



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1421 of 2010

KENYA BUILDING, CONSTRUCTION, TIMBER, FURNITURE

AND ALLIED INDUSTRIES EMPLOYEES UNION..... CLAIMANT

VERSUS

M/S CREATIVE JOINERS LTD RESPONDENT

JUDGMENT

The issue in dispute: Recognition

The Claimant herein Kenya Building, Construction, Timber, Furniture and Allied Industries Employees Union, hereinafter referred to as the Union filed their memorandum of claim on 15th November 2010. The Claimant Union gave evidence to court and indicated that the Respondent falls within the jurisdiction of the Building Union being a furniture manufacturing industry. The union also indicates that they have met the requirement of Section 48 of the Labour Relations act.

The Union avers that between August and September 2009, the claimant recruited majority of Respondent's employees into its membership. That five check-off forms were duly signed by 47 employees who had acknowledged union membership and authorized the respondent to be deducting union dues from their wages and forwarded to the Respondent on 14th August and 22nd September 2009 respectively. This is as per Appendix1 exhibited herein.

The claimant further averred that having recruited more than the required simple majority of the Respondent employees; the claimant forwarded a copy of proposals on Recognition and Negotiating procedure Agreement to the Respondent. The claimant further proposed a joint meeting to discuss the proposals as per Appendix 2 herein.

The claimant avers that several other meetings were arranged between the parties but the Respondent declined to enter into a recognition agreement despite the fact that the claimant had fulfilled all the requirements for such an agreement to be signed by the parties. The claimant avers that on 1st December 2009, the Respondent wrote to inform the claimant that they would not honour the check off forms signed by their employees claiming that their employees were not interested in being members of the Union. Respondent also indicated their unwillingness to deal with the Union due to what they termed as economic downward trend.

The Respondent refused to discuss and sign the recognition prompting the claimant to report the existence of a labour dispute to the Minister for Labour as per Appendix 4. A Conciliator was appointed to handle

the dispute. Attempts to conclude the conciliation process was however frustrated by the non attendance of Respondent on several occasions.

Finally a meeting did take place and the Respondent was asked to comment on copies of the check-off forms that claimant had availed as evidence that claimant had recruited members. The Respondent declined to comment. It now prompted the conciliator to prepare a conciliation report and advised parties to proceed and seek other means of settlement. The claimant decided to refer this case to court under Section 65 of the Labour Relations Act, 2007.

The claimant avers that they have recruited over 51% of the unionisable employees of the Respondent being 44 out of the possible 52 members. The claimant therefore prays that the court finds refusal by Respondent to sign a recognition agreement unreasonable and order the two parties to sign the same. The claimant also seeks that this court finds and award that claimant has fulfilled the requirement of the law pertaining to the recognition agreement. That the respondent refusal to sign the agreement is unjustified.

The Respondent on the other hand filed their memorandum of reply on 31st March, 2011 through the firm of Ondabu and Company Advocates.

They called no witness but filed their written submissions.

In their reply, the respondent made a blanket denial of all the averments of the memorandum of claim of the claimant. They also denied there were any conciliation meetings. They deny that the claimant is the appropriate trade union to cater the interest of the respondent's employees as it has not met the requirements for the same whether there is any other union claiming interest in representing the interest of the respondent's employees or not. They also denied their employees re-affirmed their union membership by signing fresh check off forms. They admit that its employees have a constitutional right to be members of Trade Union, however, they submitted that the respondent has a right to defend itself or its employees from organizations that do not comply with the relevant law of Kenya. They asked court to dismiss the respondent's prayers with costs.

Having heard both parties, the issue for determination is whether the claimant herein now fulfilled the provision of law to warrant them being recognized by the Respondent.

Article 41 (2) of the of the Constitution proves that:

Every worker has the right

(a)

(b)

(c) To form, join or participate in the activities and programmes of a trade union and

(d)"

The Labour Relation Act 2007 Section 54(1) provides that:

"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".

As per this Section, what the Union needs to demonstrate is that they ***represent a simple majority of unionisable employees***. (Emphasis is mine). The issue of simple majority can only be deduced from actual facts and figures obtaining from the employers records and the actual number of workers who have indicated in writing their desire to join the Union and have their union dues deducted from their salary and wages. This proof would therefore require co-operation from an employer to produce their employment records. The workers have a right to join a Union of their choice and the employer is expected to keep employment records.

Section 74 (1) of the Employment Act, 2007 provides that-

***“An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract*”**

Section 74 (2) provides that-

“An employer shall permit an authorised 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 record.....”

A conciliator was appointed in this case but his attempt to get the relevant documentation from the respondent failed. The letter from the conciliator dated 15th September, 2010 indicate that on two occasions, the respondent failed to turn up to the meeting but only indicated that only 15 employees out of 85 workers had been recruited by the Union.

The employer was definitely in breach of Section 74 of the Employment Act by not producing the relevant documentation. The law envisages that he who alleges must prove. It would have been imprudent for the Respondent to make this allegation in submission without producing their muster roll and demonstrating that indeed only 15 workers had joined the Union. The Respondent also alleges that the claimant had forged certain signatures. Given that the Respondent appear sure of this, what then made it difficult for them to call the workers whose signatures had allegedly been forged as their witnesses.

The Claimant exhibited the forms signed by worked indicating that they had joined the union and the list showed a total of 52 workers.

In absence of a list from Respondent showing who their workers are, it is apparent that the Respondent are withholding this information because it will be prejudicial to their case.

I find that the claimant has established their case and I find for claimant and find that:

1. The refusal by the Respondent to recognize the claimant is unwarranted.
2. The Respondent are ordered to recognize the claimant herein and commence negotiations leading to the signing of recognition agreement.

Signed, dated and delivered in court at Nairobi this 30th day of November, 2012.

**HELLEN WASILWA
JUDGE**

No appearances:

Paul Kiragu for Claimant

No appearance for Respondent

Rachel Gichuki Court Clerk