REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA NYERI

CAUSE NO. 6 OF 2012

(Nairobi Cause No. 190 of 2012)

BANKING, INSURANCE &

FINANCE UNION (KENYA) …..... CLAIMANT

VERSUS

KIRINYAGA DISTRICT

COOPERATIVE UNION LTD. …..... RESPONDENT

KENYA UNION OF COMMERCIAL

FOOD & ALLIED WORKERS UNION …..... INTERESTED PARTY

R U L I N G

This matter was scheduled for hearing on 7th June, 2013 when Mr. Owiyo for the Interested party informed the court that the interested party was withdrawing from the proceedings on the ground that their contention that the interested party had a valid recognition agreement with the respondent could not be sustained since no employer could have a recognition agreement with more than one Union. He informed the court that the interested party lost the argument to the claimant hence had no interest in pursuing the matter.

Mr. Munoru for the claimant consequently sought adjournment to enable him amend the claimant's claim in the light of the withdrawal by the interested party. The application for adjournment was opposed by Ms. Gladwell Mumia who appeared for the respondent on the ground that the withdrawal by the interested party did not prejudice the claimant's claim since the reliefs sought did not hinge on the interested party. In any event the claim was filed before the joining of the suit by the interested party.

Ms. Gladwell however drew the court's attention to the preliminary objection contained in paragraph 4 of respondent's memorandum of response and sought leave of court to argue the preliminary objection first.

The court granted leave to the interested party to withdraw from the suit but deferred the ruling on leave to amend the claim pending the outcome of the preliminary objection raised by Ms. Mumia.

According to Ms. Mumia, the claimant lacked the locus standi to bring the claim since it did not disclose on whose behalf the claim was brought.

She stated that rule 4c of the rules of the court require a party to set out names, physical address of any other party involved in the dispute. It was her contention that the claimant did not disclose who the grievants were as required by the rules.

Further, she argued that rule 9(3) of the rules of the court require that a statement of claim should be accompanied by the names of other claimants, their address, details of wages due and particulars of other breaches and reliefs sought. According to her, the matter is in respect of grievants who claim to have been locked out yet there is no list hence according to her the matter lacked factual details. Counsel contended that the memorandum of claim did not disclose the employees concerned and how many they were.

Counsel further argued that the claimant did not have a valid recognition agreement during the period respondent's workers were declared redundant hence were not a party to the negotiations that took place leading to redundancy. It was contended on behalf of the respondent that the claimant having taken over from Kenya Union of Commercial Food and Allied Workers Union, the interested party, which was the relevant union at the time of redundancy, was bound by the settlement reached between that Union and the respondent. The claimant cannot in the circumstances resurrect the matter as they are bound by the agreement reached between the respondent and the interested party. According to Ms. Mumia therefore, the claim before the court is bad in law, frivolous and should be dismissed.

Mr. Munoru in opposing the preliminary objection stated that the claimant is a registered trade union and prior to entering into a recognition agreement with the respondent was represented by the interested party. He contended that section 21 of the Labour Relations Act provides that a trade union is a body corporate with capacity to sue and be sued. The change from one trade union to another therefore does not create any vacuum. He further cited section 54 of the Labour Relations Act and argued that if a trade union changes, the recognition agreement is adopted in content and purpose. To demonstrate this he relied on annex 1 of the memorandum of claim which provided that the parties would adopt terms and conditions existing and in force. The clause preserved the purpose and content of the recognition agreement and the CBA in force with the respondent so that if there was a dispute before the claimant came into being the same also got adopted since the claimant fitted into the shoes of Kenya Union of Commercial Food & Allied Workers in all matters.

According to Mr. Munoru, the Union having entered into a recognition agreement with the respondent is bound to represent employees of the respondent without any discrimination. It was his contention that an employee cannot be discriminated against by reason of his or her past union membership. To do so, he argued, would be contrary to article 27 of the Constitution. Section 5(2) of the Labour Relations Act and Section 5 of the Employment Act.

Mr. Munoru urged the court to be guided by article 159 of the Constitution and avoid technicalities. He further cited article 22 of the Constitution which permits informal documentation and keeping formalities minimal in enforcement of rights under the Constitution.

Mr. Munoru submitted that contrary Ms. Mumia's contention, rule 4 of the Industrial Court rules makes reference to employees and grievants and that parties are defined under rule 2 of the court rules. It was his submission therefore that Ms. Mumia's interpretation of rule 2 of the Industrial Court rules was misleading. According to him rule 9 referred to where an employee is filing on behalf of others and not where it is the Union filing. Mr. Munoru argued that if there was defect in the names, the respondent ought to have invoked provisions of article 35 of the Constitution. According to him, the issue of non-disclosure of the names could not be used as a basis for disallowing the claim. Besides, both the claimants and the respondents did not identify the claimants in the matter. The respondent has however attached the list and that they have admitted in paragraph 9 of their memorandum of reply that they declared 96 employees redundant. He submitted that the absence of the list would not occasion any prejudice to the respondent.

