IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI.

(Before: Charles P. Chemmuttut, J.,

O.A. Wafula & J.M. Kilonzo, Members.)

CAUSE NO. 29 OF 2006.

BAKERY, CONFECTIONERY, MANUFACTURING

& ALLIED WORKERS' UNION ……………………………………Claimants.

v.

MILL BAKERS LTD. ……………………………………………..Respondents.

Issue in Dispute:-

"Refusal by the company to sign Recognition Agreement with the union."

G.M. Muchai, Nationa Secretary General, for the Claimants (hereinafter called the Union).

L.W. Kariuki, Principal Executive Officer, F.K.E, for the Respondents (hereinafter called the Company).

A W A R D.

The Minister for Labour referred this dispute to the Court for adjudication and determination on 20th February, 2006, under powers conferred upon, or vested in him, by Section 8 of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act); and his reference, together with the statutory certificate from the Labour Commissioner under Section 14(9)(e) of the Act, were received by the Court on 3rd March, 2006. The dispute was then listed for mention on 28th Mach, 2006, when Messrs. Dan Mwangure and L.W. Kariuki, who appeared for the parties respectively were directed to submit or file their respective written memoranda or statements, on behalf of the parties, on or before 19th April and 17th May, 2006, and the dispute was fixed for hearing on 15th June, 2006. Mr. Muchai for the Union belatedly submitted his memorandum on 22nd May, 2006; and, in the circumstances, Mr. Kariuki was unable to file his reply statement as directed and naturally the matter could not proceed for hearing on 15th June, 2006. The matter was brought up for another mention on 19th June 2006, when Messrs. Mwangure and Kariuki again appeared for the parties. On this occasion, Mr. Kariuki was directed to file his reply statement on or before 4th July, 2006, and the dispute was fixed for hearing on 16th August, 2006. Mr. Kariuki filed his reply statement on 5th July, 2006, and the dispute was heard as aforestated, i.e. on 16th August, 2006.

The Union is duly registered as such under Section 11 of the Trade Union Act, Cap. 233, Laws of Kenya, to represent and defend the industrial interests of all the employees engaged or employed in bakeries, pastry, biscuits, cakes, confectionery making, sweets making factories and other food manufacturing and related industries. On the other hand, the Company is a

limited liability concern which was incorporated under the Companies Act, Cap. 486, Laws of Kenya, and it came into operation six (6) years ago. It engages in the manufacture of cakes and other bakery products, and has a labour force of fifty (50) permanent employees.

In his opening remarks, Mr. Muchai stated that his union “recruited a large section” of the Company’s labour force into its membership, and, pursuant to the provisions of Section 46 of the Act, notified the Company to remit the union dues deductions from the employees who acknowledged membership of the Union by appending their signatures thereon (see Apps. I, I (a) and (b)).

Consequently, the parties attempted to meet at their own level with a view to signing the “Agreement Relative to Recognition and Negotiating Procedure”, but the Company allegedly refused to meet and/or accord recogition to the Union (see Apps. 2 and 2(a),3,4, and 5). On 1st March, 2004, the Union reported a formal trade dispute to the Minister for Labour and Human Resource Development in accordance with Section 4 of the Act. (see App. 6). The Minister accepted the dispute and, pursuant to Section 7 of the Act, appointed Mr. P.M. Wamoto of Ministry of Labour Headquaters to act as the Investigator. On 27th July, 2005, the Minister released his investigation report to the parties in which he found and recommended as follows:-

“FINDINGS.

………. Mill Bakers Limited are engaged in Baking and Confectionery activities and therefore Bakery, Confectionery, Manufacturing and Allied Workers Union is the rightful one to represent the employees in the industry ………. There is no rival union.

The Union had initially recruited 26 employees into their membership out of a total workforce of 50 employees. Out of the recruited employees 16 were casuals and had since left employment. Of the remaining ten (10) eight (8) resigned their membership from the union …………. The union was yet to meet the 51% simple majority to warrant recognition.

