



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 174 OF 2010

1. **HAMISI S. MWAHUTU [Vice-Chairman, Seafarers Union of Kenya]**
2. **JACOB MVOI [Treasurer,
Seafarers Union of Kenya].....PLAINTIFFS/APPLICANTS**
3. **OMAR BABU SULEIMAN [Trustee, Seafarers Union of Kenya]**

-VERSUS-

**ABUBAKAR OMAR KILWA [Secretary-General,
Seafarers Union of Kenya].....DEFENDANT/RESPONDENT**

RULING ON PRELIMINARY OBJECTION

More substantively before the Court is the Plaintiffs' application by Notice of Motion dated **9th August, 2010** and brought under ss.1A, 3 and 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). This application carried two main prayers: (i) that the Court do order the convening of the "*annual/special conference of the Union*"; and (ii) that the Court do "order accounts of the union to be given by the respondent."

But this Ruling is in respect of a notice of preliminary objection by the respondent, dated **2nd September, 2010**. In the objection, the respondent "*will contend as a preliminary point of law, to be determined in limine, that the plaintiff/applicant's application is fatally defective, misconceived, frivolous and that the Court lacks jurisdiction to hear and determine the same [and]....the same be dismissed with costs to the defendant.*"

Learned counsel, **Mr. Mulwa Nduya**, for the defendant, submitted that "*the entire suit as drawn is bad in law and misconceived...as the same is a representative suit and the plaintiff did not seek leave of the Court to issue and serve the required notice...before filing the suit*"; that this Court lacks jurisdiction to hear and determine the suit, such jurisdiction being vested exclusively in the Industrial Court, by virtue of the Labour Institutions Act, 2007 (Act No.12 of 2007) and the Labour Relations Act, 2007 (Act No.14 of 2007).

Counsel urged that there were, in this matter, certain facts that were *not in dispute* – this being one of the bases of a preliminary objection such as the instant one (*Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd* [1969] E.A. 696); these facts are as follows:

- (a) the plaintiffs have sued as members and office-bearers of a registered society – a trade union known as Seafarers Union of Kenya – with numerous members;
- (b) both the plaintiffs and the defendants are members and office-bearers of a trade union, known as the Seafarers Union of Kenya;
- (c) the said trade union is a registered trade union under the “Trade Unions Act and the Labour Relations Act”;
- (d) certain disputes have occurred between the members and office-bearers of the trade union – the plaintiffs and the defendant;
- (e) part of the alleged dispute leading to the cause herein, is that the defendant has failed to adhere to the union’s constitution and the Trade Unions Act;
- (f) the Labour Relations Act, 2007 (Act No.14 of 2007) has an elaborate procedure on dispute resolution between trade unions, employers and/or members of trade unions or federations;
- (g) the Labour Institutions Act, 2007 (Act No.12 of 2007) established certain labour institutions to deal with all matters connected with and incidental to labour relations, and disputes between members and trade unions;
- (h) one of the labour institutions created by the Labour Institutions Act, 2007 is the Industrial Court;
- (i) the defendant, in his statement of defence of 15th July, 2010 has taken up the preliminary issues of law;
- (j) the plaintiff did not file a reply to defence and, therefore, the defendant’s contentious in the statement of defence do not stand to be controverted.

Counsel submitted that the plaintiffs had not complied with Order 1, Rule 8 of the Civil Procedure Rules, which makes it mandatory for leave to be sought, before a representative suit is instituted, short of which a suit becomes fatally defective. Counsel relied on a High Court (*Onyancha, J*) decision, *Eritrea Orthodox Church v. Wariwax Generation Limited*, Nairobi HCCC No. 672 of 2007 [2007] eKLR, the crucial aspect of which rests on an earlier decision (by *Bosire, J* – as he then was) in *Free Pentecostal Fellowship in Kenya v. Kenya Commercial Bank*, Nairobi HCCC No. 5116 of 1992:

“The position [at] common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more of such persons in a representative capacity pursuant to the provisions of Order 1, rule 8 of the Civil Procedure Rules.”

In the *Eritrea Orthodox Church* case, *Onyancha, J* thus held:

“In this case...the purported plaintiff is a religious unincorporated organization registered under the Societies Act. The institution of the proceedings by the persons who form the society without complying with Order 1 rule 8 of the Civil Procedure Rules...renders the suit null and void ab initio. The suit is therefore, in law, non-existent. It cannot be amended as it does not exist....”

Learned counsel submitted that this Court lacks jurisdiction to hear and determine the suit, the exclusive tribunal with jurisdiction being the Industrial Court, established under the Labour Relations Act, 2007 (Act No.14 of 2007) and the Labour Institutions Act, 2007 (Act No.12 of 2007).

The Labour Institutions Act, 2007 in s.12 thus provides:

“...the Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of any of the provisions of this Act or other legislation which extends jurisdiction to the Industrial Court, in respect of any other matter which may arise at common law between an employer and an employee in the course of employment, between an employee and an employers’ organization and a trade union or between a trade union, an employers’ organization, a federation or members thereof.”

Counsel submitted that as the word “judge” means a judge of the Industrial Court, under s.3 of the Labour Relations Act, 2007, it follows that “it is only the judge of the Industrial Court who can hear and determine the suit herein under the Labour Institutions Act, 2007 and the Labour Relations Act, 2007.”

And if this Court lacks jurisdiction as was urged, then, it was submitted, it “*must down its tools and strike [out] this suit.*”

Learned counsel, **Mr. Kirui** for the plaintiffs, contested the objection, and submitted that the constitution of the seafarers Union conferred upon the executive board authority to run the affairs of the Union, with the competence to sue and be sued; that this was a dispute in the management of the trade union, and it was the executive board suing the Secretary-General who is a member of the executive board. Counsel urged that this was not the representative suit contemplated in Order 1, Rule 8 of the Civil Procedure Rules: for such a suit would only apply to unincorporated bodies such as religious organizations and social clubs. Counsel submitted that the case relied on by the defendant, **Eritrea Orthodox Church v. Warimax Generation Limited**, had no relevance since the religious organization therein was an *unincorporated* entity registered under the Societies Act (Cap.108, Laws of Kenya).

Counsel submitted that a “*trade dispute*”, by its very nature, fell to the ordinary jurisdiction of the High Court, a Court which, by Article 165(3) of the **Constitution of Kenya, 2010**, bears unlimited jurisdiction.

In my opinion, it is correct as **Mr. Kirui** urges, that the main authorities in support of the objector’s case are concerned with *unincorporated* bodies – in respect of which a plaintiff standing in the place of the applicants herein would have to comply with the rules for the filing of a representative action. In the instant matter, however, the parties all belong to a body that enjoys *corporate status* by statute. The gravamen is in the *management and accounting* domain: the *law of meetings*; and the *law of financial accountability*. These are in every sense the stock-in-trade of the *regular judicial function*, and, apart from the Constitution’s express reposing in the High Court of *unlimited jurisdiction* in civil matters, the commonplace nature of the disputes ordains that they fall to be determined by the *model superior Court*, which is the High Court. I do not find the objector to have made a case of legal import, such as would justify a limiting of the High Court’s jurisdiction in the instant matter.

Consequently, I dismiss the preliminary objection, with costs to the plaintiffs/applicants.

This matter shall be listed for mention and directions within 14 days of the date hereof.

Orders accordingly.

SIGNED at NAIROBI

J.B. OJWANG
JUDGE

DATED and DELIVERED at MOMBASA this 7th day of December, 2011.

H.M. OKWENGU
JUDGE

