REPUBLIC OF KENYA.

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA.

(Before: Charles P. Chemmuttut, J.,

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

CAUSE NO. 47 OF 2007.

KENYA SHOE & LEATHER WORKERS' UNION ....Claimants.

v.

UMOJA RUBBER PRODUCTS LTD..Respondents.

and

KENYA CHEMICAL & ALLIED WORKERS UNION ....Interested Party.

Issue in Dispute:-

"Demarcation over Umoja Rubber Industry."

Joseph Bolo, Secretary General, for the Claimants (hereinafter called the first Union).

Abisai O. Ambenge, Senior Executive Officer, F.K.E., for the Respondents (hereinafter called the Company).

Were Dibo Ogutu, National General Secretary, for the Interested Party (hereinafter called the second Union).

A W A R D.

The first Union is registered under Section 11 of the Trade Unions Act, Cap. 233, Laws of Kenya, and pursuant to Rule No. 3 (a) of its Constitution and Rules, it is allowed to represent "all employees engaged in leather industry including sandal making, boot, shoe manufacturing and repairing, tanning of hide and skin, plastics, rubber making, all kinds of leather suitcase, shoes shops, shoes laces, shoe polish, handbag making, polythene, elastic, pvc shoes, cushion making, garment making and allied industries provided that such employee is above the apparent age of sixteen years." The second Union was also registered as such on 11th August, 1958, under Certificate No. 55/1, and in accordance with Rule 3(a) of its Constitution, it is permitted to represent "all employees in the following groupings, irrespective of trade and regardless of race, namely, Chemical Products, Non-Metallic Products and Gas Industry as specified by Rule 2(a)."

Rule 2(a) of the said second Union's Constitution provides as under:-

"2(a) To secure the complete organization in the Union of all workers employed in the:-

(i) Manufacturing of chemicals and chemical products.

(ii) Vegetables, Animal oils, and Fats.

(iii) Manufacturing of Miscellaneous chemical products.

(iv) Manufacturing of all non-metallic mineral products, excluding any petroleum products, Coal and quarrying industry.

(v) Manufacturing of structural Clay products.

(vi) Manufacturing of Glass and Glass Products.

(vii) Manufacturing of Pottery, China and Earthenware including manufacturing of Cement (Hydraulic).

(viii) All Chemical Gas Industry in Kenya."

The Company, which is situated at Mtwapa in kilifi District of the Coast Province, is a limited liability concern, incorporated in Kenya under the Companies Act, Cap. 486, Laws of Kenya. According to the second Union, the Company is the largest shoe making establishment in Kenya to-day, and the ingredients or components for making shoe products include chemicals, like synthetic rubber, natural rubber, pale crepe rubber, high styrene rubber, natural latex, hydrocarbon resins, paraffin wax, china clay, diethyleneglycol, aluminium silicates, benzothiazole, diphenyaguanidine anti-oxidants, blowing agents, urea, titanium dioxides, zinc stearate rubber fragrances, silica, PPTD, yellow kaolin, whiting, sulpher, colouring pigments, process oil, e.t.c. The Company and the second Union have had a recognition agreement since May, 1979, and have also negotiated and signed or entered into several collective agreements which regulate the terms and conditions of service of the unionisable employees of the Company, the latest of which was signed on 29th August, 2006 for the period 1st July, 2005 to 30th June, 2007, and was registered by the Court on 20th September, 2006, under RCA NO. 257 of 2006. The first Union states that the Company employs about 1,500 workforce, some of whom are classified as casuals and yet they perform duties of a permanent nature.

In his opening submission, Mr. Ambenge averred that in 1998 the Minister for Labour appointed Mr. S.M. Mbae of Mombasa Labour Office to deal with a similar dispute between the parties in the instant case, and the Minister released his first report to them on 3rd June, 1999, in which he found and recommended, *inter alia*, as follows:-

"**FINDINGS.**

…….. M/S Kenya Chemical and Allied Workers Union and M/S Umoja Rubber Products Limited have a valid recognition agreement which was signed on 2nd July, 1979. Thereafter they have registered subsequent collective bargaining agreements and the current one is due to expire on 3oth June, 1999.

….. the respondents has a total labour force of 39 permanent and unionisable employees and 20 casual employees ……….. between 15th December, 1997 and 22nd December, 1997, M/S Kenya Shoe and Leather Workers Union had recruited 30 employees comprising of permanent and casuals. Upon recruitment, they submitted check-off forms to the respondents to effect union dues deductions, but 28 employees denounced their membership and re-affirmed their membership with M/S Kenya Chemical and Allied Workers Union. It was thus evident that M/S Kenya Shoe and Leather Workers Union had not acquired a simple majority to be accorded recognition.

