



REPUBLIC OF KENYA

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

Civil Suit 482 of 2006

**UNIVERSITIES ACADEMIC STAFF UNION (U.A.S.U) -JOMO-KENYA UNIVERSITY
OF AGRICULTURE AND TECHNOLOGY CHAPTER (JKUAT CHAPTER) ...PLAINTIFF**

VERSUS

**THE JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY
(JKUAT) DEFENDANT**

RULING

This Ruling relates to a preliminary objection raised by the Defendant/Respondents in the Plaintiff/Applicant's suit and chamber summons both filed on 11th May 2006. The Plaintiff/Applicant vide which the suit is filed and the chamber summons are both dated 11th May, 2006.

The Defendant/Respondent's objection is contained in a Notice of Preliminary Objection dated 25th May, 2006 and filed on the same date. The grounds of objection are that:

- 1. The Plaintiff lacks *locus standi*.**
- 2. The suit is commenced *ultra vires* the Constitution governing the Plaintiffs' existence.**
- 3. The affidavit of MOSES MUCHINA (filed in support of the chamber summons) and the annexures thereto are defective and ought to be struck out in *limine*.**

Counsel for the defendant/respondent Mr. Lutta submitted that the suit and application are bad in law in that the party suing is a chapter or branch of the Universities Academic Staff Union (UASU) which is the registered Trade Union under Section 27(1) of the Trade Unions Act (Chapter 233). Counsel referred the court to the definition of a Trade Union given in Section 2 of the Act to show that the Plaintiff/Applicant clearly does not have capacity to sue and be sued in. The said Section defines a "**registered trade union**" as follows:

"registered trade union" means "A trade union registered as a trade union under this Act or registered as a trade union at the commencement of this Act under the provisions of any Act repealed by this Act".

Counsel also cited Section 27(1) which provides for proceedings by and against trade unions as follows:

“A registered trade union may sue and be sued and be prosecuted under its registered name.”

I have noted that Section 27(2) on the other hand provides that:

“An unregistered trade union, and a staff association, employees’ association or employees’ organization may sue and be sued and be prosecuted under the name by which it has been operating or is generally known.”

Section 27(3) provides for the proceedings by and/or against trade unions whose registration has been cancelled. Counsel submitted that the plaintiff/applicant is not the registered Trade Union but a branch, a fact which is not disputed by the Plaintiff/Applicant on whose behalf counsel Mr. Jesse Kariuki submitted that a branch which is duly registered can sue as if it was a registered trade union. He further submitted that the U.A.S.U Constitution does authorize a branch to sue. Counsel however, was not able to cite the relevant clause in the Union’s Constitution authorizing a branch to sue or be sued in the branch name.

It became apparent to me during submissions by counsel that parties herein are somewhat confused as to the legal meaning of “*capacity to sue*” and “*locus standi*” which in my view are distinguishable in the sense that in the proceedings before me, the former relates to having the legal capacity to take out or defend legal proceedings while the latter relates to the legal interest in the matter in dispute. As is clear from the definition of “*capacity*” contained in “*Blacks Law Dictionary, 8th Edition*” Capacity denotes one’s legal qualification which determines one’s ability to sue or be sued. “*Locus Standi*” is on the other hand defined in the same volume as “*place of standing or the right to bring an action or be heard in a given forum.*” *Locus standi* therefore has more to do with the cause of action whereas capacity has everything to do with one’s standing as a legal entity. Mr. Kariuki was right to submit that for a party to prove locus one needs to show an interest in the matter. It is clear however, that the objection herein relates to the plaintiff’s capacity to sue under the Trade Unions act and the Union’s Constitution.

The Plaintiff/Applicant is said in the pleadings to be the **UNIVERSITIES ACADEMIC STAFF UNION (U.A.S.U) – JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY CHAPTER (JKUAT CHAPTER)**. It is defined in paragraph 1 of the plaint as follows:-

“The Plaintiff is a registered Trade Union incorporated and registered under Cap. 233.....”.

An extract of the Constitution of the **UNIVERSITIES ACADEMIC STAFF UNION (UASU)** is referred to the Affidavit in support of the Chamber Summons to prove the Unions’ mandate.

