REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 26 of 2010

TRANSPORT AND ALLIED WORKERS UNION (K)………………CLAIMANT

VS

AFRICAN SKY CHARTERS……………..……....…APPLICANT/RESPONDENT

RULING

Mr. H. Okeche, Advocate for Applicant
Mr. Tony Ndege for Respondent. Claimant

The Application to review, set aside and vacate the Award delivered by Justice Paul Kosgei on 2nd December 2010 is dated 7th February 2011. It is premised on the following grounds contained in the Supporting Affidavit of Mary Regina Thomson:-

1. That the award grants the Claimants recognition in violation of the law as the claimant has never attained a simple majority as required by the law.

2. That as at the time of hearing the matter the Claimant had only 2 members as opposed to a minimum of 5 required by law for purposes of check-off and by analogy part of membership.

That it is in the interest of justice therefore to set aside the award and hear the matter afresh. That the Respondents will suffer irreparable harm should the award remain since it would be forced to negotiate with minority employees to the detriment of the majority. That the balance of convenience favours the grant of the orders sought since both parties will be granted opportunity to present their case afresh. After all the landscape has since changed because the Claimant is no longer the relevant union for the Respondent's employees after this court authorized the registration of Aviation and Allied Workers Union.

The Claimant/Respondent filed a replying memorandum in opposition to the Application. It states in the main that:-

1. There is no new evidence to support the review and or setting aside the Award of the Court.

2. That the application is an abuse of the court processes in that the situation has not changed to warrant variation of the court award in that;

(a) the Union as demonstrated in the original application secured a simple majority during the time of recruitment.

(b) that there is no pending dispute to date on the recruitment despite the Respondent intimidating and frustrating the employees to revoke their union membership.

(c) that the Union recruited 10 of the 16 members thereby achieving simple majority for purposes of signing a recognition agreement.

(d) that the members continued to pay their union dues directly to the Union.

(e) that signing a recognition agreement in no way prejudices the operations of the Respondent but will instead lead to constructive engagement on the shop floor.

(f) that the Claimant/Respondent represents employees of C.M.C. Aviation, Z. Boskvic Air Charters; Balloon Safaris and so on, with registered CBAs by this Hon. Court and the issue of a rival union does not arise in the circumstances of the case.

Rule 32(1) of the Industrial Court (Procedure) Rules 2010 provides that:-

"A person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgment or ruling;

(a) if there is a discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) on account of the award, judgment or ruling being in breach of any written law; or

(d) if the award, the judgment or ruling requires clarification; or
(e) for any other sufficient reasons".

The application for such review is in terms of Rule 32(2) to be made to the judge who passed the decree or made the order sought to be reviewed.

In the present matter, the judge who made the Award is no longer a judge of the Court. In the circumstances, the court deems it just and equitable to consider the application and make a finding as appropriate.

The award of the court was based on Section 5(2) of the now repealed Trade Disputes Act Cap.234, Laws of Kenya which provided that where a majority of the eligible employees in an undertaking and there was no rival union claiming to represent such employees, the Minister may order in writing the employer to accord recognition to that Union for negotiating and Collective Bargaining purposes.

The judge made findings of fact that there was consensus, the Claimant was the correct union and that there was no rival union seeking to represent the respondent's employees. The only issue in dispute was whether or not the Claimant had recruited a simple majority.

Both parties were in agreement that the Claimant had recruited 10 out of the 15 unionisable employees of the Respondent and made an application for recognition of the union. They comprised more than 51% of the employees.

The judge made a finding of law, that the material time for consideration of the strength of union representation is the time of recruitment. The Respondent had argued that three employees had subsequently resigned from the Union and thereby denying it a simple majority at the time it came to court. The court also refused to be persuaded that the three resignations were made voluntarily but was in its view a result of harassment and intimidation by the employer. The Respondent had also purportedly

conducted a survey in 2010 to gauge the strength of the union and the court found this exercise to be an illegal activity in that it could be construed as intimidation to the employees.

The court found that the Claimant had established a case for recognition by the Respondent and rejected the respondent's version.

Upon a careful analysis of the award, the court finds that no new facts have been disclosed in the application for review nor are there any errors or mistakes apparent on the face of the award itself.

The court has also been unable to find a breach of the relevant written law on the subject by the judge.

It is trite that the percentage of members recruited is reckoned at the time the Application for recognition is made and not subsequently. There is nothing whatsoever on record to show that the Claimant had not achieved this threshold at the time of reckoning.

The Application for review is therefore without merit and the same is dismissed with costs.

It is so ordered.

DATED and **DELIVERED** in Nairobi this **24th** day of **January, 2013**.

Mathews N. Nduma

PRINCIPAL JUDGE