



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT AT NAIROBI  
CAUSE NUMBER 1256 OF 2011

**BETWEEN**

AVIATION AND ALLIED WORKERS UNION .....CLAIMANT

**VERSUS**

AIR KENYA EXPRESS LIMITED ..... 1<sup>ST</sup>  
RESPONDENT

MANAGING DIRECTOR AIR KENYA LIMITED..... 2<sup>ND</sup> RESPONDENT

*Rika J*

*CC. Leah Muthaka*

*Mr. Nyabena instructed by Nyabena Nyakundi & Company Advocates for the Claimant*

*Ms. Effendy instructed by Karimbux- Effendy & Company Advocates for the Respondent*

ISSUE IN DISPUTE: RECOGNITION AGREEMENT

AWARD

1. This Claim was initiated by the Claimant Union through a Statement of Claim filed on 27<sup>th</sup> July 2011. The Respondent filed its Statement of Reply on 9<sup>th</sup> August 2011. There were many interlocutory applications filed by both Parties thereafter, which had the effect of slowing down the ultimate determination of the issue in dispute. It was not until 8<sup>th</sup> November 2012 that the Claimant's first and only witness Yovinalis Achoki, a Member of the Claimant Union testified. The Respondent's sole witness Susan Wangare Chege gave evidence on 22<sup>nd</sup> January 2013, bringing the hearing to a close. The matter was last mentioned on 30<sup>th</sup> April 2013 when the Parties confirmed the lodging of their Final Arguments with the Court and were advised the Award would be delivered on notice.

2. The Claimant seeks the following prayers:-

- a. A declaration that all unionisable members have a right to join a union of their choice;
- b. The Respondent be directed to sign the recognition agreement annexed to the Statement of Claim marked BNN2 [BNN3];

- c. The Respondent be compelled to begin CBA negotiations with the applicant in good faith, and the collective bargaining process be concluded within 30 days; and
- d. Costs be provided for.

3. The Respondent answers that the Claimant has not recruited a simple majority of the Respondent's unionisable employees to be granted recognition. The Respondent has never denied any employee the right to join a trade union of their choice. The Respondent is a reputable Airline, which has never indulged in bad labour practices.

4. Yovinalis Achoki testified that the recognition dispute was reported to the Minister for Labour, and a Conciliator appointed. Achoki was at the time an employee of the Respondent, a Member of the Claimant and its Chief Shop Steward. He described his role as a bridge between the Union and the Respondent's Management.

5. He stated that on 12<sup>th</sup> April 2011, the Parties met before the Conciliator and recorded a settlement. The issue before the Conciliator was: "*failure to sign recognition agreement.*" The

Parties went on to sign "*an agreement,*" worded as follows:-

*" [The Parties] have therefore both voluntarily signed this certificate of Agreement, as a way of*

*signifying that the Management of Air Kenya limited has formally recognized Aviation and Allied Workers Union, as the legal union representative of their unionisable employees and pave way for Collective Bargaining Agreement and negotiation procedures."*

This 'agreement' was signed by Bonnie Barasa the Secretary General of the Claimant, James Kabare the Organizing Secretary and Yovinalis Achoki then described as Shop Steward, all representing the Claimant. Susan Chege Masinde the Human Resource Officer and Livingstone Indangasi the Payroll Accountant represented the Respondent.

6. Yovinalis testified there were three meetings between the Parties preceding the execution of the abovesaid agreement. The Management signed the document voluntarily. At the conciliation meeting, all issues were sorted out by consent. It was concluded at the meeting that the Claimant had recruited 53 out of 78 unionisable employees, representing 67.95 % majority.

7. The Claimant forwarded a draft formal Recognition Agreement to the Respondent. The Respondent reneged. Instead of amending or signing the un-amended draft, the Respondent approached the National Labour Board, seeking reversal of recognition. The Respondent also went on a termination of employment spree, sending away about 20 employees who had enlisted with the Claimant. Yovinalis volunteered that he has filed a Claim for unfair termination against the Respondent elsewhere.