Finally, …………. Kenya Chemical and Allied Workers Union and M/S Umoja Rubber Products Ltd. have maintained a cordial industrial relations machinery and thus M/S. Kenya Shoe and Leather Workers Union has no mandate and legitimate case to aspire for recognition. Hence, they should henceforth cease interfering with the existing industrial relations machinery.

RECOMMENDATION.
……….. it is recommended that M/S. Kenya Shoe and Leather Workers Union should not be accorded recognition."

The Minister finally appealed to the parties to accept the recommendation as a basis of settling the dispute, but it would appear that none of the parties pursued the matter further. However, on 5th March, 2004, the first Union reported a fresh dispute, re: "Demarcation over Umoja Rubber Industry" in accordance with Section 4 of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act); and on 14th April, 2004, the Minister constituted a Demarcation Committee to deal with the matter, whose members consisted of Mrs. E.F. Onuko (Chairlady), Mr. J.N. Mwanzia (Secretary) and Messrs. L.W. Kariuki (F.K.E.) and M. Ouma (COTU) (Members) to act as the Investigators. On 28th June, 2006, the Minister released his second report to the parties wherein he found and recommended, *inter alia,* as under:-

"**FINDINGS**.

…….. the Kenya Chemical and Allied Workers Union has a valid recognition Agreement with Umoja rubber products signed

way back on 2nd May, 1979. Since then, the parties have concluded several successive agreements.

…both union's constitutions over rubber making/manufacturing as undertaken by Umoja Products Ltd. However the Kenya Shoe and Leather Worker's Union is more specific covering the manufacture and repair of Shoes among others.

……….. Umoja rubber products Limited are manufacturers of sandals, canvas shoes, micro-solling sheets and other rubber moulded items. It has grown to the extent that it is currently the largest shoe manufacturer in the country employing over 1800 unionisable employees. Indeed …… other shoe companies source their material/products from the company. Over 80% of the company's activities are devoted to the manufacturing of shoes.

On the level of unionization……. there are only 27 permanent employees paying dues to the Chemical Union.

……… while the sanctity of the recognition agreement is to be respected, cognizance should also be taken of the dynamically changing circumstances. In this instant case, the company since 1994 has made significant inroads in the shoe manufacturing sector. The company is currently the largest manufacturer of shoes in the country, an activity that constitutes over 80% of the company's concerns. There is therefore a need to review the existing recognition agreement between the company and the Chemical union in view of the company's altered activities.

RECOMMENDATION.

…… I recommend that the Shoe and Leather Workers Union be the sole legitimate representative of the industrial interests of the workers at Umoja Rubber Products Ltd. I further recommend that the Kenya Chemical and Allied Workers Union graciously arrange to terminate its recognition agreement with the company and on expiry of the current C.B.A., cease to collectively bargain for the workers."

The Minister finally appealed to the parties to accept the recommendation as a basis of settlement of the dispute. The first Union accepted the recommendation but the second Union and the Company rejected it, leading to exchange of numerous correspondence between themselves and also the management of the Company on the matter, particularly the letter by the Chairman of the Company, Mr. Ashok Shah, dated 4th September, 2006, to the Secretary General of the second Union, which reads as follows:-

"**RE: RESCISSION OF THE RECOGNITION AGREEMENT.**

This has reference to the above.

Our records show that 77 workers have left your Union in favour of the KSLWU. This constitutes 87% of the workers in our payroll.

Consequently, we have no alternative but to give three month's notice of our decision to rescind the recognition agreement between the parties as the law dictates that we give recognition to the Union with a simple majority.

Kindly revert.

Yours faithfully

UMOJA RUBBER PRODUCTS LTD.

(Sigd)

ASHOK SHAH

CHAIRMAN."

The second Union challenged the decision of the Company to rescind the recognition agreement and insisted that the matter should be determined by the Court. Consequently, on 6th September, 2006, the second Union reported a trade dispute against the first Union on "interference with our members in Rubber and Plastics Companies, namely Umoja Rubber Products Ltd. and Kevrose Plastics (EPZ) Ltd." It is important to note at this juncture that the fate of the said dispute is unknown to the Court. In view of the foregoing scenario, the Company has been unable to accord recognition to the first Union.

