



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 333 OF 2011

**UNION OF NATIONAL RESEARCH AND ALLIED
INSTITUTES STAFF OF KENNYACLAIMANT**

-VERSUS-

**KENYA MARINE AND FISHERIES
RESEARCH INSTITUTE.....RESPONDENT**

Mr.Zacharia Chacha for Claimant.

Mr. Abenge for Respondent.

JUDGMENT

The Claimant Union and Respondent employer have a dispute regarding the level of Union-representation in the organization.

The parties have a Recognition Agreement dated 12th February 2009 attached to the Memorandum of Claim as Appendix ZA1.

In the said Recognition Agreement the parties agreed that unionisable staff shall include those in job groups R1.6 and below and that those in Job groups R1.7 and above are excluded from the Union representation.

Clause 4(iii) of the said Recognition Agreement titled “**Modification and termination of this Agreement**” provides:

“Either party wishing to amend or modify the Agreement shall give (3) months written notice to the other party with details of proposed amendments. In the event of proving impossible to obtain mutual agreement to the amendment of the Agreement then either party may refer the dispute to the Minister for Labour for formal action in terms of Labour Relations Act.2007.”

The Claimant Union gave the three months notice to the Respondent dated 28th July 2009 that it intends to amend Section (2) of the Recognition Agreement to allow all staff to join the union in line with **Section 80(1)** of the erstwhile Constitution of Kenya now repealed and replaced by the Constitution of Kenya 2010.

On 23rd March, 2010, the Union reported a dispute to the Ministry for Labour and by a letter dated 24th March 2010, the Respondent wrote to the Union stating that the parties should respect the provision of the Recognition Agreement regarding the level of representation.

The Respondent noted that the Chief Shop Steward **Mr. Eliud M. Katana** and twenty six other staff members in job group R1.7 and above should not have remained in the union after signing of the Recognition Agreement. The Respondent advised the Claimant to get another Chief Shop Steward from the unionisable cadre. The Management threatened to stop with immediate effect to deduct money due from the staff in job group R1.7 and above. The list of affected employees is attached to the letter.

The Union Responded by a letter of the same date asking the management to respect **Section 80** of the Constitution which provides for freedom of association as read with **Section 4(1) (a) (b)** and **4 (2) (a) (b)** and **(c)** of the **Labour Relations Act 2007 (LRA)**.

The union reiterated that the staff members joined the union freely and voluntarily and the Shop Steward was democratically elected and therefore the management should respect the choice of the workers.

The dispute was not resolved by the Minister for Labour and the conciliator **Mr. F.L Okello** issued a Certificate of unresolved dispute in terms of **Section 69** of the LRA dated 22nd February 2011.

THE LAW

Section 4(1) of the LRA provides:

“Every employee has the right to-

.....

(b) Join a trade union; or

(c) Leave a trade union.”

Whereas **Section 4(2)** provides, every member of a trade union has the right, subject to the constitution of that trade union to-

“a) participate in its lawful activities.

c. stand for election and be eligible for appointment as an officer or official....”

Section 54 (3) of the Act provides:

“An employer, a group of employers or an employer’s organisation referred to in subsection (2) and a trade Union shall conclude a written recognition agreement recording the terms upon which the employer or employers’ organisation recognises a trade Union.”

The Recognition agreement is based on a model published by the Minister of Labour in terms of **Section 54 (4)**.

Presently the Model Recognition Agreement is in terms of the Labour Relations Charter.

The Labour Relations Charter and the Model Recognition Agreement embraces the principle that staff in Senior Management positions should remain un-unionisable to allow practical management and non-infiltration of confidential matters especially during collective bargaining between management and

the unions.

For the purpose of this case, the parties entered into a Recognition Agreement based on the said model. At the time the Recognition Agreement was concluded, the LRA was in place and so were the provisions of **Section 80(1)** of the repealed Constitution.