RECOMMENDATION.

………………………. I recommend that the union be denied recognition until they are able to recruit the 51% simple majority of the unionisable employees.”

Finally, the Minister appealed to the parties to accept the recommendation as a basis of settling the dispute. The Company accepted the Minister’s report but the Union rejected both the findings and recommendation. (see Apps. 7,8 and 9).

In the circumstances, the Union forwarded a Notification of Dispute, Form ‘A’, through the Chief Industrial Relations Officer, to the Company, but the latter refused/failed and/or neglected to countersign. Accordingly, the Minister invoked his powers under Section 8 of the Act and referred this dispute to the Court as aforestated for consideration and determination (see Apps. 10,10(a), 11 and 11(a)).

Mr. Muchai submitted that the Minister, by his findings and recommendation, erred in law when he found that, despite the Union having recruited more than a simple majority required for recognition, sixteen (16) of those who had appended their signatures were actually casual employees. He said this was a misrepresentation of law as there was no legal provision for it. Mr. Muchai pointed out that the Company has bitterly fought to avoid recognizing the Union so as to continue exploiting the employees, calling them ‘casuals’, and using them to provide the desired labour for purposes of production and generation of wealth. This, he averred, amounted to unfair labour practice, if not slavery, which is prohibited under Section 73 of the Constitution of Kenya, and the said employees have no means of claiming for their share of the wealth jointly created between them as providers of labour and the owners of the enterprise as providers of capital. Mr. Muchai stated further that the Company has, in defiance of the statutory provisions under Sections 46, 47 and 49 of the Act, failed to remit union dues as provided for therein and has also defied the Registrar of Trade Unions’ notice to that effect (see Apps. 12 and 12(a).

Mr. Muchai submitted further that the Company too has violated, transgressed and flouted the following instruments:-

(i) ILO Convention No. 87 on Freedom of Association and Protection on the Right to Organise.

(ii) ILO Convention NO. 98 on the Right to Organise and Collective Bargaining.

(iii) ILO Declaration on Fundamental Principles and Rights at Work.

(iv) Industrial Relations Charter.

(v) Constitution of Kenya.

Article 2 of the ILO Convention No. 87 states as follows:-

“Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organinsations of their own choosing without previous authority.”

Article I of the ILO Convention No. 98 provides thus:-

“Article 1.

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts and calculated to:-

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.”

The ILO Declaration and Fundamental Principles and Rights at Work, which is binding on the Republic of Kenya, is as hereunder:-

“2. Declares that all members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.”

Clause B. III of the Industrial Relations Charter provides that:-

“III. Employers’ Responsibilities.

(1) That each employers’ organization, group of employers or individual undertakings, shall accord recognition to trade unions appropriate to their industries as negotiating bodies for the employees of such organisations, groups or undertakings in respect of terms and conditions of employment.

(2) That employers shall not engage in such practices as:-

(a) Interference with the right of employees to enroll or continue as union members;

(b) Discrimination, restraint or coercion against any employee because of recognised activity of trade unions;

(c) Victimisation of any employee and abuse of authority in any form;

(d) Abusive or intemperate language;

(e) Shall generally respect the provisions of ILO Convention No. 98 concerning application of the Principles of the Right to organise and Bargain Collectively.”

Finally, Section 80(1) of the Constitution of Kenya states that:-

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular form or belong to trade unions or other associations for the protection of his interests.”

In the circumstances, Mr. Muchai urged the Court to disregard the Minister’s findings and recommendation and prayed that an award in favour of the Union be entered or made as follows:-

(i) That the union has fulfilled all the necessary and relevant provisions mandated under Section 5(2) of the Act, in that it has in its membership a simple majority in the company enterprise who are eligible by virtue of its constitution, to become its members.