8. He told the Court on cross-examination that he was employed by the Respondent at different times, on contract and on permanent terms. He lastly worked on a three year contract. All employees were on this form of a contract. Yovinalis' contract expired. He was advised he would not get a renewal. He filed a claim for unfair termination. He had unsuccessfully sought

in Court, to restrain the Respondent from terminating his contract of employment. He was the Shop Steward and attended all conciliation meetings. The Conciliator's signature was not shown in the minutes of the conciliation meetings. Yovinalis himself was present at the meetings. The whole process was purposed on signing of the Recognition Agreement. The agreement arrived at between the Parties was, according to Yovinalis, a final agreement. Pressed to explain, the witness buckled and stated the agreement was not a final settlement. He was not aware if the conciliation proceedings had been challenged by the Respondent. He was not aware of subsequent recommendations originating from the Conciliator. Redirected, the witness testified that the conciliation minutes are indicated to have been signed by Mr. Owange the Conciliator. No other minutes had been availed by the Respondent to the Court. The Managing Director of the Respondent Dino Bisleti stated he did not have a problem signing

the Recognition Agreement. Yovinalis did not know of a second round of conciliation. Such an exercise would be understood by the witness to amount to an attempt by the Respondent, to derail recognition and collective bargaining. The Claimant prays the Court to grant its prayers.

9. Susan Wangare Chege [also Susan Chege Masinde] told the Court that the Claimant has been seeking to be recognized by the Respondent, from 2009. The Claimant wrote to the Respondent in December 2009 and May 2010 demanding recognition. The Respondent replied, explaining it could not accede to this demand, because the Claimant had not recruited a simple majority of the Respondent's unionisable employees.

10. The dispute was referred to the Minister for Labour. Dino Bisleti the Respondent's CEO, stated he would be willing to recognize the Claimant if the Claimant demonstrated it had a simple majority. The Parties held a conciliation meeting on 19<sup>th</sup> January 2011. A list of Respondent's employees was submitted at the meeting. The trade union members were 52, and non-union members 93, total 145. The Claimant had not attained a simple majority. Susan told the Court that the minutes of the conciliation meetings are not signed. She confirmed the

attendees were as given in the evidence of Yovinalis. She however felt that the Conciliator was not impartial, and the Respondent was not given a proper opportunity to state its position. Mr. Owange did not give the Respondent a chance to make full discovery of the list of employees the Claimant alleged to have recruited. The Claimant alleged it had secret members. The Conciliator concluded a simple majority had been established, without revealing the actual numbers. Susan did not agree that the minutes of the meetings captured the correct version of the deliberations.

11. The Conciliator then compelled Susan and her colleagues to sign a document titled 'agreement' dated 12<sup>th</sup> April 2011. He made it clear that the Parties had to sign. It was not a recognition agreement. Susan went back to the office and wrote a letter to the Claimant Union, copied to the Ministry of Labour, forwarding a list of Respondent's employees and their designations. According to the list, the Respondent had 142 employees. 111 were unionisable, and 31 non-unionisable. The Claimant had recruited 44 unionisable members, representing 40% of the total unionisable employees. The Ministry and the Claimant did not respond to the Respondent's letter.

12. Susan wrote once again to the Ministry of Labour. The Ministry wrote on 24<sup>th</sup> August 2011, revoking the appointment of Owange as the Conciliator. P.N. Macharia was appointed the new Conciliator. He invited Parties for conciliation. The Respondent complied and attended conciliation meetings. The Claimant did not attend any meeting. On 3<sup>rd</sup> October 2011, Macharia wrote to the Parties advising that the earlier agreement of 12<sup>th</sup> April 2011 had been retracted. This recommendation from the Conciliator was received by the Respondent on 21<sup>st</sup> February 2012.