In determining the preliminary objection the court will concern itself with only two issues. First, does the claimant have locus standi to bring this claim on behalf of the grievants? Second, does failure to attach a

list or disclose the names of persons on whose behalf the claim is brought fatal to the claim?

Concerning locus, it was submitted by both parties that the claimant succeeded Kenya Union of Commercial Food & Allied Workers (the interested party) as representing the respondent's workers. The respondent however contends that although at the time of redundancy, the claimant had no recognition agreement with the respondent, as successor to the interested party they are bound by any agreements entered into between the respondent and the interested party.

What this implies is that the claimant has the locus to bring the claim and the only dispute there is concerns its justification in bringing up this claim which according to the respondent, was resolved fully during their engagement with the interested party.

This then brings me to the next question: If the claimant assumed the place of the interested party, would it be justified to reopen, negotiate or follow up issues that were in the knowledge of the interested party and which they did not pursue at the time of negotiations for redundancy?

According to Mr. Munoru, the grievants were declared redundant and a declaration of redundancy requires that they be compensated in accordance with the Employment Act. According to him the respondent did not issue the necessary notices to the affected staff, the union officials and Labour Officer, on their intention to declare the grievants redundant. What the court understands the import and intention of Mr. Munoru's argument is that since the respondent did not strictly adhere to the provisions of the Employment Act as pertains to declaration of redundancy the respondent cannot be heard to say that the claimant (BIFU) is a barred from reopening the negotiations between the respondent and KUCFAW and to this extent.

The respondent for its part contends that the claimant signed a recognition agreement on 1st March 2011 and prior to this the interested party was the Union representing the respondent's unionisable employees and since the interested party negotiated and came to an agreement on what grievants would be paid the claimant has no right to reopen the issue. The respondent further contends that the grievants were paid under a more favourable gratuity clause hence cannot demand again to be paid in accordance with redundancy clause. According to the respondent the interested party which was then the relevant union was informed of the termination on account of redundancy in accordance with section 40 of the Employment Act in response to which the interested party approached the respondent to negotiate for a better pay.

The court fully agrees with the submission by the respondent that it would be untenable to reopen concluded negotiations between the respondent and the interested party whose position has now been assumed by the claimant. It is a settled principle of negotiation that agreements and or settlements reached by parties are deemed to be binding on their successors in title or assigns.

The question however in this case is whether any final agreement was reached between the interested party and the respondent in respect of which the claimant would be barred from reopening. Although the interested party withdrew its interest in the matter, the court cannot totally ignore averments in their memorandum of interest since their withdrawal was not on the merit or otherwise of their claim but on the ground of conflict over representation of the grievants. The interested party in paragraph 4 of its memorandum of interest avers that the respondent declared 96 of its employees redundant contrary to the provisions of section 40 of the Employment Act in that no notice was sent to the interested party and Labour Office detailing reasons for and extent of the envisaged redundancy. According to the interested party this effectively disabled and or hindered the interested party's participation in the matter. Further ,the interested party has disputed the admissibility of appendix 6 which the respondent claims were minutes of a meeting at which the agreement over redundancy was reached. The interested party averred it is the respondent who authored the minutes and signed them. These are very weighty averments whose resolution can only be reached after full hearing at which evidence for or against will be required. As stated earlier the claimant is bound by concluded agreements or settlements entered into by its predecessor. However in this case finality appears unclear and can only be ascertained after a full trial.

Concerning the omission to attach the list of the grievants on whose behalf the claimant is acting, this is a valid concern by the respondent since it needs to know the number and identity of those claiming in order for it to prepare its defence. Ms. Mumia is right when she submits that her client needs to know the size of the claim. The claimant is therefore ordered to file and serve such list on the respondent, prior to setting the suit down for hearing.

Regarding the favourability of the terms paid out by the respondent to its employees declared redundant this would be a significant fact in determining the claim at the conclusion of the hearing.

From the foregoing the court declines to uphold the preliminary objection and orders that the claim proceeds to full hearing on merits.

It is so ordered.

Dated at Nyeri this 26th day of July, 2013.

Abuodha J. N.

Judge

Delivered in open Court in the presence of Munoru Advocate for the Claimant and Ms. Mumia Advocate for the Respondent.

Abuodha J. N.

Judge