REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1275 of 2004

KENYA PLANTATION AND AGRICULTURAL INSTITUTE ....PLAINTIFF

VERSUS

KENYA AGRICULTURAL RESEARCH INSTITUTE (KARI)......1ST DEFENDANT

KENYA PLANT HEALTH INSPECTORATE (KEPHIS)..............2nd DEFENDANT

RULING

The back grand information is that the Plaintiff herein Kenya Plantation and Agricultural Workers Union filed Cause No.56 of 2000 in the Industrial Court Nairobi Against National Seed Quality Control (now Kenya Plant Health Inspectorate Service (Kephis) on behalf of 8 beneficiaries named therein. A copy of the award traced on the record which had been annexed as annexture F1 to the supporting affidavit to an application dated 26th January 2005 and filed on 26.1.2005 indicates that there was no appearance for the defendants herein. An award was given whose beneficiaries are the same parties on behalf of whom the action herein has been filed.

A perusal of the award shows that the dispute between the parties was referred to the Industrial Court by the Minister for labour in accordance with the laid down procedures. Parties were asked to submit their Memoranda's. The union did file theirs. The defendants who are the Respondents in the Industrial Court claim did not file a reply to the claim neither did they attend the hearing. The matter was heard exparte in their absence and the Industrial Court found for the claimants to the effect that as found by the minister for labour the claimants who had worked for the Respondents from 1981 to 1997 where no longer casuals.

(2) That they are entitled to either of the reliefs prayed for

(3) Since they had been out of employment for over 6 years it was too late in the day to thrust them on an unwilling employer.

(4) For the reasons in No.3 above the Industrial Court refused to reinstate them to their former employment but ordered that they be paid sums found to be due to them as set out in the award as specified here under in this ruling.

(i) Mumelo Masolo of Kshs 162,385/=

(ii) Zadock Iramwenya Kshs 52,675.00

(iii) Owino Olale Kshs 345,837.00

(iv) Hezron Iramwenya Ksh 444,312.00

(v) Onsongo Maemba Kshs 472,424.80

(vi) Lomini Anomat Kshs 162,384.00

(vii) Odanga Isaki Kshs 134,371.00

(viii) Ekwe Nawaton Kshs 162,384.00

It is gathered from the pleadings that HCCC Miscellaneous application No.1424 of 2002 was filed. Copies of documentation in the said Misc. application are not on record and so this court does not know what it was all about or what the last orders were in that file.

The Plaintiff Union moved to this Court and filed a plaint dated 23rd November, 2004 filed the same date. The salient features of the plaint are that :-

(i) The Union reprepresented the claimants in the industrial court in cause No.56 of 2000.

(ii) The Industrial Court awarded the claimants the sums specified in paragraph 5 of the plaint.

(iii) The Plaintiffs had severally demanded payment of those sums from the defendants to no avail hence the filing of the suit.

The reliefs being sought by the union are a declaration that both the first and second defendant are bound in law to the judgment and award of the industrial court cause No.56 of 2000, that both the first and second defendant do pay to the plaintiff the sum awarded in the Industrial Court Cause No.56 of 2000, that in default of payment of the said sums awarded, the property and assets of the said first and second defendants be attached in settlement and satisfaction of the award and costs in the industrial court cause No.56 of 2000 and that costs and interests at court rates be awarded to the plaintiffs. Summons for directions were taken out and served on the named defendants. The first defendant filed a defence and the averment relevant to this application is paragraph 7 which is to the effect that this suit is incompetent as the plaintiff has no capacity in law to institute the same on behalf of persons named in paragraphs 5 of the plaint and that the plaintiff is non suited against the first defendant. Further in paragraph 8 that there is a suit pending between the same parties namely High Court Misc. Cause No.1424 of 2002 Nairobi and as such this suit is an abuse of the due process of the Court.

The second defendant also filed a defence. It averred that it is wrongly joined to the suit and will apply to have it struck out from the suit, that there is still subsisting between the parties HCCC cause No.1424 of 2004.

Against the foregoing background the 2nd defendant has filed an application subject of this ruling. It is an application by way of chamber summons brought under order 6 rule 13 (1) (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks three prayers namely:

1. That this Honourable Court do strike out this suit with costs to the 2nd defendant for being an abuse of the process of this court.

