Kenya Chemical & Allied Workers Union v Kenya Plantation & Agricultural Workers Union & 2 others (Civil Appeal 197 of 2019) [2023] KECA 1493 (KLR) (8 December 2023) (Judgment)

Neutral citation: [2023] KECA 1493 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 197 OF 2019

PO KIAGE, M NGUGI & JM NGUGI, JJA

DECEMBER 8, 2023

BETWEEN

KENYA CHEMICAL & ALLIED WORKERS UNION ..... APPELLANT

AND

KENYA PLANTATION & AGRICULTURAL WORKERS UNION .... 1ST RESPONDENT

AGRICULTURAL EMPLOYERS ASSOCIATIONS ..... 2ND RESPONDENT

HOMALIME KENYA LIMITED ..... 3RD RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Kisumu (M. Onyango, J.) delivered by M. N. Nduma, J. on 6th December, 2018 in ELRC Cause No. 97 of 2017)

JUDGMENT

JUDGMENT OF KIAGE, JA

1. The 1st respondent filed a Memorandum of Claim in the Employment and Labour Relations Court against the appellant and the 2nd and 3rd respondents for;

    a. A Declaration that the activities of Kenya Chemical & Allied Workers Union in Homalime Kenya Limited amounts to interference of the claimant's right to freedom of association and right to collective bargaining with Homalime Kenya Limited.

    b. A declaration that Kenya Chemical and Allied Workers Union by itself, its agents, servants, assigns and representatives are hereby restrained and prohibited from holding meetings, recruiting, entering into any agreement(s), or demanding trade union dues from the 2nd respondent employees and interfering with the claimants rights to freedom of association

and collective bargaining as long as there exists a Recognition Agreement and a Collective Bargaining Agreement between the claimant and the 2nd respondent.

c. Costs of this suit be provided for.

2. Contemporaneously, the 1st respondent filed a Notice of Motion seeking preservatory orders. The application was certified urgent and the appellant was restrained from interfering with the relationship between the 1st and the 2nd respondents pending hearing and determination of the case. The case was further referred to the County Labour Officer, Kisumu County to carry out a demarcation exercise and file a report in court within 30 days. On 10th April 2017, the Kisumu County Labour Officer invited parties herein to appear before him and make submissions. Subsequently, the Labour Officer filed a demarcation report dated 2nd June 2017. On 15th June 2017, parties agreed to consolidate the application and the main suit and proceed by way of written submissions in disposing of the matter.

3. The 1st respondent framed four issues for determination by the trial court namely, whether the appellant was the right Union for Grant of Recognition; whether the 2nd respondent employees had resigned from the Claimant Union; whether the 2nd respondent was justified in deducting and remitting union dues to the appellant, and whether the Recognition Agreement and the Collective Bargaining Agreement (CBA) signed between the 1st respondent and the 3rd respondent was valid and binding on the parties.

4. The 1st respondent submitted that the appellant did not meet the threshold of being the right Union for Grant of Recognition. In support of that assertion, section 54(2) of the *Labour Relations Act*, 2007 (LRA) was cited. The provision guarantees the recognition of a trade union by employers for purposes of collective bargaining if the trade union represents a simple majority of unionisable employees of that employer. Section 54(8) was also referred to for the proposition that, 'When determining a dispute under this section the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister."

5. Referring to paragraph 20 of the demarcation report, the 1st respondent contended that, the 2nd respondent is an agricultural entity and engages on a large scale in the farming of sugarcane, forestry, rearing of livestock and production of lime powder for agricultural purposes. The 1st respondent further drew the Court's attention to paragraph 17 of the demarcation report where the 3rd respondent, whose membership included the 2nd respondent is stated to have submitted that, '...Homaline Kenya Limited started as an Agricultural Farm, and despite going through internal administrative changes they still undertake agricultural and lime activities and have maintained their name as 'Homalime Kenya Limited' and equally maintained their Industrial Relationship with Kenya Plantation and Agricultural Workers Union on behalf of its employees.'

6. The 1st respondent adverted to *the constitution* of the appellant union. Rule No. 2 of that constitution provides for the nature of organisations and companies for which the appellant was established, and none of them included those in the agricultural sector. It was further urged that no evidence had been tendered to show that employees of the 2nd respondent had resigned their union membership from the 1st respondent. The 1st respondent contested the alleged deduction and remittance of trade union dues to the appellant by the 2nd respondent, for some of its employees who had apparently joined the appellant union. It argued that the same was not in compliance with section 48(3) of the *LRA* which stipulates that deductions of trade union dues by an employer can only be done upon the Minister issuing such order.

