



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Cause 7 of 2013**

**KENYA ENGINEERING WORKERS UNION.....CLAIMANT**

**v**

**NARCOL ALUMINIUM ROLLING MILLS LTD.....RESPONDENT**

**RULING**

1. Kenya Engineering Workers Union (the Union) filed a Notice of Motion on 4 February 2013 against Narcol Aluminium Rolling Mills Ltd (the Respondent) seeking an order directing the Respondent to immediately open its doors to unionisable employees who had been locked out. The application was supported by the affidavit of Charles Natili Wekesa.
2. The motion was placed before me on 5 February 2013, *ex parte*, when I certified the application as urgent and ordered the Respondent to open its doors to the unionisable employees who had been locked out. I set a return date of 7 February 2013 but on this day the Respondent did not appear, and I directed the County Labour Officer to file a report on the situation on the ground by 11 February 2013.
3. On 11 February 2013, Mr. Khagram appeared for the Respondent and the County Labour Officer had filed a report dated 9 February 2013 as directed. I set a further mention for 13 February 2013, on which date the Respondent sought leave to file a Response within 14 days. I granted the leave sought.
4. On 13 March 2013 the Respondent filed a Preliminary Objection to the Motion and the Claim generally but did not file a Response. I heard the Preliminary Objection on 13 May 2013.

**The Preliminary Objection and parties submissions**

5. The Preliminary Objection was to the effect that the Motion and the whole Claim ought to be struck out because
  - (a) The relief sought were misconceived/untenable in view of the report by the County Labour Officer
  - (b) Provisions of section 74 of the Labour Relations Act was inapplicable as the parties were not engaged in an essential service
  - (c) The Court did not have jurisdiction to grant the relief sought
  - (d) The Union did not have the locus and or cause of action
  - (e) The action was frivolous, vexatious and an abuse of the Court's process

6. Mr. Khagram submitted that section 74 of the Labour Relations Act deals with reference of disputes concerning recognition of trade unions, redundancy or essential services and that the dispute before Court did not fall within any of the mentioned categories.

7. The Respondent also submitted that it is section 77 of the Labour Relations Act which deals with lock-outs and that the Union had refused to take part in conciliation. It was also submitted that there was no lock-out and that the Respondent had terminated the services of the union members for desertion.

8. Lastly, it was submitted for the Respondent that the Union had no locus standi because under rules 7 and 9 of the Industrial Court (Procedure) Rules, 2010 the Statement of Claim ought to be signed by the employees.

9. For the Union, it was submitted that the Claim was properly before Court and that disputes concerning lock-outs, redundancy and mass dismissals could be challenged by invoking section 74 of the Labour Relations Act. It was further submitted that the Court order given on 5 February 2013 should be complied with by the Respondent.

### **Analysis/Conclusion**

10. It is now notorious that a preliminary objection should be based purely on issues of law. In the landmark case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA 696, Law JA had this to say about the principle regarding preliminary objections

***So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...***

11. Sir Charles Newbold, P on his part stated

***A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion***

12. I must therefore determine and consider the preliminary objection raised in light of these principles.

13. As regards the question of the relief being misconceived or untenable, that can only be resolved after listening to the evidence. In the circumstances of the case under discussion, it cannot be resolved through a preliminary objection or legal arguments.

14. Similarly, whether the Respondent is engaged in an essential service is both a question of law and fact. At this early stage it would not be proper for me to reach the conclusion that the Respondent is not engaged in an essential service, obvious though it might seem.

15. When making their submissions, both parties made reference to issues which can only be resolved through evidence or ascertainment of facts. There are mixed issues of law and fact. Some of these issues were whether there was a lock-out as asserted by the Union or termination after desertion as submitted by the Respondent, whether the Union refused to participate in conciliation and who is the proper person to sign the statement of Claim. There were several disputed facts which both parties mentioned while arguing the preliminary objection.

16. Because of the disputed facts and the circumstances surrounding the Claim and the parties heavy reliance on facts in their submissions it is my considered view that the Preliminary Objection filed in Court on 13 March 2013 should be dismissed and I do dismiss it.

17. I do order the Union to file and serve its witness statements and any other document it seeks to rely on within the next ten days. The Respondent on its part to file its Response within the next twenty one days together with witness statements and documents sought to be relied on.

18. There will be no order as to costs.

**Delivered, dated and signed in open Court in Mombasa on this 7<sup>th</sup> day of June 2013.**

**Justice Radido Stephen**

**Judge**  
**Appearances**

Mr. Khagram instructed by

A.B. Patel & Patel Advocates for Respondent

Mr. Omollo instructed by Kenya

Engineering Workers Union for Claimant Union