13. She testified further on cross-examination that she is a Human Resource Professional, holding MBA in Human Resources. There is no other trade union that seeks recognition from

the Respondent. She attended the conciliation meeting that culminated in the contentious agreement. The Conciliator made it clear there were no other options but for the Parties to sign. He did not place a gun on anyone to procure their signatures. The list presented at the conciliation did not highlight employee designations. She challenged the findings of the Conciliator, and wrote to the National Labour Board. She did not approach this Board in order to have a recognition agreement revoked, as there was no such agreement. Recognition can only happen once there is a simple majority.

14. The agreement was not binding. The witness did not know if Dino Bisleti changed his mind on the agreement. Susan herself had not reneged. The figures given at conciliation were incorrect. She did not refer the dispute for fresh conciliation. She is not familiar with Court procedures. The agreement signed on 12<sup>th</sup> April 2011 was deemed null and void in a subsequent conciliation. She clarified on redirection

that she wrote to the Ministry on 8<sup>th</sup> June 2011, before this Claim was filed. The Respondent is still remitting the trade union dues. The Claim for recognition should be dismissed with costs to the Respondent.

#### *The Court Finds and Awards-:*

15. Two legal issues arise out of this dispute: One, what are the legal requirements and objectives for trade union recognition; and two, what is the borderline between conciliation and adjudication?

16. The first question is answered through Section 54 of the Labour Relations Act Number 14 of 2007. Subsection 1 provides that, “ *An employer, including an employer in the public sector, shall recognize a trade union for purposes of collective bargaining, if that trade union represents the simple majority of unionisable employees.*” The main requirement for grant of recognition by employers to trade unions, is that the trade unions must have recruited a simple majority of the employer’s unionisable employees. The objective in granting recognition is to enable the employer and the trade union, negotiate and conclude a Collective Bargaining Agreement.

17. This objective is amplified under Section 57, which is in the following words: “*An employer or group of employers or an employers’ organisation that has recognized a trade union in accordance with the provisions of this Part, shall conclude a collective agreement with the recognized trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.*”

18. Other requirements in considering recognition as laid out in a succession of Industrial Court decisions, and the Industrial Relations Charter, are that the trade union seeking recognition must be the relevant trade union to represent employees in a particular industry. Section 54 [8] provides that where there is a recognition dispute, the Court shall take into account the sector in which the employer operates. The relevance of a trade union in a given industry is read from its area of coverage, defined in its internal constitution. The third consideration on recognition is that there must be no rival trade unions, seeking to represent the same collective bargaining unit.

19. With regard to dispute resolution, Section 54 [6] of the Labour Relations Act stipulates that if there is a dispute as to the right of a trade union to be recognized for purposes of collective bargaining in accordance with the Section, or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII of the Labour Relations Act. Part VIII, which commences at Section 62 and ends at Section 72, regulates the dispute settlement mechanism of conciliation.

20. The next Part IX beginning at Section 73 and ending at Section 75 governs adjudication by the Court. Section 73 [1] states, “*If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.*” Section 74 regulates urgent referral of disputes concerning *inter alia* recognition to

the Industrial Court. Conciliation predates adjudication. Adjudication is resorted to where conciliation does not resolve the dispute. The line of demarcation between the two forms of dispute settlement is clarified under Section 69 of the Labour Relations Act which states, “*If a trade dispute is settled in conciliation, the terms of agreement shall be [a] recorded in writing and [b] signed by the parties and the conciliator. [2] A signed copy shall be lodged with the Minister as soon as practicable.*” The dispute is deemed unresolved after conciliation if *[a] the conciliator issues a certificate that the dispute has not been resolved by conciliation; or [b] thirty day period from the appointment of the conciliator, or any longer period agreed by the parties, expires.*”