7. It was submitted that the 1st respondent and the 2nd respondent formalised a Recognition Agreement on 6th September 1999 through the 3rd respondent. In the circumstances, it was urged that the

Agreement was binding and the 2nd respondent could not sign another Recognition Agreement with the appellant. Moreover, the Collective Bargaining Agreement signed between the 1st respondent and the 2nd respondent through the 3rd respondent, for the period 2013-2015 and 2015-2017, was binding upon the parties during the period when it was in force.

8. The appellant lodged a response to the 1st respondent's claim on 7th July 2017 contending that the workers of the 2nd respondent approached it in early January 2016 seeking to join it after resigning from the 1st respondent. After a period of one month, the appellant gave the workers check off forms to enrol as its members. The appellant explained that it combined all the check off forms signed by the employees together with a standard Recognition Agreement and sent them to the 2nd respondent to sign and accordingly formalise the relationship. The check off forms also required the 2nd respondent to implement the deduction of union dues as from June 2016, which it complied with pursuant to section 48(2) of the *LRA*.

9. It was contended that following the voluntary resignation of members of the 2nd respondent from the 1st respondent, it was the duty of the 2nd respondent to forward their resignation letters to the union and not the individual employees themselves. Section 48(8) of the LRA was invoked for this argument. The appellant further asserted that it was the right union to represent the employees of the 2nd respondent since their product, which is lime, is used in a variety of products including, mortar, plaster, cement, bleaching powder, and in various compounds for improving crops.

10. The appellant claimed that it had recruited over 222 out of 400 workers of the 2nd respondent, which is equivalent to 56% of the work force and thus is above the simple majority required by section 54 of the *LRA*. The court was urged to consider compelling the 2nd respondent to sign a Recognition Agreement with the appellant, taking into account that, its employees had exercised their freedom of association and hence their fundamental rights and wishes should be respected.

11. The 2nd and 3rd respondents made their submissions jointly to the effect that, the 1st respondent had 75 of their workers affiliated to it, while the appellant had 168 workers affiliated to it. There existed a Recognition Agreement between the 1st respondent and the 3rd respondent which, the 2nd respondent was party to by virtue of its membership in the 3rd respondent Association. It was contended that for purposes of collective bargaining and in cases such as the instant one where two unions seek to be recognised as the party with more members, the 2nd respondent was in a quagmire as there was already an existing Recognition Agreement. It was argued that going by court decisions like the High Court holding in *Bakery, Confectionery, Food Manufacturing And Allied Workers Union [K] Vs. Mombasa Maize Millers Limited & 3 Others* [2016] eKLR, two unions can coexist in an institution. The 2nd and 3rd respondents suggested that a secret balloting exercise should be conducted to determine the right union in the sector.

12. At the end of the trial, Maureen Onyango, J. wrote a judgment that was delivered by M. N. Nduma, J. on 6th December 2018 and held as follows:

    1. The 2nd respondent operates within the agricultural sector.

    2. The appellant, Kenya Chemical and Allied Workers Union is not eligible to recruit members from among the employees of the 2nd respondent.

    3. The activities of Kenya Chemical and Allied Workers Union in Homalime Kenya Limited amounts to interference with the Claimant's right to Freedom of Association and right to Collective Bargaining with Homalime Kenya Limited.

4. Kenya Chemical and Allied Workers Union by itself, its officials, its agents, servants, assigns and representatives be and are hereby restrained and prohibited from holding meetings, recruiting, entering into any agreement(s), or demanding trade union dues from the 2nd respondent employees and interfering with the claimants rights to Freedom of Association and Collective Bargaining as long as there exists a Recognition Agreement and a Collective Bargaining Agreement between the claimant and the 2nd respondent.

13. The appellant was aggrieved by that judgment and filed this appeal raising 7 grounds in the memorandum of appeal, later condensed to 2 grounds in oral submissions. The grounds are that the trial court erred by:

a. Disregarding the freedom of association enjoyed by the employees of the 2nd respondent who had voluntarily exercised that freedom by joining the appellant union.

b. Finding that the appellant was not eligible to recruit employees of the 2nd respondent whereas there was overwhelming evidence showing that the 2nd respondent operates in both the Agricultural and the Chemical sector and therefore, the 2nd respondent employees were eligible to join the appellant's trade union.