2. A declaration be made that the plaintiff has no capacity to institute this suit.

3. That costs be provided for.

The grounds in support are set out in the body of the application supporting affidavit and oral submissions

in court. The major ones are that:-

1. The Plaintiff has no locus standi to present a suit of this nature before this court as it seeks to enforce legal rights of persons who have capacity to enforce those rights on their own.

2. As a trade union it can only champion rights of the union and union members but not to champion on the personal rights of 3rd parties.

3. Section 16(6) of the trade disputes Act establishes that terms of an Industrial Court award becomes an implied term of a contract between an employer and employee which can only be enforced by parties to it.

4. The right to appoint a representative to appear before the industrial court by parties to a suit before the Industrial Court does not extend to enforcement of the award in a court of law.

5. The trade disputes Act stipulates clearly that an Industrial court award becomes a civil debt which can be recovered summarily.

6. The suit filed herein cannot be taken to be a representatives suit in terms of order 1 rule 1 and 8 of the Civil Procedure Rules as it has not been instituted as such as paragraph 7 of the plaint shows that the plaintiff has brought the suit on its behalf and it seeks to have the said monies paid to it.

7. It is their stand that the plaintiffs have not substantiated their right to pursue the claim on behalf of individuals.

8. Further that no injustice will be suffered if the suit is struck out as the individuals will have a right to pursue those rights in their own capacity.

In response the plaintiff's counsel relied on the deponents in the replying affidavit and oral submissions in court and the major ones are:-

1. The application is bad in law as it is brought under provisions of law that do not exist and so the application is bad in law and cannot hold.

2. They maintain they are properly before court because their constitution allows them to file representative actions.

3. Order 2 rule 7 Civil Procedure Rules allows them to file representative action and seek declaratory judgments.

4. They maintain they are properly before court as they have merely come to enforce the industrial court award.

5. They content the applicant keeps on filing applications just to delay the cause of action and this should be dismissal with costs.

In response to the Respondents counsels submission's Counsel for the objector stated that the Respondent objection to the want of form of the application under review does not hold as it does not go to the substance of the application as the Respondents has not been prejudiced in any way. Further this is curable under order 50 rule 12.

(2) They maintain that provisions of a Unions constitution cannot operate to oust the provisions of law.

(3) That they are not objecting to the suit merely because it seeks declaratory orders but because the plaintiff has no *locus standi* to file the same. They are not seeking to challenge the finality of the industrial courts' award or seeking review of the said orders but simply to question the *locus standi* of the

plaintiff.

On the courts assessment of the facts herein upon hearing both parties on this application the following matters seem not to be in dispute.

(i) That there was an industrial dispute between the beneficiaries and the respondents which ended up in the industrial court.

(ii) That the industrial court gave an award in favour of the persons on whose behalf the action is brought for enforcement.

(iii) That the main contest in this application is the issue of the locus standi on the part of the union to represent the beneficiaries before the industrial court and the current proceedings. It is not in dispute that the union representation of the beneficiaries at the industrial court is not challenged. What is challenged is their ability to do so in these proceedings.

(iv) It is also clear that the Plaintiff respondent has attempted to fault the application challenging the suit.

Before dealing with the issue of *locus standi* of the plaintiffs in this matter it is better to deal with the want of form of the application first because if the objection is upheld then there will be no need to go into the other merits of the application. The objection raised to the application touches on the want of form of the application which arises because it is headed to have been brought under order VI rule 13 (1) 9(d) of the civil procedure Rules and section 3A Civil Procedure Act. A perusal of the civil procedure rules reveals the none existence of order VI rule 13(1) 9(d). What is in existence is order VI rule 13 (1) (d). In the courts opinion the writing of 9 is a typographical error in view of the bracket on the other side of the d. The court has no doubt the 9 was meant to be the inner left bracket for the (d). Even if this court were to take it that the error was inadvertent, the same is not fatal to the application as order 50 rule 12 of the Civil procedure Rules provides a cure. It states "*Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule*". This provision gives this Court authority to deal with the application on merit.

Order 13(1) (d) of the Civil Procedure Rules states "*At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –*

(d) it is otherwise an abuse of the process of the court …… Assertion that the plaintiff herein is an abuse of the process of the court is what this court has been asked to do. Abuse of the process of the court has to be looked at, both in substance and in form.

As regards substance the proceedings relate to an industrial court award. The applicant/defendant has submitted that they are not challenging the finality of the award. Section 17 of the Trade Disputes Act cap.234 Laws of Kenya

s:-

17(1) "The award or decision of the Industrial Court shall be final.

(2) The award, decision or proceedings of the industrial court shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari or otherwise, either at the instance of the government or otherwise". This Section insulates the award from attack on whatever grounds.

Being so insulated and protected while still on substance a question arises as to how the award can substantively be enforced. Section 15(2) and 16(6) of the Trade Disputes Act Cap.234 Laws of Kenya provides some assistance. Section 15(2) provides

"*without prejudice to any other remedy, any compensation, awarded under this section may be*

recovered summarily as a civil debt. Section 16(6) of the same Act states "subject to this section an award shall as from the date that the award has effect, be an implied term of every contract of employment between the employers and employees to whom the award relates, so that the rate of wages to be paid and the terms and conditions of employment to be observed under the contract shall be in accordance with the award until it is varied by a subsequent award or by agreement"

Section 23 of the Act states "*subject to any rules made under section 49, the industrial court or any board of inquiry may permit any interested party in any proceedings under this Act to appear by advocate or to be represented by any person".* Rule 6 of the Industrial Court (procedure) Rules States "*persons may, with the permission of the court, be represented by Counsel in proceedings before the court.*

Applying the above provisions to the facts of this application it is clear that representation through another party is permitted before the industrial court proceedings. Neither the provisions of the Act nor the rules made there under provide for representation through a 3rd party on account of enforcement of the award. That being the case then Section 15(2) and 16(6) of the Act are called into play. When they are so called into play a question arises as to who is to enforce the recovery of the award summarily as a civil debt under Section 15(2) or who is to enforce the contractual rights that have arisen between the parties under Section 16(6) of the Act .

The argument of the applicant is that these rights have to be enforced by the beneficiaries themselves and since the action has been brought by the union who had authority to appear for the beneficiaries in the industrial court only, the suit is unlawful and incompetent and it should be struck out. They assure the court that the rights of the beneficiaries will not be jeopardized as they can enforce them on their own.

The plaintiffs on the other hand maintain that they have locus standi. They rely on Article F and Rule 2 (c) of the union's constitution and order 2 rule 7 of the Civil Procedure Rules. The plaintiffs constitution is attached to the replying affidavits as an annexture. Rule no 2 (c) which is relied upon states "To make every endevour to obtain just and proper rates of wages, working hours and other conditions of employment, to negotiate and promote the settlement of disputes between employee and employers and between employees and employees by conciliation or otherwise and generally to safe guard the interests of the members.

(f) to seek and obtain legal advise and any other assistance on any matter affecting the union, or protecting the rights of the members on matters arising out of the relations with their employers. Provided that the executive committee shall have the right to decide whether or not such legal advise or assistance is in the best interests of the union or members concerned".

These rules are framed in vague and wide terms which can be interpreted or construed to mean that the union can intervene in any situation affecting any of their members.

The Plaintiff has specific legislation namely the Trade Unions Act Cap.233 Laws of Kenya. Section 27(1) of the said Act states " A registered trade union may sue and be sued and be prosecuted under its name" A perusal of all the provisions of the Act do not yield any provisions empowering the union to file suits for enforcement of industrial court awards on behalf of union members.

Having found that the Trade Unions Act Cap.233 Laws of Kenya and the Trade disputes Act Cap.234 Laws of Kenya do not contain express provisions empowering the union to sue in its own name to enforce Industrial Courts awards on behalf of its members the court has no alternative but to turn to case law for assistance. The applicant cited the case of **NATIONAL UNION OF CLERICAL, COMMERCIAL AND TECHNICAL EMPLOYEES VERSUS DRAPERS LTD [1969] E.A.63.** In this case a dispute arose between employees and employer over terms of service. Some of the employees were uninionzable and the Minister of labour referred the dispute to the arbitration tribunal. The tribunal gave an award in favour of the employees to the effect that certain increases of salaries were to be awarded to its employees by the defendant employer. The plaintiff union instituted proceedings against the defendant employer on behalf of the employees to enforce the award. A preliminary issue of law was whether the plaintiff had a

cause of action under the Act. Section 13(d) of the trade disputes (Arbitration and Settlement Act) conferred upon a registered trade union the right to sue under its registered name. Section 10 of the Act provided to the effect that an award binds the employer and its employees to whom the award relates and the terms of the award became implied between the employer and its employee.