23. The law acknowledges that freedom of association includes the right of an employee to belong, or not belong to a trade union. An employee can associate and dissociate. It is stated that the right to belong to the union must be accompanied by the right not to belong, just as much as freedom of expression must include the right to silence. Freedom of Association within the trade union is regulated under Section 4 of the Labour Relations Act. It is enshrined in the Constitution of Kenya. This mobility of labour raises the

possibility that even where a trade union has satisfied the requirements for recognition, and is granted recognition, there may arise a situation where reversal of recognition is necessary. The employees who gave the trade union simple majority leading to recognition, may opt to leave the trade union for another trade union, or the nature of the employer's business may change and not fall within the recognized trade union's area of coverage. Section 54 [5] of the Labour Relations Act therefore provides for de-recognition. It provides, "An employer, or group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement." The Board in question is the National Labour Board established under Section 5 of the Labour Institutions Act Number 12 of 2007. De-recognition is a process that involves the Board, not a conciliator appointed by the Minister.

24. Has the Claimant satisfied the criteria for recognition? There is no dispute on the relevance of the Claimant in representing the unionisable employees of the Respondent. Secondly, there is no rival trade union representing or seeking representation of the particular collective bargaining unit. The dispute revolves around the third consideration: whether the Claimant recruited a simple majority of the unionisable employees of the Respondent.

25. Both parties agree that the dispute was referred to the Minister by the trade union, under the Labour Relations Act. Reference was made on 13<sup>th</sup> October 2010. Mr. Barrack Owange was appointed as the Conciliator. The Conciliator convened conciliation meetings. A meeting of 12<sup>th</sup> April 2011, resulted in a document titled "agreement," signed by the Parties' representatives and by the Conciliator. The "agreement" states:-

*"The undersigned parties to this dispute met under the chairmanship of the appointed conciliator and recorded settlement on the issue in dispute: failure to sign the recognition agreement .*

*They have therefore both voluntarily signed this certificate of Agreement as a way of signifying that the Management of Air Kenya Limited has formally recognized the Aviation and Allied Workers Union as the legal union representative of their unionisable employees, and to pave way for Collective Bargaining and negotiation procedures."*

26. The Court finds that this was firstly, a valid certificate of agreement, issued under Section 69[1] of the Labour Relations Act by the Conciliator. The terms of agreement were recorded in writing. The agreement was signed by the two Parties, and by the Conciliator. The formal validity of the certificate of agreement cannot be contested. Secondly, the Court is satisfied that the 'agreement' amounted to a valid recognition agreement. It states that, ...." *the Management of Air Kenya limited has formally recognized Aviation and Allied Workers Union as the legal representative of their unionisable employees and to pave way for Collective*

*Bargaining Agreement and negotiation procedures."* It fully meets the interpretation of the term 'recognition agreement,' given under Section 2 of the Labour Relations Act, which is, "an agreement in writing made between a trade union and 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' organisation." The 'agreement' dated 12<sup>th</sup> April 2011 was therefore a certificate of agreement, as well as a valid recognition agreement.

27. There was no evidence that the Respondent was duped or compelled to sign this agreement. Susan Chege Masinde is a Senior Officer of Air Kenya Limited, overseeing the Human Resource department. She holds an MBA in human resources. Her Colleague Livingstone Indangasi is the Respondent's Accountant. These are knowledgeable and competent officers, who cannot be heard to lament that they were prevailed upon by a Labour Officer, to sign the recognition agreement/ certificate of agreement. The Court rejects the evidence of Susan, that she and her colleague did not sign the agreement voluntarily.

28. The Court is satisfied that the minutes of the conciliation meeting held on 12<sup>th</sup> April 2011, reflect the factual background leading to the 'agreement' of 12<sup>th</sup> April 2011. It was only after the two representatives of the Respondent went back to their offices, and probably as suggested by the Claimant,

consulted their CEO Dino Bisleti, that there was a change of heart. Susan wrote to the Claimant regurgitating the issue of the number of recruited employees and their designation. She approached the National Labour Board, seeking the de-recognition of the Claimant. This course of action reinforces the findings of the Court above, that what was concluded on 12<sup>th</sup> April 2011 was a valid recognition agreement. An employer recognized a trade union under Section 54 [1] of the Labour Relations Act 2007, and immediately applied for de-recognition under subsection [5]. There would be no resort to subsection [5], if the Respondent did not believe it had concluded a recognition agreement on 12<sup>th</sup> April 2011.