As the Company declined to accept the report of the Demarcation Committee and also refused to sign the Notification of

Dispute, Form 'A', the first Union urged the Minister to invoke his powers vested in, or conferred upon, him by Section 8 of the Act, which he did and referred the dispute to the Court on 30th April, 2007. The Minister's 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 May, 2007, and the dispute was listed for mention on 17th May, 2007. On this day, Mr. Bolo appeared for the first Union, but there was no appearance for the Company. Mr. Bolo submitted his written memorandum on the same day, i.e. on 17th May, 2007; but despite the absence of its representative, the Company was directed and notified to file its reply statement on or before 24th May, 2007, and the dispute was fixed for hearing on 31st May, 2007. Messrs. Ambenge and Ogutu for the Company and the Interested Party respectively filed their reply statement and rejoinder on 24th May 2007, and the dispute was heard as aforestated, i.e. on 31st May, 2007.

Mr. Bolo submitted that, although the Company is the largest shoe manufacturing firm in the country, it pays its employees low wages because the second Union, which has been representing them, is ignorant about shoe making. He pointed out that competition in footwear industry or sector is favourable to the Company since it pays low wages to its employees and sells its products cheaply in the market, and this has caused some concern to other shoe manufacturing establishments. For example, while other establishments are paying Kshs. 300/=, the Company pays Kshs.175/= per day, for the same operation. Mr. Bolo averred that 89 out of 1,500 unionisable employees, who are engaged by the Company are members of the second Union, while the rest resigned and joined the first Union when the recognition agreement between the Company and the second Union was terminated or rescinded on 4th December 2006. He maintained that the first Union is the right and appropriate one to represent the industrial interests of the Unionisable employees of the Company.

In the circumstances, Mr. Bolo prayed that the Company revokes or rescinds the recognition agreement between it and the second Union and accord formal recognition to the first Union forthwith as the appropriate one to represent the interests of the unionisable employees in its establishment.

In reply, Mr. Ambenge stated briefly that the Company has a total of 155 permanent employees, 88 of whom are members of the first Union. The Company also engages some casual workers. But since the Company has had a valid recognition agreement and has also negotiated and entered into several collective agreements with the second Union, its endeavour to rescind the recognition agreement has been objected to or challenged by the latter; and it is not the wish of the management of the Company to recognize two unions in their establishment since this will cause confusion and possible industrial unrest. Mr. Ambenge strongly denied that the Company pays low wages to its employees; and, on the contrary, asserted that its wages are in comparison far above the wages, which are paid by other concerns, e.g. C&P Shoes, Slapper Shoe Industries, Macquin Shoes, e.t.c.

In conclusion, Mr. Ambenge contended that since the second Union is already representing the interests of the unionisable employees of the Company, the first Union is estopped from seeking recognition to represent them. Accordingly, he urged the Court to maintain the *status quo.*

Mr. Ogutu submitted that the first Union amended its constitution in 2004 to include employees working in rubber and plastic manufacturing establishments, and this led to an encroachment of the second Union's area of representation. He stated that sometime in 1998, the first Union had reported a similar trade dispute against the Company; but, after investigation, the Minister recommended that the said Union should not be accorded recognition by the Company. If, therefore, the first Union was dissatisfied with the aforementioned recommendation, then it should have reported a dispute under Section 7 of the Act for adjudication and determination by the Court. He said that the move by the first Union in reporting a fresh or another dispute on the same issue amounted to interference of the Company's operations, and the subsequent recommendation by the Minister that the first Union be accorded recognition by the Company is misconceived and misguided. Mr. Ogutu averred further that the stand taken by the Company to deny the first Union recognition was supported by the Federation of Kenya Employers (F.K.E.), but the Demarcation Committee ignored it. In the circumstances, the first Union disorganized the membership of the second Union in the establishment of the Company; and, as a result, the latter Union reported a dispute to the Minister for Labour, which is still pending for investigation. He complained bitterly that, although the second Union was a party to the Demarcation Committee proceedings, it was kept in the dark regarding the proceedings of the case until the Federation of Kenya Employers draw its attention to it.

In summary and conclusion, Mr. Ogutu maintained that:-

(i) the constitution of the second Union caters for unionisable employees in the plastic and rubber industries;

(ii) the first Union amended its constitution in 2004; and, as a result, it has disorganized and interfered with the peaceful industrial relations existing between the Company and the second Union;

(iii) the Company and the second Union have a valid recognition agreement and have also negotiated and entered into several collective agreements, the last of which is still in force;

(iv) since the first Union did not pursue the earlier dispute which it had reported in 1998 for lack of merit, then it should be denied recognition in the present dispute, and

(v) therefore, the second Union hereby rejects the report by the Minister in which he has recommended that the first Union be accorded recognition by the Company.
Accordingly, Mr. Ogutu prayed that the demand by the first Union for recognition be rejected and the *status quo* be maintained.

Admittedly, the second Union has a valid recognition agreement and has also negotiated and entered into several collective agreements with the Company since 1979 to-date, while the first Union has none; but it alleges that it is the right and appropriate Union to represent the interests of the unionisable employees of the Company and has recruited most or majority of them as its members. Therefore, the question for determination in this case is: which one of the two unions is entitled to represent the interests of the unionisable employees in this concern. The case at hand is a demarcation dispute between two rival trade unions demanding recognition from one employer; and, while upholding the industrial relations system in Kenya, which has become the envy of most countries, the Court is determined to rule on which of the two Unions is competent to be recognized by the Company. It is true that in his first report which was released to the parties on 3rd June, 1999, the Minister recommended that the first Union should not be accorded recognition, mainly on two grounds, namely:-

(a) that the first Union had not acquired a simple majority of the unionisable employees as its members to be accorded recognition by the Company, and

(b) that the second Union and the Company had "maintained a cordial industrial relations" and the first Union had "no mandate and legitimate case to aspire for recognition"; and as a such, it should, therefore, not interfere with the existing industrial relations machinery.
Both rival unions vigorously pursued their demand or claim for recognition from the Company and this claim necessitated the appointment of a Demarcation Committee by the Minister to decide on which was the right and appropriate union to be recognized by the Company. On 28th June, 2006, the Minister released to the parties his second report, wherein he found, *inter alia:-*

(a) that the Company is currently the largest shoe manufacturer in the country, an activity that constitutes over 80% of its activities, and

(b) that there is need to review the existing recognition agreement between the Company and the second Union due to its altered activities.
In the circumstances, the Minister recommended that the first Union, being a more specific one, be the sole and legitimate representative of the industrial interests of the employees in the establishment of the Company, and that the second Union "graciously arrange to terminate its recognition agreement with the Company and on expiry of the current CBA, cease to collectively bargain for the workers."

During the hearing of this dispute, Mr. Ogutu vigorously challenged the validity of the recommendation by the Minister in his second report to the parties on the ground that the same was not signed by the members of the Demarcation Committee. Section 119 of the Evidence Act, Cap. 80, Laws of Kenya, states that:-

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

The said section deals with rebuttable presumptions of fact, and the terms thereof are such as to take a number of presumptions in English law and reduce them to the status of *maxims* which the Court may then apply or not. The illustrations to Section 114 of the Indian Evidence Act, 1872, nine in number, are some of the more important of these *maxims*, and have been referred by the courts on numerous occasion.

No objection of this report regarding lack of signatures was taken up earlier by Mr. Ogutu on behalf of the second Union. If such an objection had been taken up, it would have been possible for this Court to summon the members of the Demarcation Committee and enquire from them as to whether their report to the Minister was duly signed or not. The Court very much appreciates the important role which the Demarcation Committees are intended to play in solving disputes between various unions on matters of recognition by the employers. Therefore, the presumption in this case is that the Demarcation Committee must have performed its duty properly, signed or endorsed the report and sent it to the Minister as required by law.

One other factor which goes against the second Union is that in his second report the Minister found that 80% of the Company's activities involves the manufacture of shoes; and in the circumstances, the nature of its commercial activities have drastically changed and are now entirely geared and overwhelmingly oriented towards making shoes. It is true. The Company's major industrial activity now is no longer strictly related to its original activity, but appropriately falls under the shoe industry or sector.

With the foregoing discussion in view, and also taking into account that the first Union is a more specific union to this industry, we uphold the Minister's findings and recommendation and award that the Company accord formal recognition to the first Union as the sole and rightful representative of its unionisable employees, and we, therefore, **ORDER** that the parties should sign a formal recognition agreement within **two (2) months** from the date of this award for purposes of collective

bargaining.

We **ORDER FURTHER** that the Company revokes or rescinds forthwith the existing recognition agreement between it and the second Union.

DATED and delivered at Nairobi this 13th day of September, 2007.

Charlse P. Chemmuttut, MBS.,

JUDGE.

J.M. Kilonzo, O.A. Wafula,

MEMBER. **MEMBER.**