The registration of trade unions is mandatory under Sections 8 and 9 of the Trade Unions Act. Trade unions are registered under Section 10(1) which provides inter alia that:-

“Every application for registration as a trade union shall be made to the Registrar in the prescribed form and shall be signed by at least seven members of the union, any of whom may be officers thereof.”

The distinction between a registered trade union and a registered branch of a trade union is clearly evident in Section 20A(1) of the Trade Unions’ Act which provides for the registration of branches. It provides that:

“Application for registration of a branch of a trade union shall be made by the Secretary of the trade union concerned within twenty eight days from the date of its formation and shall be signed by the Secretary; it shall be accompanied by the prescribed fee (if any) and shall contain the following particulars –

(a) the name of the union concerned, the name of the branch, the postal address of the branch office or of the branch; and

(b) the titles names, age, addresses and occupations of all the officers of the branch.”

The trade union concerned is clearly the parent union registered as such under S.10 (1) of the Trade Unions act and which by virtue of such registration acquires the capacity to sue and be sued under Section 27(1) of the Act. Clearly from the wording of the section a branch is not accorded such power or right. The Plaintiff being a registered branch of a trade union is wrongly defined in the pleadings and I find that it lacks legal capacity to take out these proceedings and do uphold the Defendants/Respondent's objection on this ground. It follows that without legal capacity the Plaintiff would have no locus standi whether or not it has an interest in the matter before court.

Having found that the Plaintiff/Applicant lacks capacity to take out these proceedings. I do not consider it worthwhile to delve into the issue of whether or not the proceedings are ultra vires the constitution of the parent union from which they purport to derive the power to sue. Needless to say any contract which would purport to oust the provisions of any statute is illegal, null and void.

Regarding the third objection, I have studied the affidavit sworn in support of the chamber summons and have found that indeed the same does not disclose the deponents' abode as required under Rule 4 of order XVIII. It is also said to have been sworn on the basis of facts which are within the deponents' own knowledge, information and belief without indicating which of those facts are based on knowledge, which ones on information and which ones on belief. It also does not disclose the sources of such information as is relied upon as required by Rule 3 of Order XVIII. Citing the Court of Appeal decision of **FIRST AMERICAN BANK –vs- GRANDWAYS VENTURE LTD [2003] I.E.A. 60**, counsel for the Applicants submitted that this defect was curable under Rule 7 of Order XVIII. The third challenge to the affidavit is that the intended annexures thereto are not annexed and/or securely sealed to the affidavit contrary to the requirements of Rule 9 of the Oaths and Statutory Declarations Rules which states that:

“All exhibits to affidavits shall be securely sealed thereto under the seal of the Commission and shall be marked with serial letters of identification.”

Although the documents are stamped and marked as exhibits they are loosely placed in the file separately from the affidavit to which they are said to be annexed. This being the case they cannot be said to be the.

“exhibits referred to the annexed affidavit of MOSES MUCHINA sworn on 11th May, 2006.”

as appearing in the Commissioners stamp or seal.

Counsel for the Respondents submitted that the defects to the affidavit are curable under Rule 7 of Order XVII which reads as follows:-

“The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof.”

The non-disclosure of the true place of abode of the deponent is not, in my view, an irregularity but a non disclosure of a material fact mandatorily required under the relevant provisions of the law. The failure to annex the exhibits as required is also not a defect or irregularity in the form of the affidavit but an incurable omission. I find therefore that whereas Order XVII Rule 7 may apply to the objection as to the failure by the deponent to state what facts deponed to relate to knowledge, belief or information it cannot apply to cure the other two defects. The affidavit is, in my view only fit for striking out as being incurably defective, leaving the application unsupported and of no value.

For the reasons given above I have no option but to uphold the preliminary objection and to strike out both the Plaint and the Chamber Summons dated 11th May, 2006 which I hereby do. Consequently, the suit and the Chamber Summons are hereby dismissed with costs to the Defendant/Respondent.

Dated at Nairobi this 6th day of October, 2006

M. MUGO

JUDGE

06.10.2006

***Order:* Ruling delivered in presence of:**

Mr. Osundwa holding brief for Lutta for Defendant/Respondent

Mr. Wetangula holding brief for Mr. Kariuki for Plaintiff/Applicant