14. When the appeal came up for hearing, learned Counsel Mr. Nyabena appeared for the appellant. There was no appearance for the respondents and none of the parties had filed written submissions. Mr. Nyabena elected to make oral submissions.

15. He submitted that there was overwhelming evidence to the effect that at the time the matter was being argued in the trial court, 239 out of 400 employees of the 2nd respondent, which constitutes 59.75% of the employees, had signed check off forms signaling their intention to join the appellant. He thus faulted the learned judge for disregarding the wish of those employees, which, to him, was protected under section 54(2) and (8) of the *LRA*. Counsel argued that there was no limitation under *the Constitution* for exercising that freedom of association and consequently, this Court should interfere with the learned judge's finding.

16. On the second ground, Mr. Nyabena contended that the 2nd respondent manufactures lime which is used in industries and, the appellant being a trade union whose constitution covers employees working in industries including those dealing with chemicals, its employees were eligible to join the appellant. To counsel, the court appeared to suggest that two trade unions cannot operate in one industry which defeats the purpose of freedom of association. He argued that forcing the 2nd respondent's employees to be members of the 1st respondent was interfering with their freedom of association. Counsel urged this Court to analyse the record of appeal and find for the appellant by setting aside the judgment of the trial court with costs.

17. We inquired from Mr. Nyabena the current status of the dispute. Counsel's reply was that they obtained a stay of execution pending appeal which was still subsisting. He contended that the appellant's complaint is that it cannot proceed to negotiate a collective bargaining agreement on behalf of its members. We probed counsel whether in his opinion, the fact that the 2nd respondent manufactured the single item, lime, and looked at against the primary object of the appellant Union, brought its employees within the appellant's sphere. He insisted that the 2nd respondent's employees qualified to join the appellant because they belonged to both the agricultural and chemical sectors, hence they could belong to both unions. When we suggested to counsel that restricting employees to a union in their sector, as the learned judge did, is rational and not a violation of *the Constitution* as alleged, Mr. Nyabena, to his credit, agreed with these sentiments.

18. As the first appellate court, we have an obligation to re-consider and re-evaluate the evidence and come up with independent conclusions, see *Selle Vs. Associated Motor Boat Co. Ltd & Others* [1968] Ea 123 And *Abok James Odera T/a A. J. Odera & Associates Vs. John Patrick Machira T/a Machira & Co. Advocates* [2013] eKLR.

19. From the record and the appellant's submissions, it is apparent that the issue in contention is whether the learned judge was wrong to find that the 2nd respondent operated within the agricultural sector, and not the chemical industries sector. To the appellant, the 2nd respondent worked in both sectors hence its employees should have been allowed to join either of them. It is plain that the decisive provisions of the LRA on this question are section 54(2) and (8):

    1 ...

    2. A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

    [...]

    8. When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister." (Emphasis mine)

20. Accordingly, a trade union seeking to be recognized by an employer has to meet the threshold of having majority membership of the particular institution. Further, when resolving a dispute in that respect, courts are enjoined to consider the sector in which the employer operates.

21. I note that while determining the matter in contention herein, the learned judge correctly observed that, while an employee is free to join any union of his choice, that freedom is necessarily limited by reference to the industry in which the employee works. In ascertaining the sector in which the 2nd respondent operates, the judge considered the membership clause of both the appellant and the 1st respondent, and the demarcation report from the County Labour Officer, which revealed that the 2nd respondent largely operated in the agricultural sector. The learned judge thus concluded that the appellant's constitution does not permit it to recruit employees of the 2nd respondent.

22. Having reviewed the record, I come to the same conclusion as the learned judge and find the limitation of the 2nd respondent to the 1st respondent reasonable. I am not at all persuaded that the mere fact of utilizing the chemical lime in its agricultural activities somehow transformed the 2nd respondent into an entity in the chemical industry. Consequently, I have no basis for interfering with her judgment.

23. Ultimately, this appeal has no merit and I would dismiss it, but with no order as to costs since there was no appearance for the respondents.

24. As Mumbi Ngugi and Joel Ngugi JJ.A agree, it is so ordered.

JUDGMENT OF MUMBI NGUGI, JA

1. I have had the benefit of reading in draft the judgment of my brother, P. O. Kiage, JA. which I entirely agree with and have nothing useful to add.

JUDGMENT OF JOEL NGUGI, JA

1. I have had the advantage of reading in draft the Judgment of my learned brother Kiage, J.A. I entirely concur with his findings and I have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF DECEMBER,2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR