



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NUMBER 639 OF 2012**

**BETWEEN**

**KENYA SCIENTIFIC RESEARCH INTERNATIONAL**

**TECHNICAL AND ALLIED INSTITUTIONS WORKERS**

**UNION..... CLAIMANT**

**VERSUS**

**KENYA AGRICULTURAL RESEARCH INSTITUTE ..... RESPONDENT**

**AND**

**UNION OF NATIONAL RESEARCH AND ALLIED**

**INSTITUTES STAFF [UNIRISK]..... INTERESTED PARTY**

*Rika J*

*CC. David Kipsang'*

*Mr. Martin Oduor Secretary General, appearing for the Claimant Union*

*Ms. Ogutu holding brief for Ms. Pauline Masila, Advocate for the Respondent*

*Mr. Zachariah Achacha Secretary General, appearing for the Interested Party Union*

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**ISSUE IN DISPUTE: RECRUITMENT OF RESPONDENT’S UNIONISABLE EMPLOYEES**

**AWARD**

1. Kenya Agricultural Research Institute [acronym KARI], is a State Corporation involved in agricultural research. The Claimant is a registered Trade Union, authorized by its Constitution to represent unionisable employees working in Scientific Research Institutions. The Interested Party is likewise a registered Trade Union broadly mandated by its Constitution, to represent unionisable employees in National Research Institutes. None of the two Trade Unions is formally recognized by the Respondent.

2. Several disputes have been presented before this Court from 2003 over the representation of the employees of KARI. No determination has conferred either of the Unions the right of recognition.
3. The present dispute was presented by the Claimant through a Statement of Claim filed on 16<sup>th</sup> April 2012. Two prayers are sought: that the Honourable Court order and direct the Respondent and its Agents to allow the Claimant to enter and recruit employees at the Respondent's Centre and Head Office; and the Respondent to pay the costs of the Claim.
4. The Respondent filed its Statement of Reply on 5<sup>th</sup> July 2012. It avers that the dispute is *res judicata*. The Industrial Court in Cause Number 575 of 2010 granted the Interested Party access to the Respondent's premises to recruit employees. At paragraph 4 of the Reply, the Respondent affirms that the Respondent has already recognized the Interested Party. In the Industrial Court Cause Number 48 N of 2009, the Court ordered the Claimant to submit fresh check off forms to the Respondent, for the request for recognition to be considered. The Respondent failed to submit fresh check off forms.
5. The Interested Party filed its Statement of Interest on 6<sup>th</sup> July 2012. It is brought to the attention of the Court that the Claimant sought recognition from the Respondent through Industrial Cause Number 355 of 2009; the prayer was declined. The Interested Party adopts the position of the Respondent with respect to Cause Number 48 N of 2009, submitting that the Claimant failed to submit fresh check off forms, and is, by presentation of the current dispute, seeking variation of the decision in Cause Number 48 N of 2009, through the back door.
6. Parties Representatives made their oral arguments before the Court on 22<sup>nd</sup> February 2013. They confirmed filing of their Final Arguments at the last mention on 22<sup>nd</sup> April 2013, and were advised by the Court Award would be delivered on Notice.

