



Kenya Shoe & Leather Workers Union v Technoplast Ltd (Cause E781 of 2023) [2024] KEELRC 1785 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1785 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E781 OF 2023
JK GAKERI, J
JULY 10, 2024**

**BETWEEN
KENYA SHOE & LEATHER WORKERS UNION CLAIMANT
AND
TECHNOPLAST LTD RESPONDENT**

RULING

1. Before the Court is the Respondent’s Notice of Preliminary Objection dated 4th March, 2024 based on the arguments that:
 1. The Honourable Court lacks jurisdiction to entertain the present claim dated 21st September, 2023.
 2. The Claimant has wrongfully instituted the instant suit against the Respondent contrary to Section 69 of the *Labour Relations Act*, 2007 and Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
 3. The claim dated 21st September, 2023 should be struck out and/or dismissed in limine as the same is fatally incompetent, misconceived and an abuse of the court process.
2. The Preliminary Objection was filed on 5th March, 2024 and the Claimant responded by way of written submissions.

Respondent’s submissions

3. On whether the court has jurisdiction to entertain the Claimant’s suit, the Respondent relied on the Court of Appeal decision in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* (1969) EA 696 on the nature of a preliminary objection as well the sentiments of the court in *Quick Enterprises Ltd V Kenya Railways Corporation*, Kisumu HCCC No. 22 of 1999.



4. Avtar Singh Bhamra & another V Oriental Commercial Bank, HCCC No. 53 of 2004 and Oraro V Mbaja (2005) eKLR among others to urge that the Claimant was bound to invoke conciliation.
5. Reliance was also made on the doctrine of exhaustion of local relief and the decision in Geoffrey Muthinja Kabiru & 2 others V Samuel Munga Henry & 1766 others (2015) eKLR to urge that the Claimant was obligated to conclude the conciliation process as it was on-going, thus the court lacks jurisdiction to hear and determine the suit.
6. Concerning the wrongfulness or otherwise of the suit, counsel urges that the Claimant's suit violates Section 69 of the [Labour Relations Act](#), 2007 and Rule 5 of the Rules, 2016.
7. Reliance was made on the sentiments of Rika J in Janet Mwacha Mwaboli V Modern Soap Factory Ltd (2019) eKLR to reinforce the submission that the Claimant did not comply with the prescribed procedure.
8. Sentiments of the court in Anthony Kariuki Mwai V National Transport & Safety Authority & 2 Others (2020) eKLR, Charles Kagema Muraya V David Muthoka Mutangili (2012) eKLR and Mutanga Tea & Coffee Co. Ltd V Shikara Ltd & another on compliance with procedures prescribed by laws, to urge that the Claimant's suit is incompetent and incurably defective as the requisite documents were not attached nor were the provisions of Section 69 of the [Labour Relations Act](#), 2007 complied with.

Claimant's submissions

9. The Claimant cites relevant parts of the CBA to urge that the court has jurisdiction to hear and determine the claim dated 21st September, 2023 in accordance with Section 12 of the [Employment and Labour Relations Court Act](#), 2011 and the provisions of Section 74 of the [Labour Relations Act](#), 2007 were complied with.
10. The Claimant submits that on 15th August, 2023, the Respondent unlawfully declared 72 employees redundant and after deliberations, an agreement was reached, and a handwritten agreement was signed by two labour officers, Mr. Laurent Mulwa and Mr. Edward Chemei and witnesses for both parties.
11. But when employees reported to work on 16th August, 2023, they were turned away. The Ministry was notified and appointed one Joyce Kimulu as Conciliator but was replaced by Laurent Mulwa who was transferred before he concluded the matter and Ms. Christine Chepkosgei was appointed but had not convened a conciliation meeting .
12. That the suit was properly instituted.

Determination

13. The only issue for determination is whether the Respondent's Notice of Preliminary Objection is merited.
14. Before delving into the merits of the notice, it is elemental to ascertain whether there is a competent preliminary objection before the court as enunciated in Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (Supra), where Law JA stated as follows;

“ 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 of the suit. Example 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.”

15. Similarly, according to Sir Charles Newbold V.P;

“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 . . .”
16. The Respondent argues that as the Claimant had not pursued conciliation to its logical conclusion, even after initiating it and had not complied with the requirements of the Employment and Labour Relations Court (Procedure) Rules, 2016, this court has no jurisdiction to hear and determine the suit and the same is incompetent and fatally defective. The Claimant argues otherwise.
17. Since the Respondent’s case is based on compliance with statutory provisions and the Claimant has not provided evidence of compliance, the Respondent’s notice raises a competent preliminary objection.
18. It requires no belabouring that the Employment and Labour Relations Court derives its jurisdiction from Article 162(2)(a) of *the Constitution* of Kenya, 2010 read with provisions of Section 12(1) of the *Employment and Labour Relations Court Act*, 2011 and non-compliance with the provisions of the *Labour Relations Act*, 2007 and the Employment and Labour Relations Court (Procedure) Rules, 2016, would not, in the court’s view oust the court’s jurisdiction to hear and determine a suit before it as it must assess and determine the impact of the non-compliance.
19. In the instant suit, it is not in contest that the dispute relates to a redundancy, which according to the Claimant was not conducted in accordance with the law.
20. Since the suit involves an employer/employee relationship, the court has jurisdiction to hear and determine it, the effect of the alleged non-compliances notwithstanding.
21. As observed in the previous Ruling dated 1st February, 2024, the Claimant union notified the Cabinet Secretary, Ministry of Labour, Social Security and Services that there was a trade dispute vide letter dated 16th August, 2023 in accordance with the provision of Section 62(1) of the *Labour Relations Act*, 2007 and M/s Joyce Kanyiva was appointed a Conciliator vide letter dated 25th September, 2023 and a meeting of the parties was scheduled for 4th October, 2023 at 10.30am and the suit was filed on 5th October, 2023.
22. The Claimant union did not disclose the outcome of the meeting slated for 4th October, 2023.
23. Strangely, the Claimant union reported the dispute to the Cabinet Secretary, thus invoking reconciliation, it does not appear to have been committed to the process and sought the court’s intervention before the conciliation process had commenced.
24. As held in the previous Ruling, having invoked conciliation, the Claimant/Applicant ought to have given it a chance as it is a constitutionally ordained method of dispute resolution and is binding on the parties.
25. A credible justification for stranding the process ought to have been provided but was not.



26. The foregoing reasoning is fortified by the sentiments of Rika J. in *Janet Mwacha Mwaboli V Modern Soap Factory Ltd* (2019) eKLR as follows:

“Section 69 of the *Labour Relations Act* requires the Conciliator to issue a certificate if the dispute is unresolved. Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016 states that where the dispute has been the subject of conciliation, the statement of claim shall be accompanied by a report of the Conciliator on the conciliation process supported by minutes of the conciliation meeting. It is mandatory also to have the certificate of conciliation under Section 69, accompanying the statement of claim. Where there is no certificate of conciliation, the Claimant or his representative shall swear and file an affidavit attesting to the reasons why the Conciliator has not issued the certificate.

Where report has been made and conciliation has not taken place, the Claimant shall swear and file an affidavit attesting to reason why conciliation has not taken place.

Conciliation is therefore meant to be a binding and effective dispute resolution mechanism with the court’s intervention sought only when there are compelling reasons to do so. Parties can only move to the Court under Rule 5 above . . .

Non-adjudicatory mechanisms are anchored on Article 159(2)(c) of *the Constitution* of Kenya. They must be taken as binding and effective dispute resolution mechanisms, not merely a stepping stones to the judicial forum.”

27. Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016 prescribes the process of filing a claim pursuant to the provisions of the *Labour Relations Act*, 2007.

28. In the instant case, since the Claimant union filed this suit a day after the meeting scheduled by the Conciliator, no conciliation had taken place and the Claimant was required to comply with Rule 5(3) as follows:

Where no conciliation has taken place, the statement of claim shall be accompanied by an affidavit sworn by the Claimant or by the representative of that Claimant attesting to the reasons why conciliation has not taken place.

29. Other than the Verifying Affidavit dated 21st September, 2023, the Claimant union did not file any other affidavit and thus did not comply with the requirements of Rule 5(3).

30. It requires no emphasis that the provisions of Rule 5 are expressed in mandatory tone.

31. The Claimant union, however sought refuge under Section 74 of the *Labour Relations Act*, 2007 which provides that:

A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns;

- a. the recognition of a trade union in accordance with Section 62; or
- b. a redundancy where –
 - i. the trade union as already referred the dispute for conciliation under Section 62(4); or
 - ii. the employer has retrenched employees without giving notice; or



c. Employers and employees engaged in an essential services.

32. In the court's view, although the Claimant union complied with the provisions of Section 74 of the [Labour Relations Act](#), 2007, it did not comply with Rule 5 which is mandatory.
33. The essence of Rule 5 is to ensure that the court is apprised of the circumstances in which a suit before it was filed as conciliation is the homeport under the provisions of the [Labour Relations Act](#), 2007.
34. The affidavit sworn by the Claimant or its representative explains why there is need for judicial intervention even in circumstances in which no conciliation has taken place.
35. The Claimant union denied the court this mandatory requirement and appears to have reported the dispute under Section 62(4) of the [Labour Relations Act](#), 2007 as a stepping stone to the court.
36. Worthy of note, the Claimant did not demonstrate compliance with the provisions of Section 69 of the [Labour Relations Act](#) as it neither filed a conciliation certificate that the dispute had not been resolved nor show that 30 days had lapsed from the date of appointment of the Conciliator or that the agreed period for conciliation had lapsed.
37. This is decipherable from the documentation filed by the Claimant. All are dated 21st September, 2023, a day after the Chief Industrial Relations Officer appointed a Conciliator, Ms. Joyce Kanyiva and parties had been directed to submit their proposals within 7 days.
38. Similarly, the Conciliator, by letter dated 25th September, 2023 invited the parties for a meeting on 4th October, 2023 at 10.30 am and reminded the parties to submit their written proposals.
39. The Claimant union tendered no evidence of having submitted its proposals or attended the meeting but filed the suit on 5th October, 2023.
40. In its ruling delivered on 1st February, 2024, the court found that the Claimant's Notice of Motion dated 21st September, 2023 was premature and that remains the court's position.
41. The totality of the foregoing is that the Claimant union neither complied with the provisions of the [Labour Relations Act](#), 2007 nor Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016, which are mandatory which renders the suit incompetent.
42. Flowing from the foregoing, it is clear that the Claimant's union suit dated 21st September, 2023 and filed on 5th October, 2023 is for striking out and it is accordingly struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of [the Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of [the Constitution](#) and the provisions of



Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

