights include the Union being able to enter into a CBA with the employer or with the employers' organisation. Once there is Recognition, it is an acknowledgement that the Union has a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector. This is the basis of section 54(2) of the Labour Relations Act;

*(2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a Trade Union for the purposes of collective bargaining if the Trade Union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of*

*The employers' organisation within a sector.*

40. Where an employer is no longer keen to recognise the union, there is provision for the same, which must be done through application to the National Labour Board seeking the termination or revocation of such Recognition. Where the Union wishes to contest this termination, revocation or application, there is provisions that parties are to file their matter at the Industrial Court. This is provided for under section 54(5) of the Labour Relations Act;

*(5) An employer, group of employers or employers' association may apply to the*

*Board to terminate or revoke a Recognition agreement.*

41. The background to this petition is important to revisit. Matters of Recognition between the Petitioners and the Respondent were the subject of **Industrial Cause No.363 of 2011** where the court gave specific directions;

- on 4th April 2011 that Recognition Agreement be signed within 4 weeks;
- To affirm this, on 28th September 2011, the Interested Party wrote to the Respondent with confirmation that the petitioners were their members and would implement the ongoing CBA [2011-2013] under negotiations once registered and thus there was no need to the Petitioners to enter into a new Recognition Agreement with the respondents;
- The CBA was subsequently registered on 14th December 2011 vide **RCA No. 343 of 2011** for the period of 2011 – 2013;
- On 12th March 2012 the Interested Party further wrote to the Respondent on the membership of the Petitioners with them;

- On 28th January 2012, the Respondent filed **Industrial Cause No.182 of 2012** against the Petitioners on the issue of indiscriminate implementation of the CBA for the period of 2011-2013 and seeking for orders that they implement the CBA in full;
- The Respondent also filed **Industrial Cause No.576 of 2012** between themselves and the Petitioners on harassment, victimisation and dismissal of their members;
- On 15th March 2012 the Petitioners filed **Industrial Cause No. 363 of 2012** against the respondents seeking restraining orders on a planned industrial action, and later a return-to-work formula was reached on the basis that a Recognition Agreement was to be signed and a CBA was to be entered in 8 weeks from 4th April 2014;
- On 12th August 2012, parties reached an Agreement to implement the Interested Party CBA;
- on 22nd July 2013 the Petitioners withdrew their membership with the Interested Party during the review of the 2013-2015 CBA;
- on 3rd March 2014, the respondent issued a Notice to go on strike on 8th March 2014;
- on 5th March 2014, the Petitioners filed this Petition seeking to stop the strike;
- on 10th March 2014, the Court directed the Petitioner and the Respondent to commence negotiations with a view of having a CBA within 45 days; and
- On 17th April 2014 the Petitioners re-joined the Interested Party.

42. With the above thus outlined and going back to the listed issues as above, on whether **the Petitioners by membership of Interested Party can negotiate a direct CBA with the respondent**, as outlined by the Interested Party in their submissions, once an employer in the floriculture sector becomes their member, such member enjoys benefits such as the application of the CBA in force with a Union such as the Respondent where such a CBA exists. In this regard, the Interested Party was already in Recognition of the Respondent with is a CBA registered as between them covering the period 2011 – 2013, and renewed for the period of 2013-2015. When the Petitioners joined the Interested Party, that membership came with its benefits part of which was the application of the CBA. However, where a member of the Interested Party is dealing with a unique situation either not covered by the Interested Party CBA or not adequately so covered or not covered at all, such a member may enter into Recognition directly with the Union such as the respondent.

43. A Member of the Interested Party keen to enter specific Recognition with any Union is therefore merited. However such direct negotiations of a member of the Interested Party and a Union must be communicated in writing to the Interested Party. With such knowledge, then the Interested Party cannot be held liable for a member who out of notice and choice enters into a Recognition Agreement with a Union.