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

7. There is no Trade Union which is currently recognized by KARI. The Claimant seeks an order for access of the Respondent's premises, to recruit unionisable employees. The Court does not see this prayer as being out of line with the Constitution of Kenya or the Labour Relations Act. The answer by the Respondent and the Interested Party that the Claim is *res judicata* lacks conviction.
8. Recognition of trade unions rests on freedom of association. Employees have the right to join and leave trade unions. Recruitment is a continuous process. Even where an employer has formally granted trade union recognition, employees belonging to that recognized trade union are not barred by any law from shifting allegiance to another trade union. Freedom of Association acknowledges the right to associate is co-joined to the right to dissociate; just as much as the right of recognition includes the right of de-recognition. Employees look at the trade union that is best placed to articulate their collective rights and interests of the moment, and do not take a lifelong vow of fidelity, by joining any one trade union.
9. The Respondent has not granted any of the Unions recognition. Whenever an employer is confronted with a situation where there is more than one relevant trade union jostling to represent its employees, that employer is likely to favour retention of the status quo, as the squabbling ensures there is no trade union representation at the workplace for lengthy periods of time. It is in the interest of trade unions to resolve the kind of differences between the Claimant and the Interested Party, at their own level, with the assistance of the Trade Union Centre. Trade Unions must nurture trade union solidarity or perish.
10. The Industrial Court Cause Number 575 of 2010 simply granted the Interested Party access to the Respondent's premises to recruit employees. It did not bar the Claimant, or other trade unions which may be favoured by the employees of the Respondent, to access the premises and recruit members. It is not clear why in the first place, in a democratic country priding itself of a progressive National Constitution, it would be necessary for Courts to be called upon to assist trade unions in accessing workplaces to recruit employees; the right of access is inherent in the exercise of legitimate trade union activity, subject only to such regulations as relate to notification of the employer, and hours when recruitment is to take place.

There is no reason why an employer should deny a trade union access. It is not clear why both trade unions have felt it necessary to seek the assistance of the Court in carrying out an everyday, legitimate and constitutionally sanctioned trade union activity of employee recruitment.

11. The failure by the Claimant to submit fresh check off forms as ordered in Cause Number 48 N of 2009 could in the view of this Court have resulted from lack of access to the Respondent's premises, which access is sought in the present Claim. Such failure suggests that the Claimant was not able to recruit afresh, after the decision in Cause Number 48N of 2009. The present Claim therefore falls in place. The Interested Party ran ahead of the Claimant and obtained access orders. The Claimant has been recruiting from the same unit, right from 2003. It is a Trade Union which has enjoyed a long association with a succession of Respondent's employees. It would be unreasonable of this Court to order that the Claimant cannot access the Respondent's employees, whether or not the Interested Party has been promised recognition, or indeed recognized by the Respondent.

12. *Res Judicata* is a concept of the Civil Procedure Law, which stipulates that issues in a dispute between the same parties, over the same subject matter, which have been heard and fully determined before a competent tribunal, should not be raised and re-litigated. It is a concept that aims at ensuring disputes are not regurgitated; parties are not vexed over the same disputes; and Courts are not subjected to wasteful and endless determination of issues. Ultimately, *res judicata* ensures decisions of the Court are final, binding and effective.

13. It is not a concept that should however be applied without caution in trade disputes. Recognition as observed above is a continuous process. The decision between the parties over recognition in 2003 cannot be said to have finally settled the issue of recognition. Similar issues have arisen in other disputes, between the same parties, in 2009, 2010 and 2011. Even after a trade union has been recognized, as observed above, other trade unions are not barred from recruiting employees from the same collective bargaining unit. Employers are not barred from de-recognizing recognized trade unions, and granting new trade unions recognition. It is a reality of the concept of freedom of association. The Industrial Justice system therefore views the idea of *res judicata* with caution, as same issues are capable of being contested between the same parties, and the phrase '*final*' is quite relative. This is not restricted to recognition disputes, but to other aspects of labour disputes, particularly with respect to collective bargaining agreements.

14. The disputes determined in different Causes at the Industrial Court in the past, do not have the effect of barring the Claimant from seeking the assistance of the Court as it has done in this Claim. The Court has observed that it is not necessary for trade unions to have the sanction of the Court in recruiting of members. The Respondent appears to restrict access, which is regrettably, in violation of freedom of association. Against this backdrop, the *Court Orders*-:

***[a] The Respondent shall grant the Claimant Union access to its premises for purposes of recruitment of unionisable employees as members of the Claimant Union;***

***[b] The Claimant shall notify the Respondent at least 7 days before, in undertaking such exercise;***

***[c] Recruitment shall be undertaken during tea, lunch breaks, and/ or the close of business, and shall not in any event be timed to disrupt the normal performance of duties by potential recruits; and***

***[d] No order on the costs.***

Dated and delivered at Nairobi this 18<sup>th</sup> day of September 2013

James Rika

Judge