The Court however notes that the provisions of **Section 80(1)** have been largely retained Under **Article 41(2) (c)** of the current Constitution which reads:

“Every worker has the right to form, join or participate in the activities and programmes of a trade Union;”

What has changed in the Constitution of Kenya 2010 in this regard, is the provision governing limitation of a right for fundamental freedom as provided under **Article 24** of the new Constitution. As said earlier the dispute arose when the Claimant union invoked its right to initiate what it considers appropriate amendments in terms of the law applicable and the Constitution, with regard to level of representation and the Respondent failed to engage the union on the matter within the three (3) months notice in disregard of the Recognition Agreement.

The only response from the Respondent is dated 24th March 2010, well over Seven (7) months from the date the three months notice to amend was written to the Respondent on 28th July 2009.

The Union has submitted that the employees in question became union members before the Recognition Agreement was entered into, a fact acknowledged by the Respondent in its letter of 24th March 2010. The said Recognition Agreement had the effect of retracting accrued rights to engage and benefit in the activities of the Union.

From the said letter, the listed employees continued to be members of the union even at the time this dispute was referred to the Minister of Labour for conciliation.

It is the Respondent’s contention that of the 850 employees of the Respondent countrywide, 600 are unionisable whereas 250 are denied union representation by fact of their positions regarded as management.

The Claimant’s case is that, not all 250 positions should be categorized as top management on basis of taking key decisions, controlling finances of the organisation or being custodians of confidential information.

The Claimant union states that some of these employees include librarians, artisans, technicians, laboratory technologists, senior clerical officers, senior drivers and security officers according to the Respondent’s letter dated 24th March 2010.

On the contrary, the Respondent alleges employees in level R1.7 and above are as follows;

Programme coordinators, Station coordinators, Principal Administrative Officers, Principal Human Resource Officers, Principal Accountants, and Principal Supplies Officers;

The Respondent submits that these officers are in charge of respective areas with a number of staff who they supervise. That they handle employee grievances, Conduct disciplinary hearings and handle confidential matters therefore are all management staff.

The Court notes that this is the category excluded under Clause “2 (j)” of the Recognition Agreement.

Freedom of association under **Section 4** of the LRA and **Section 80 (1)** of the repealed Constitution

of Kenya is not absolute.

The Law applicable at the time the Recognition Agreement was concluded changed with regard to circumstances under which a right to join a union may be limited in that the exemptions given in the Recognition Agreement are only permissible to the extent that they limit the right of the employees to join a Union of choice if the Labour Laws of Kenya expressly provide for that limitation.

Article 24 (1) of the Kenya Constitution 2010, which is applicable now to the issue in question provides that a right or fundamental freedom in the Bill of Rights “**shall not be limited except by Law...**”

It has not been demonstrated to this Court that there is in existence in Kenya today a written Law that expressly provides for the level of representation in a union to allow an employer to designate certain level of employees as non-unionisable. **Section 54 (3)** under which Recognition Agreements are concluded does not expressly provide for levels of unionisable employees.

The Labour Relations Charter of 1964 under which a model recognition agreement is provided is not a Law for the purpose of limiting rights and fundamentals freedoms. It is only a model or a guide to the parties intending to conclude a recognition agreement.

To the extent that clause 2(j) of the Recognition Agreement entered into on 12th February 2009 excludes a large category of employees from enjoying a fundamental right under **Article 41(2) (c)** of the Constitution to participate in the activities and programmes of a trade union, then the clause is unlawful unless it is backed by a written law in express terms.

This may not have been the situation when the notice to amend was issued by the Union on 12th February 2009, but it is now.

The law as existed then must be read today with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution in terms of **Section 7(1)** of the Sixth Schedule, Transitional and Consequential provisions.

The parties had the opportunity to use the amendment clause of the Recognition Agreement to review the level of representation but the Respondent squandered the opportunity.

The Court therefore declares Clause ‘2j’ of the Recognition Agreement in issue, unconstitutional and prohibits the Respondent from preventing any of its employees who wish to be members of the union from joining the Claimant union and participating in the activities and programmes of the Claimant Union.

The Respondent to pay costs of the suit to the Claimant union.

It is so ordered.

Dated and delivered at Nairobi this 19th day of September, 2013

MATHEWS N. NDUMA

PRINCIPAL JUDGE