REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 901 of 2012

BANKING INSURANCE AND FINANCE UNION...................CLAIMANT

VS

JAMII SACCO SOCIETY LIMITED.................................RESPONDENT

AWARD

The Claimant Union came to Court by way of Statement of Claim dated 25th May 2012 together with a Notice of Motion of even date. The Claimant sued the Respondent for what the Claimant termed as "phantom promotions of unionisable staff to defeat the existing Recognition Agreement" and refusal to remit union dues. The Respondent filed grounds of opposition on 20th July 2012. The Claimant and the Respondent made oral submissions on 23rd October 2012 and filed written submissions on 9th November 2012.

Mr. Munoru for the Claimant Union told the Court that the parties were bound by a Recognition Agreement signed on 16th September 1997 (the Recognition Agreement is marked Appendix 1 in the Claimant's documents). Among the issues set out in the Recognition Agreement was the principle of employee promotions. The parties had over the years negotiated and executed successive Collective Bargaining Agreements (CBAs) the latest one being for the period 1st July 2009-30th June 2011, which was in force. Mr. Munoru referred the Court to Clause 1 of the CBA on Staff Designations, setting out the categories of unionisable employees from JS14-JS9 (the CBA for 1st July 2009-30th June 2011 is marked Appendix 2 in the Claimant's documents)

Mr. Munoru went on to state that the Union had forwarded proposals for the CBA for the period 1st July 2011-30th June 2013 (the proposals are contained in Appendix 3 of the Claimant's documents). One of the proposals was review of unionisable job categories to include JS14-JS4. According to the Claimant, the Union had recruited a total of 18 employees pending conclusion of the CBA which was the subject of conciliation.

On 22nd August 2011, the Respondent wrote to the Claimant Union notifying the Union that some of the Respondent's staff who had acquired professional training had been promoted **"on merit and in recognition of their achievements."**

The Respondent concluded its letter thus:

"The purpose of writing is to inform you that majority of staff under your Union are beneficiaries of the promotion".

The letter also contained a schedule of the staff who had been promoted together with their previous and current designations and duties.

(The Respondent's letter is marked Appendix 5 in the Claimant's documents).

The Claimant took issue with these promotions stating that all the staff had been lumped together under JS 8 which was the lowest grade within the non unionisable staff categories. The Claimant took the view that the sole purpose of the promotions was to remove the staff from the unionisable bracket, that their jobs had not really changed and that their terms of service had also remained unchanged.

Mr. Munoru added that on 25th August 2011 and 7th October 2011, the Union had served the Respondent with check off orders for deduction and remittance of union dues on account of 18 employees (the check off orders are marked Appendix 6A and 6B in the Claimant's documents).

On 16th September 2011 the Respondent wrote to the Claimant explaining that 16 out of the 17 staff appearing on the check off order dated 25th August 2011 fell under managerial cadre. The Respondent undertook to remit union dues on account of staff under grades JS9-JS14 (the Respondent's letter is marked Appendix 7 in the Claimant's documents).

The Claimant then reported a trade dispute and a conciliator was appointed before whom the parties signed a Memorandum of Agreement in which it was agreed inter alia:

"(a) That the promotion of the nine employees who were recently promoted to management should be revised and continue to be unionisble cadre.

(b)That the nine employees should continue being deducted union dues.

(c) That the benefits the nine employees enjoyed as management staff be considered during the next Collective Bargaining negotiation."

(the Memorandum of Agreement is marked Appendix 8 in the Claimant's documents)

The Claimant averred that the employees had been intimidated by the Respondent and 9 of them had revoked their union membership vide a group letter dated 22nd December 2011 (The letter is marked appendix 9 in the Claimant's documents). The Claimant alleged that the Respondent had written to the employees on 1st February 2011, asking them to revoke their union membership individually. Subsequently, 10 employees wrote individualized letters confirming their resignation from the Union (letters are marked Appendix 10 in the Claimant's documents).

On 23rd February 2012, the Respondent issued to the Claimant a notice of termination of Recognition Agreement on account of the number of the Respondent's employees who were members of the Claimant Union having fallen below the simple majority threshold (the notice is marked Appendix 11A in the Claimant's documents)

Mr. Munoru submitted that the Respondent's action of promoting its members to a non unionisable job grade amounted to unfair labour practices within the meaning of Article 41(1) of the Constitution of Kenya, 2010.

The Claimant sought the following reliefs:

a) That the Respondent be restrained from violating the parties' Recognition Agreement and Collective Bargaining Agreement by unprocedurally promoting the unionisable employees to management cadre.

b) That the Respondent be compelled to deduct and remit monthly union dues from the salaries of all the 17 unionisable employees as per the check off order served on 25th August 2011 and to pay all the arrears

as from August 2011 from its own funds.

c) That the Respondent be compelled to engage with the Claimant on review of the parties'Collective Bargaining Agreement for the period 1st July 2011-30th June 2013.

d) That the Respondent be restrained from unprocedurally revoking the parties' Recognition Agreement.

e) That the Respondent be restrained from threatening, harassing, intimidating coercing and/or terminating unionisable employees because of union membership.

f) That the Claimant be awarded the costs of this case.

Mr. Masese, instructed by the Federation of Kenya Employers (FKE) appeared for the Respondent. He told the Court that the employees in issue had voluntarily revoked their union membership. He added that the employees had sworn an affidavit on 19th June 2012 confirming that they did not wish to continue their membership with the Union. Mr. Masese referred the Court to Article 36 of the Constitution of Kenya, 2010 which guarantees Freedom of Association as well as section 48 (6)&(7) of the Labour Relations Act which outlaws deduction of union dues from an employee who has notified their employer of their resignation from a union.

The Respondent's Counsel submitted that there was no evidence that the employees had been forced to resign from the Union. He stated that the management positions in issue had been advertised, interviews conducted and those employees found qualified offered the positions. Counsel further stated that the Claimant was seeking blanket orders aimed at forcing the Respondent to make certain decisions in managing its affairs. He submitted that there was no intimidation on the employees, that everything had been done voluntarily by the employees and that the promotions had come with benefits to the employees. He asked that the Claimant's claim be dismissed and did not ask for costs.

The twin questions for determination are:

a) Were the promotions of the Claimant's members who are employees of the Respondent phantom?

b) Were the resignations of the Claimant's members thus promoted by the Respondent voluntary?

The right to union representation is anchored in Article 41 of the Constitution of Kenya, 2010. Employers cannot therefore prohibit an employee from joining or participating in the activities of a trade union. Conversely under Article 36 of the Constitution and Section 48(6) & (7) of the Labour Relations Act, a trade union cannot force an employee into its membership.

This case is somewhat unique in that as the Claimant was negotiating for the union net to be thrown wider within the Respondent's workforce, the net shrunk right under their feet as the Respondent promoted majority of the employees who were already unionisable. The Respondent consistently maintained that in promoting the Claimant's members, it was in fact contributing to their career growth and well being.

While trade unions are permitted by law to interact with their members and the employers of those members especially in matters of collective bargaining, unions cannot be allowed to enter the work place and run the employer's affairs.

In the case of **Kenya Game Hunting and Safari Workers Union Vs Lewa Conservancy Limited (Industrial Cause No. 1567 of 2011), Justice Rika** stated held that:

The Constitution of Kenya has not opened the door of Industrial Relations to accommodate such esoteric principles as co-determination. The day has not arrived when trade unionists sit in the boards of Kenyan companies with whom the trade unions have recognition agreements. The participation of trade unions in management of companies cannot extend beyond that which is agreed to between the parties under their recognition agreements and successive CBAs.

Following this legal position, the Respondent was well within its right to promote its employees. However, the manner and timing of the promotions reeked of bad faith.

a) First, the resignation letters appear to have been motivated by the promotions;

b) Second, the matter of unionisable job categories was on the parties negotiating table when the Respondent promoted the employees;

b) Third, the change in job designations and duties was not substantive but merely cosmetic;

c) Fourth, the clock work fashion in which the employees resigned from the Union leading the Respondent to issue a notice of revocation of the Recognition Agreement made no excuse for the real intention of the Respondent, being to kick the Claimant Union out of the Respondent's operations.

d) Finally, the payment receipt for filing of the affidavit sworn by the employees was issued in the Respondent's name, meaning that the affidavit was actually filed by the Respondent.

However and in spite of my findings above, individualized letters signed by the respective employees expressing their wish to resign from the Union are on record. The Respondent cannot therefore legitimately deduct union dues from these employees.

Consequently, the only order i will make is that the parties review the unionisable job categories in accordance with the parameters set in the Industrial Relations Charter, without any loss of accrued benefits to the employees. Once this is done, the Claimant is at liberty to pursue a fresh recruitment of members.

Each party will bear their own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF DECEMBER 2012

LINNET NDOLO
JUDGE

In the Presence of:

…...Claimant

…...*Respondent*