In her letter of 27<sup>th</sup> June, 2011 to the National Labour Board, Susan states “On 27<sup>th</sup> April, 2011, we informed the conciliator that despite the fact that a recognition agreement had been signed...” She specifically invokes section 54 (5) in asking the Board to revoke the agreement. There is no doubt whatsoever that the Parties made a recognition agreement on 12<sup>th</sup> April, 2011.

28. The National Labour Board did not terminate or revoke the agreement. The Respondent then resorted to an illegitimate process of conciliation, to undo what had been concluded between the Parties, and what the National Labour Board had correctly ignored. The Minister for Labour was in the finding of the Court *functus Officio*, and had no business instituting a second conciliation. The matter was indeed already in the docket of the Industrial Court, when such second conciliation is alleged to have taken place. The Respondent stated that it reported the existence of a dispute on 8<sup>th</sup> June 2011. There is no truth in this statement. The letter of 8<sup>th</sup> June 2011 was written to the National Labour Board, seeking de-recognition under Section 54

[5]. It was not a referral to the Minister under Section 62. There is indeed nothing on record, showing any referral of a second dispute on recognition that would result in termination or revocation of the concluded recognition agreement. Even if there was a valid second referral, the outcome would not be binding, as the role of de-recognition of a trade union is given to the independent National Labour Board, and not a conciliator. The first conciliation ended with a certificate of agreement. There was no certificate of disagreement, even after the alleged second conciliation process. There is nothing therefore, that turns on the alleged second conciliation.

29. The question may be asked why the Claimant forwarded a model recognition agreement to the Respondent for endorsement after 12<sup>th</sup> April 2011, if indeed there was a valid recognition agreement made on 12<sup>th</sup> April 2011. Why is the Claimant in Court? In the view of the Court the Claimant sought to fill in the details that were not captured in the brief agreement of 12<sup>th</sup> April 2011. There were bits and pieces necessary to be incorporated in the recognition agreement, which is not the same thing as to say the agreement of 12<sup>th</sup> April 2011 was not valid. A contract, even in ordinary commercial transactions, could entail a number of different, written documents. What the Claimant sought after 12<sup>th</sup> April 2011 was to amplify the terms of the recognition agreement. The search for amplification cannot be seen to invalidate the recognition agreement. The Respondent has been deducting and remitting trade union dues, as required by the law. Check-off lists exhibited by the Claimant as annexure BNBI show the Respondent has been remitting dues for as high as 58 employees. It is difficult to understand why the Respondent should revisit the issue of numbers after recognition, and allege only 44 employees are members of the Claimant. The minutes of the meetings held on 19<sup>th</sup> January 2011 and 12<sup>th</sup> April 2011, support the view that Mr. Owange was a methodical, fair Conciliator who acted above Board. The top Officers of the Parties including Dino Bisleti and Bonnie Barasa were involved in the conciliation process that culminated in the recognition agreement of 12<sup>th</sup> April 2011. Three conciliation meetings preceded the execution of the agreement. This does not leave room for ambush of either party by the other. It is time for Parties to fine tune terms of recognition and move on to collectively bargain and negotiate. IT IS ORDERED-:

***[a] The employees of the Respondent have a right to join a trade union of their choice;***

***[b] The Respondent shall, within 30 days of this Award sign the model recognition agreement submitted by the Claimant Union;***

***[c] In any event, Parties to commence and conclude the collective bargaining process within 90 days of this Award; and***

***[d] Costs to the Claimant***

Dated and delivered at Nairobi this 27<sup>th</sup> day of September 2013

James Rika

Judge