(ii) That the Company should accord formal recognition to the Union and deposit with the Court, within a given period, copy of such duly signed recognition agreement, and

(iii) That the effective date of the recognition agreement be 27th November, 2003, being the first date recognition was sought so as to enable the employees effectively lay a claim on the wealth they have helped to create over the period that the Company has dragged its feet over this matter.

In opposing the demand, Mr. Kariuki submitted that two names in the check-off list, out of the 26 employees who were recruited by the Union, were not genuine and their signatures also differed. The signatures of Messrs. James Wachira Maina and Vincent Kuti, whose membership numbers are Nos. 5105 and 5106, also differed from those appearing in the Muster Roll and other letters. In any case, he said, the Union recruited 16 casual employees who were hardly one month or so old in employment, and these category of employees have since been laid off after the completion of the tasks assigned to them. Mr. Kariuki pointed out that 3 employees namely, Messrs. Francis Kamau, Patrick K. Muchiri and Richard Ngweso, out of 10 permanent employees who were recruited by the Union, have since resigned from employment. The remaining 7 out of 50 permanent employees resigned from the Union and have instructed the management of the Company not to remit any union dues to the Union. In a nutshell, therefore, 16 casual employees who were recruited by the Union are no longer in employment; 3 out of 10 permanent employees have since resigned, and the remaining 7 permanent employees have resigned from the Union. This being the case, the Union is not entitled to recognition by the Company.

On effective date, Mr. Kariuki pointed out that the demand is premature and misplaced as the terms and conditions of employment, if any, have yet to be negotiated by the parties.

For the foregoing reasons, Mr. Kariuki prayed that the demand for recognition by the Union be rejected.

In this case, the Union sought recognition from the Company on the ground that:-

(i) it had recruited 26 out of 50, or 52%, unionisable employees in the Company’s undertaking as Union members;

(ii) there is no rival union claiming representation or recognition from the Company, and

(iii) the Union is the sole and appropriate one to represent the unionisable employees of the Company on matter pertaining to terms and conditions of employment.

On the other hand, Mr. Kariuki denied that the Union had recruited a simple, or more than a simple, majority of the Company’s unionisable employees, but had only managed to recruit casual workers who were hired on specific jobs, and who have since left the employment of the Company.

Admittedly, the Union has satisfied grounds (ii) and (iii) hereinabove, and the only question for consideration is whether it has satisfied ground (i) as well. It is evident from the Minister’s findings and recommendation that the Union was denied recognition allegedly on the ground that 16 out of the 26 employees who had been recruited by the Union as members were casual workers. But the total unionisable employees at the material time, when the Union sought recognition from the Company, were 50 permanent employees. This is supported by the submission of the management to the Investigator when they stated at the outset of their submission that :-

“The management …………… have currently a labour force of 50 employees comprising of unskilled, semi-skilled and skilled cadres all in permanent employment and with whom they enjoy cordial relations.”

In the circumstances, it is clear that the 26 out of 50 employees, who were recruited by the Union as its members, were actually permanent employees. We, therefore, take great exception to the Minister’s findings and recommendation, and find that the Union had satisfied ground (i) hereinabove as well; and the contention by the Company that the Union did not recruit a simple majority of the unionisable employees of the Company as union members is devoid of force and untenable. We also find that the management of the Company violated the provisions under the ILO Conventions Nos. 87 and 98,the Declaration on

Fundamental Principles and Rights at Work, Clause B. III of the Industrial Relations Charter and Section 80(i) of the Constitution of Kenya.

Consequently, we are satisfied that the Union has fulfilled the requirements for recognition under Section 5(2) of the Act; and accordingly we order that the Company accord forthwith formal recognition to the Union as the sole and appropriate representative of the unionisable employees in its establishment. We also direct that the parties must sign a recognition agreement within **one (1) month** from the date of this award.

DATED and delivered at Nairobi this 15th day of March, 2007.

Charles P. Chemmuttut, MBS.,
JUDGE.

A.O Wafula,
MEMBER.

J.M. Kilonzo,
MEMBER.