The above decision emanates from Ugandan legislation. It is a High Court decision not binding on this court but of persuasive authority. The Section mentioned in the summary are set out at page 65 paragraphs E –H. Section 13 (1) (d) is similar to Section 27(1) of the Trade Union Act Cap.233 Laws of Kenya whereas Section 10 is word for word with Section 16 (6) of the Trade Disputes Act Cap.234 Laws of Kenya. Sheridan J as he then was at page 66 after reviewing cases at paragraph B-F had this to say "*The question is whether section 13(1) (d) of the Trade Union Act gives the union right to sue on behalf of its members to enforce the award ………….The use of the name in legal proceedings imposes no duties and alters no rights, it is only a mere convenient mode of proceedings than that which would have to be adopted if the same could not be used ……….*"

No case has been cited to me where an individuals rights to a sum of money has been enforced by using the name of the union.

On the basis of the scrutiny of cases on the subject Sharidan J. as he then was held *inter alia* that in principle a Trade Union may sue only in its own name for wrongful acts against itself.

(ii) the plaintiff union had no cause of action on behalf of employees whether members of the union or not.

The plaintiff Respondent on the other hand relied on the case **KENYA BANKERS ASSOCIATION AND OTHERS VERSUS MINISTER FOR FINANCE AND ANOTHER (NO.4) [2002] 1 KLR 61**. In this case one of the arguments was that the Kenya Bankers Association had no right to litigate on behalf of members. The decision has several holdings but the court was referred specifically to holding No.3,12 and 13. Holding 3 is to the effect that the Kenya Bankers Association has *locus standi* to challenge the Act on behalf of its members because it is permitted by the Trade Unions Act and the Constitution of the Association as Association members are defined and ascertainable, it is convenient and prevents multiplicity suits. Holding 12 on the other hand states that where an association or other organization exists for its members who are defined or are as ascertainable and its constitutional document provides for it and it is not contrary to a relevant registration statute governing the organization, it is generally the organization or association which is better placed to litigate for or on behalf of the members while 13 provides that it would be unjust to require by an un bending rule individual members to sue or defend when the constitution of the association or organization says that legal proceedings may be taken or defended in the name of the association or organization or of the specified officials of that body.

The Kenyan Authority is also a High Court authority and not binding on this court. This court has duly considered the two decisions in the Light of the relevant provision of Cap.233 and 234 Laws of Kenya as applied to the facts herein and find that the Kenya Bankers Case refers to Litigation before the establishment of individual rights. The holding in this case refers to the proceedings permitted by Section 23 of Cap.234 and rule 6 of the industrial court rules. It does not apply to a situation where industrial rights have been established like in this case.

Where rights have been established it is the Ugandan Authority which applies. Though a High Court case, this court finds no reason to depart from that reasoning more so, when the provisions being interpreted in that case are similar to those being interpreted herein.

The overriding legal principle is that an Industrial courts' award is a binding contract between the employer and employee. The union has no place in that contract save that it participated in its facilitation. Being a contract, trite law comes into operation to the effect that only parties to a contract can sue on it either in person or through a legally recognized agent. Legally recognized agents before a court of law are representatives in a representative action and advocates. The Plaintiff herein did not

commence the proceedings in a representative capacity and so it is not a representative for purposes of the law. Neither is it an advocate. Its locus standi is therefore lost.

The loss of the *locus standi* does not rob the beneficiaries of their rights to the benefits of the award. Section 17 of Cap.234 comes into play to protect that interest. The said award cannot even be questioned for purposes of limitation of actions Act. It remains alive until enforced. The beneficiaries are free to apply for its enforcement jointly or severally. If the union is still interested in assisting them then it can do so by providing legal counsel to pursue the said claim on their behalf but in their individual capacity.

Prayer 1 of the application dated 9.1.06 and filed on 16.1.2006 is upheld. Prayer 2 is struck out as that can only be sought in a substantive suit or originating summons. The net result is that the suit is struck out with costs to the 2nd defendant who prosecuted the application. The second defendant will also have costs of the application. The beneficiaries are at liberty to commence either separate or joint action but in their individual capacity to enforce the award as a civil debt summarily.

DATED, READ AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2007.

R.NAMBUYE

JUDGE