44. The challenge posed here is that the Petitioners have in the past been members of the Interested Party, and before the conclusion of the CBA covering the period 2011-2013 they withdrew their membership. The Petitioners have since re- joined the Interested Party. During the period the Petitioners were members of the Interested Party, the Interested Party and the Respondent had a Recognition Agreement that was agreed upon to cover all Interested Party members inclusive of the Petitioners and on the basis of this Recognition, the parties went into negotiations with regard to the CBA covering 2011-2013 and even commenced negotiations with regard to the CBA covering 2013-2015. This latter CBA was concluded and registered as **RCA No. 68 of 2014**. These CBAs come with rights, obligations and duties on each party, part of which is to review terms and conditions

of work. The Petitioner on 17th April 2014 re-joined the Interested Party and agreed to be bound by the terms of the existing CBA 2013-2015.

45. While the Petitioners remained members of the Interested Party, the CBA applicable between the Interested Party and the respondents was as a result applicable to them. But things do not seem to have worked smoothly as despite the membership of the Petitioners to the Interested Party, various Causes were filed before the Court on matters that ordinarily were covered under the effective CBA on employment dues and industrial action. Out of **Cause No. 182 of 2012** there are orders directing the Petitioners and the Respondent to have a Recognition Agreement and a CBA within a specific timeline. Under **Cause No.363 of 2012**, the court ordered the respondents herein not to engage in industrial action and to engage in negotiations that resulted in a return-to-work formula and negotiations on a Recognition Agreement and CBA while in Cause **No.576 of 2012**, the Petitioners herein were ordered not to harass, intimidate and or dismiss Respondent members in their employ.

46. Therefore the Petitioners though members of the Interested Party can opt and negotiate directly with the Respondent Union on matters they choose so to be covered by a separate Recognition agreement or a CBA. Where no separate Recognition Agreement exists as between them through mutual consent, the Interested Party Recognition Agreement applicable to its members applies. However caution is to be taken as where the Petitioners withdrew from the membership of the Interested Party during the subsistence of a CBA that CBA does not cease to operate with regard to the Union members in their employ. There are rights and obligations that flow from the existing CBA until the same is revoked. Employee's terms and conditions of employment and their contracts of employment do not cease simply because the employer has withdrawn their membership from their organisation or federation.

47. On 10th March 2014, the Court directed parties to commence negotiations immediately under the office of the Chief Industrial Relations Officer on the basis that, the parties engaged at the time were the Petitioners and the respondents only. The petitioners did not at the time disclose to the Court that they were members of the Interested Party or were intending to re-join the Interested Party to act for and on their behalf. Had this been disclosed at that material time, the Court would have directed accordingly. Even where the Petitioners did not disclose this fact to the Court or to the respondents at the time, immediately the Petitioners knew that they would be represented in the negotiations by the Interested Party; this should have been brought to the attention of the Court by the Petitioners at the earliest. The application by the Interested Party to be enjoined in the suit should have in essence been filed by the Petitioners.

48. For the Petitioners to now claim constitutional right to associate, even where they enjoy this right, what is lawful in labour relations jurisprudence may not necessary be a fair labour practice. See the decision of this Court in **Industrial Cause No.100 of 2012, Collins Orotu Lukhale versus AAA Growers Limited** see also the analysis of what fair labour practices entail in labour relations in **Elizabeth Washeke and 62 Others versus Airtel (K) limited and Another, Cause No 1972 of 2013**.

49. On the issues as to **Whether the CBA between the Interested Party and Respondent is binding upon the Petitioners**, based on the outlined issues above and based on matters outlined under Industrial Cause No.182 of 2012 and Industrial Cause No.576 of 2012, therein exists orders directing the Petitioners and the respondents to have a Recognition Agreement within a set timeframe. I find no challenge to these submissions to negate the orders granted under Industrial Cause No.182 of 2012 and Industrial Cause No.576 of 2012. Even where the orders were not fully complied with, the Petitioners became members of the Interested Party within the duration where the Respondent and the Interested Party had a running CBA that became applicable to the Petitioners by virtue of their joining the membership of the Interested Party covering the period 2011-2013 and 2013-2015 in pursuance to the provisions of section 59(1) and (2);

*59. (1) a collective Agreement binds for the period of the Agreement –*

*(a) the parties to the agreement;*

*(b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or*

*(c) The employers who are or become members of an employers' organisation party to the agreement, to the extent that the Agreement relates to their employees.*

*(2) A collective Agreement shall continue to be binding on an employer or employees who were parties to the Agreement at the time of its commencement and includes members who have resigned from that Trade Union or employer association.*

*(3) The terms of the collective Agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.*

50. Therefore the essence of section 59(1) and (2) is that;

a) A CBA becomes binding on parties to the Agreement for the stated duration;

b) A CBA becomes applicable to all unionisable employees employed by the employer or groups of employers bound the agreement;

c) A CBA becomes applicable to employers who are or become members of an employer's organisation party to the Agreement with regard to their employees;

**d) A CBA continues to be binding on an employer or employees party to the Agreement at the time of its commencement which includes members who have resigned; and**

e) The terms of the CBA are to be included into the employment contracts of each/every employee.

51. Therefore section 59(2) make provision for situations where an employer, being a member of an employer's organisation opts out of such organisation while there is an ongoing CBA, such an employer remains bound by such CBA, the resignation or opting out notwithstanding. In this case, where the Petitioners became members of the Interested Party and the Interested Party wrote to the Respondent indicating that the Petitioners were their members and would be bound by the existing Recognition Agreement and the CBA applicable at the time as between the Interested Party and respondents, then the Recognition Agreement and the CBA in force at the time of the Petitioners joining the Interested Party automatically became the effective and applicable CBA. When the Petitioners resigned and opted out of the Interested Party membership, section 59(2) remained in force and the Recognition and CBA operative at the time being 2011-2013, continued in force with regard to the relationship as between the Petitioners and the Respondent for the entire duration the same was agreed upon by the respondents and the Interested Party. Equally, the Petitioners have re-joined the Interested Party during the existence of another CBA covering 2013-2015, they have indicated their willingness to be bound by this CBA. This in essence then addressed matters that were subject of court orders in Industrial Cause No.182 of 2012 and Industrial Cause No.576 of 2012.

52. The Petitioners are therefore bound by the terms of the CBA for the period of

2011-2013 and 2013-2015 as between the respondents and Interested Party where the Petitioners are members. The Union dues and agency fees due to the Respondent from the Petitioners during these periods becomes due and owing. The effective dates are applicable under both CBA covering 2011-2013 and 2013-2015. This is the implication of section 59(1) and (2) of the Labour Relations Act.

53. I note the content of the interested Party letter to the respondent dated 22nd April 2014 and the attached communication. Despite this communication indicating that the Petitioners had joined the Interested Party and agreed to be bound by the effective CBA 2013-2015 as registered on 14th

February 2014, by operation of section 59 of the Labour Relations Act, the effective date for the applicable CBA cannot be a matter of choice. There is a legal requirement to the same. The CBA cannot be applied in piecemeal and taking its context, the entire duration is relevant.

54. The above finding therefore addresses the three issues with regard to the application of the CBA covering the period 2011-2013 and 2013-2015 and the date of effect being the entire period of the CBA. Equally in the same chain, the CBA being applicable between the Petitioners and the Respondent for the 2011-2013 and

2013-2015 periods, the Petitioners shall pay the Union dues and agency fees for the periods the CBA are in force.

55. Where the Petitioners no longer wish to be bound by the Interested Party Recognition Agreement as between them and the Respondent, this is to be expressed in writing within the next 14 days as under the provisions of section 54(5). Where no such procedure is followed, the CBA applicable to the Petitioners through their membership of the Interested Party shall remain in force for its duration.

56. With the above outlined issues and the analysis, it is important to go back to the reasons as to why the Petitioners came to Court in the first place. The threat by the respondents to engage in an industrial action that was not protected. This issue

though not canvassed by either party or outlined in the list of issues, it is important for this Court to go back to.

