REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 45/2013

(Before Hon. Justice Hellen Wasilwa on 30th September, 2013)

KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS ..... CLAIMANT

-VERSUS-

YATIN SUPERMARKET LIMITED ..... RESPONDENT

R U L I N G

The claimants herein Kenya Union of Commercial Food and Allied Workers Union filed their memorandum of claim against the respondent herein on 21/6/2011. The issue in dispute relates to recognition. The claimants also filed an application brought under certificate of urgency on the same day seeking orders restraining the respondents from terminating, dismissing or disciplining unlawfully any employee on account of their Trade Union Membership. It was then the claimants contention that they had recruited 51 out of 70 unionisable employees of the respondent and they had sought to be recognized by the respondents which fact the respondent failed to do and even refused, ignored or failed to attend conciliation meetings. An order restraining the respondents from dismissing any of the employees who were claimants union member was granted by court on 30.6.2011. It appears that the claimant applicants ignored to pursue the notice of motion filed on 21.6.2011 and instead chose to prosecute the main claim.

It is the claimants contention that they have attempted to exercise their right enshrined in Section 4 of the Labour Relations Act 2007 on freedom of association by registering the respondent's employees as their members. This they did on different dates i.e 3rd February 2005, 7th July 2006 and 6 – 20th May 2009 and 20th May 2010. This was done by recruiting the respondents unionisable employees out of their own free will and choice. The said employees then signed check off forms as proof of their membership authorizing the respondents to deduct and remit their union dues to the claimants. The said check off forms were produced before court as Appendix BMK 2. The claimants contend that a previous attempt of these employees in 2003 to join the claimants union was thwarted by the respondents who threatened them with victimization. On 8th and 9th June 2011 forty four unionisable employees out of a total of fifty – four reaffirmed their union membership and signed the claimants' check off forms – Appendix BMK 2(e). The claimants informed the respondents of this reaffirmation and send the respondents two copies of a model recognition agreement duly completed by the claimants. They also proposed a meeting to discuss the proposals which meeting did not take off on 29.9.2010. Another meeting was proposed to take place on 20th October 2010 at 10 am at the respondents offices but this meeting again did not take place as it was alleged that the respondents Managing was out of town and the matter could not be handled by anyone else. A subsequent attempt to have another meeting on 8.11.2010 at 2.30 pm also failed. On 24.11.2010 the claimants referred the matter to the Minister of Labour and Human Resource Development under Section 62 of the Labour Relations Act 2007 as per the claimants Appendix BMK 6.

On 19.1.2011 the Minister appointed a conciliator to handle this dispute as per Appendix BMK 7. On 16th February 2011, the conciliator wrote to the parties and asked them to write their proposals on the issue as per Appendix BMK 8 and also proposed a meeting to take place on 23.2.2011 at 9.30 am. The claimants aver that on their part, they forwarded their proposal in a memorandum as per their Appendix BMK 9. The respondents not only failed to forward their proposal but also failed to attend conciliation meeting of 23.2.2011.

In another meeting of 6.4.2011 attended by both the claimants and respondents no agreement was reached. The conciliator therefore advised any aggrieved party to proceed and seek redress from court. This is now what prompted the claimants to file this case.

A perusal of the court file however reveals that the respondents never filed their memorandum of reply in this matter. They however filed their replying affidavit on 18.7.2011. The respondents replying affidavit was sworn by one K. C. Hariharan, the respondents Operation and Administrative Manager. This case was scheduled to be heard on 13.3.2013. On this day both the claimants and respondents were in court and they made their respective submissions before court. At the end of the submissions, this court referred this case back to the conciliator who was expected to investigate the entire matter again and report to court. The respondent submitted that some of the workers the claimant alleged were their members had never worked for the respondents and some were even deceased, it was therefore imperative that the labour officer investigates this claim and reports back to court. The court was further guided by S. 15 of the Industrial Court Act 2011 which provides that:-

"If at any stage of the proceedings, it becomes apparent that the dispute ought to have been referred for conciliation or mediation the court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration."

The labour officer who was also the conciliator in this case did write his report which was submitted in this court on 1.7.2013. This court had ordered that parties would make submissions on this report on the same day 1.7.2013. The respondents counsel was absent on 1.7.2013.

On 18.9.2013, both parties had a chance to submit on this report. The conciliator's report was to the effect that the claimants have recruited the requisite number of workers being seven out of the current 12 workers and therefore the claimant and respondent should sign a recognition agreement in accordance with Section 5(2) of the Labour Relations Act 2007 and Section 54(1) of the same Act.

Having considered evidence adduced in court plus the conciliator's report, the issues for consideration as follows:-

1. Whether the claimant have recruited the requisite number of respondent's employees to warrant recognition.
2. How this court should consider the conciliator's report.

On issue of recruitment of employees by claimant union, under Section 54 of the LRA 2007:-

"An employer, including an employer in the public Section shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees."

What needs to be determined is therefore whether the claimants have actually recruited a simple majority of the unionisable employees. According to the respondents the claimants have not done so. There have been two attempts to have this matter resolved by the conciliator without success. In the 1st instance the respondents did not present their memorandum with their documents to the conciliator. In the second case, the conciliator's report states that the respondents through their employment records stated that they have 15 employees out of which 3 are in management. It is worth pointing out here that the respondents appear to have been evasive. They have never filed their response in this case. They want to rely on evidence without producing any documents which disadvantages the claimants.

Under S. 74 (1) of the Employment Act, an employer is expected to keep certain records. Including:-

"---- a written record of all employees employed by him with whom he has entered into a contract under this Act which shall contain the particulars ---"

Some of the particulars include the employment contracts with the particulars.

Under S. 74(2) of the Employment Act:-

"An employer shall permit an authorized officer who may require an employer to produce for inspection the record for any period relating to the preceding thirty – six months to examine the records."

These records mandated by the Employment Act 2007 are key to ascertaining the truth but in absence of the respondents availing them to court or even to the conciliator. It is very difficult to ascertain the truth. The respondents contend that the numbers the claimants have stated as being their members are not their employees or are deceased. He who alleges must prove, and the best way is through documents which respondents have not even filed before this court. It appears that there is something under the table which needs to be unearthed by this court. This court would have assumed that the evidence being hidden by the respondents is prejudicial to their case and found that for claimants. However this is a court of law and all facts must be established.

The conciliator's report on the other hand seems to suggest a shift in the work place of the respondent. Initially the claimants had stated that they had recruited 44 out of the total 54 in 2011. At the moment the report suggests that there are only 15 employees which totally changes the landscape. In the circumstances it would be imprudent to grant orders sought on the prevailing circumstances.

I therefore find that the claimants case is not established and they must go back to the drawing board and carry forth a fresh recruitment before any recognition can be allowed or sought for.

HELLEN WASILWA

JUDGE

30/09/2013

Appearances:-

Atela for claimant present

Owiti h/b Onsongo for respondents present

CC. Sammy Wamache.