57. Following the history of the relationship between the Respondents and the Petitioner since 2011, the question of Recognition has been in dispute prompting several matters being filed before this Court and its predecessor under Industrial Cause No.182 of 2012 and Industrial Cause No.576 of 2012 and Cause No.363 of

2012 and the current suit. Each time the Respondent is aggrieved, a cause is filed which go back to the issue of Recognition. The Petitioners as well, both times they have initiated suits was to stop pending industrial action. Each time, parties opt out to settle the matter with varying orders with regard to drawing Recognition and a CBA. Each time, and observing from the submissions, the Petitioner does join the Interested Party and just before there are firm conclusions to a CBA as in the case of negotiations for the 2011-2013 CBA, they resign or opt out of this membership. Against while negotiations were ongoing for the 2013-2015 CBA, the Petitioners withdrew their membership with the Interested Party. The respondents, each time there is breakdown in negotiations, they issue strike notice. This must stop. As otherwise, there will be a plethora of suits going around the same issue of Recognition and CBA that is not useful for peaceful industrial relations as between the Respondent Union and the Petitioners as employers.

58. The essence of labour relations is for both parties to act in good faith and for the Interested Party to ensure that their members get the best support even as they enjoy their rights as under Article 36 and 41 of the Constitution to associate and confederate as they wish. The essence of fair labour relations is defeated where the Petitioner keep getting in and out of the Interested Party membership, an action that frustrate negotiations and not in the best interests of what is desired for fair labour practices. Similarly, the Respondent is aware of the provisions for a protected strike and before issue of strike notice, any dispute must be registered with the Minister and where not resolved, the same registered with the Court like in the instant Petition.

59. There is now ample jurisprudence of this Court with regard to what constitute fair or unfair labour practices. The opting in and out of negotiations even where a party has that right is one such indication that parties are not acting in good faith and thus an unfair labour practice. This court will equally not force any party to be enjoined to another without their consent. But from each relationship the Petitioners enters into and then opt out of, left behind are a list of obligations that must be met. These include commitments made during the subsistence of their membership with the Interested Party; to be

bound by existing CBAs in their entirety and duration as behind each CBA there are employees who have rights too. These rights must be protected as the Court seeks to protect the rights of the Petitioners to enjoy their freedom to association and join an organisation of their choice.

60. The strike notice issued by the Respondents, though allowed as under the applicable CBA, the same must be read within the meaning of section 76 and 77 of the Labour Relations Act. Even with the Notice issued by the Respondents with regard to section 76(1) (c), the Court has to give directions before such notice is enforced as under section 77(3);

*(3) The National Labour Court [Industrial Court] may, in granting relief in respect of any application made under subsection (1) (b), direct the parties to engage in further conciliation in good faith with a view to resolving the dispute.*

61. Such reference of matters in dispute between parties at the workplace is to ensure further conciliation in good faith with a view to resolving the dispute. Each party must engage in such further conciliation within the realms of fair labour practices.

## **Conclusion**

**Noting the above, Judgement is hereby entered in the following terms;**

- (a) A declaration that the Petitioners and the Respondent are bound by the terms of the Collective Bargaining Agreements applicable for the periods 2011-2013 and 2013-2015 as between the Respondent and the Interested Party ;**
- (b) A declaration that the effective dates for the application of the Collective Bargaining Agreement for the Petitioners and Respondent is the entire duration of the 2011-2013 and 2013-2015 subject to any reviews that the agreement for 2013-2015 may be subjected to by consent of the party or other lawful orders;**
- (c) Where the Petitioners no longer wish to be bound by the Interested Party Recognition Agreement and Collective Bargaining Agreement as between them and the Respondent, this is to be expressed in writing;**
- (d) The Respondent shall not engage in industrial action vide notice dated  
3rd March 2014;**
- (e) The Petitioners shall remit Trade Union dues of all unionisable employees members of the Respondent and the agency fees dues from all unionisable employees not members of the Respondent as due and outstanding to date, all to be paid on or the 2nd of October 2014;**
- (f) The matter will be mentioned on 9th October 2014 for the Court to confirm compliance as (e) above;**
- (g) Each party will bear their own costs**

These are the Orders of the Court.

**Delivered in open court at Nairobi this 25th Day of September 2014**

**M. Mbaru**

**Judge**

In the presence of: