Galot Estate Kiambu & another v Kenya Union of Commercial Food & Allied Workers & another (Civil Appeal 362 of 2019) [2025] KECA 690 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 690 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 362 OF 2019

W KARANJA, WK KORIR & GV ODUNGA, JJA

APRIL 11, 2025

BETWEEN

GALOT ESTATE KIAMBU ..... 1ST APPELLANT

MOHAN GALOT ..... 2ND APPELLANT

AND

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS ..... 1ST RESPONDENT

LONDON DISTILLERS (K) LTD ..... 2ND RESPONDENT

(An appeal against the ruling of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated 9th July 2019 in ELRC Cause No. 120 of 2019)

JUDGMENT

1. This appeal arises from a ruling delivered on 9th July 2019 by H. Wasilwa J. of the Employment and Labour Relations Court (ELRC) in Nairobi ELRC Cause No. 120 of 2019 in respect to preliminary objections raised by Galot Estate Kiambu and Mohan Galot, the respective 1st and 2nd appellants and London Distillers (K) Ltd, the 2nd respondent. The objections, which were against a claim filed by the 1st respondent, Kenya Union of Commercial, Food & Allied Workers, were based on the grounds that the ELRC had no jurisdiction to entertain the claim because it was filed in breach of section 62 of the *Labour Relations Act*, that the 1st respondent lacked locus standi because it had not signed a recognition agreement with the 1st appellant, and that the 2nd appellant was wrongly sued.

2. Upon hearing the preliminary objections, the learned Judge discharged the 2nd appellant from the proceedings after finding that he was wrongly sued, but dismissed all the other grounds in the preliminary objections.

3. Dissatisfied with the ruling, the appellants appeal to this Court on eight grounds, which we condense as follows: that the learned Judge erred by failing to appreciate that she had no jurisdiction to hear and determine the dispute as there was no recognition agreement between the 1st appellant and the 1st respondent; and, that there was non-compliance with section 62 of the *Labour Relations Act* which makes conciliation mandatory prior to the institution of the claim in the ELRC.

4. In a nutshell, the claim by the 1st respondent was that some of its members who were employees of the 2nd respondent had been seconded to the appellants' premises. Further, that the 2nd appellant was the proprietor and owner of both the 1st appellant and the 2nd respondent. It was the 1st respondent's claim that it had signed a recognition agreement with the 2nd respondent in 1996 and its members had always benefited from the collective bargaining agreements between the parties, irrespective of their work stations. The crux of the claim was that the 2nd appellant and the 2nd respondent had forced the 2nd respondent's employees to cease membership of the 1st respondent at the pain of termination of their services. The claim was opposed, leading to the filing of the preliminary objections that gave rise to the ruling, which is the subject of this appeal.

5. During the hearing of this appeal, learned counsel Mr. Ogembo appeared for the appellants, while learned counsel Mr. Nyumba appeared for the 1st respondent. There was no appearance for the 2nd respondent despite service of the hearing notice.

6. In urging the appeal, learned counsel Mr. Ogembo relied on the submissions dated 9th September 2020. In regard to his clients' assertion that the 1st respondent lacked locus standi to bring the claim, counsel submitted that the 1st respondent had no relationship with the appellants because a recognition agreement or a collective bargaining agreement did not exist between them. Further, that personal and domestic workers, who form the core of the 1st respondent's membership, could not be employed by the 2nd respondent, considering that the business it was involved in did not require such employees. It was additionally the appellants' case that the 1st appellant lacked legal personality and could not be sued.

7. Turning to the issue of alleged non-compliance with section 62 of the *Labour Relations Act*, counsel submitted that conciliation was a mandatory requirement prior to the initiation of a claim in court. Counsel argued that the ELRC lacked jurisdiction to entertain the claim because conciliation had not been undertaken prior to the institution of the claim by the 1st respondent. According to counsel, the jurisdiction of the ELRC could only be invoked where the dispute was not resolved through conciliation. Reliance was placed on Speaker of National Assembly vs. James Njenga Karume [1992] eKLR and Kenya Anti-Corruption Commission vs. L. Z. Engineering Construction Limited & 5 Others [2004] KEHC 132 (KLR) for the proposition that a dispute resolution mechanism provided by statute should first be exhausted before resorting to litigation. We were, therefore urged to allow the appeal.

8. Despite not being present for the hearing, the firm of Maumo & Co. Advocates for the 2nd respondent had filed brief submissions dated 5th June 2020 wholly supporting the appeal.

9. In opposition to the appeal, counsel for the 1st respondent relied on submissions dated 29th July 2020. Rejecting the appellants' assertion that the 1st respondent lacked locus standi, counsel referred to sections 21 and 22 of the *Employment and Labour Relations Court Act*, section 54 of the *Labour Relations Act*, 2007 and the holding in Modern Soap Factory vs. Kenya Shoe and Leather Workers Union [2020] KECA 4 (KLR) to urge that the grievants were entitled to representation by the 1st respondent. Still on this issue of locus standi, counsel submitted that no other trade union had stepped forward to claim that the grievants were its members.

10. In opposing the appellants' contention that the claim was bad in law because of the failure to comply with section 62 of the Labour Relations Act, 2007, counsel relied on section 73 (2) (a) of the *Labour Relations Act*, 2007 to urge that the dispute had crystalized and the trial court had unfettered jurisdiction to entertain the dispute under section 12 (3) (vii) of the *Employment and Labour Relations Court Act*. To further affirm that the ELRC did indeed have jurisdiction, counsel referred to Article 162 (2) of *the Constitution* and section 87 of the *Employment Act* to pinpoint the general jurisdiction of that court. Counsel consequently urged us to disallow the appeal and uphold the impugned ruling.

11. This is a first appeal arising from the learned Judge's ruling on the appellants' preliminary objections. Therefore, our task is to determine whether, based on the record, the learned trial Judge exercised her discretion judiciously. In delivering on this task, the guiding principles are those established in Mbogo & Another vs. Shah [1968] EA 93 namely, that the Court can only upset the decision of the trial Judge if it is satisfied that she misdirected herself in some matter and as a result arrived at a wrong decision, or it is manifest from the record that the learned Judge was clearly wrong in the exercise of her discretion and that as a result there has been misjustice.

12. The foundational principles of preliminary objections were expressed in Mukisa Biscuit Manufacturing Co Ltd vs. West End Distributors (1969) EA 696, and reaffirmed by the Supreme Court in Joho & Another vs. Shahbal & 2 Others [2014] KESC 34 (KLR) thus:

> " To restate the relevant principle from the precedent- setting case, Mukisa Biscuit Manufacturing Co Ltd vs. West End Distributors (1969) EA 696:
>
> > "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. 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....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"".

13. We are aware that there were two notices of preliminary objections determined by the learned Judge in the impugned ruling. The preliminary objection dated 13th March 2019 filed by the 2nd respondent is not a subject of this appeal. The appeal is in respect to the appellants' preliminary objection dated 14th March 2019 through which they challenged the competency of the 1st respondent's claim on four fronts: violation of section 62 of the *Labour Relations Act*; lack of locus standi by the 1st respondent for want of a recognition agreement; want of legal personality by the 1st appellant; and, lack of authority by the 1st respondent to represent the grievants.

14. The learned Judge determined the preliminary objections in five paragraphs as follows:

> " 27. I have examined all the averments of both parties. The Preliminary Objections raised by the 1st and 3rd Respondents concern Locus of the Claimant to file this Claim against the Respondents.
>
> 28. The main contention by the Applicants is that there is no recognition agreement between the 1st and 3rd Respondents and the Claimant to allow the Claimant to file this claim.

29. The Claimants have submitted that they have a recognition agreement with 2nd Respondent who posts employees to serve the 1st Respondent. The 3rd Respondent is owner of Galot Estate Kiambu and he is said to be issuing directions to the 1st Respondent.

30. I note that 3rd Respondent is sued as owner of 2nd Respondent which is a limited liability Company and which has its own legal standing as per the principal (sic) in Salomon vs Salomon. The 3rd Respondent is therefore wrongly enjoyed (sic) in this case and I struck him off these pleadings

31. As for the issue of Locus of the Claimant this is not an issue I can resolve without hearing the Parties fully in view of the submissions by the Claimant that the employees of the 1st Respondent were send by 2nd Respondent, who has a recognition agreement with the Claimant. This issue will therefore be resolved in the main claim."

15. A perusal of the impugned ruling shows that the learned Judge did not render herself on the question as to whether the claim was brought in contravention of the provisions of section 62 of the *Labour Relations Act*. It is our considered view that the determination of this particular ground of objection will resolve all the other grounds in the appellants' preliminary objection.

16. The question that we must, therefore, address is whether the alleged violation of the provisions of section 62 of the Labour Relations Act was an issue for determination through a preliminary objection. From the outset, it is important to point out that the issue surrounding compliance with section 62 of the *Labour Relations Act* met the threshold of a preliminary objection as established in Mukisa Biscuit Manufacturing Co Ltd vs. West End Distributors (supra). This was a point of law arising out of the pleadings and could dispose the claim as it related to the trial court's jurisdiction.

17. On this issue, the appellants, being the proponents of the preliminary objection, urge that section 62 of the *Labour Relations Act* makes conciliation a mandatory prerequisite to the initiation of a claim in court. It is submitted that since the conciliatory process was yet to be concluded, the trial court lacked jurisdiction to entertain the claim. On the other hand, the 1st respondent contends that the dispute had crystalized and the court had unfettered jurisdiction to entertain the dispute by virtue of the provisions of section 73 (2) (a) of the *Labour Relations Act*, 2007 and section 12 (3) (vii) of the *Employment and Labour Relations Court Act*.

18. The appellants and the 1st respondent agree that the 1st respondent, through a letter dated 14th February 2019, moved the Labour Officer to invoke the powers under section 62 of the *Labour Relations Act*. The issues raised in the letter were similar to the issues subsequently framed in the claim. The issues in dispute were:

"(i) Forced union membership withdrawal;

ii. Lock out of employees who declined to sign prescribed forms for union membership withdrawal;

iii. Intention to terminate the services of 9 employees (names attached) on account of their union membership; and

iv. Employment status of the employees of Galot Estate"

19. It was the appellants' case before the trial court, and in this appeal that the 1st respondent did not let the process before the trial court proceed to conclusion before filing the claim in court. The 1st respondent did not deny this assertion. Instead, the 1st respondent sought to circumvent the dispute resolution mechanism provided in Part VIII of the *Labour Relations Act*, 2007 by arguing that its right to file the claim had crystalized by dint of section 73 (2) (a) of the same Act. In order to address the 1st respondent's argument, it is important to reproduce the entire section 73, which provides as follows:

> "73. Referral of dispute to Industrial Court
>
> 1. If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.
>
> 2. Notwithstanding the provisions of subsection (1), if a trade dispute -
>
> a. is one in respect of which a party may call a protected strike or lockout, the dispute may only be referred to the Industrial Court by an aggrieved party that has made a demand in respect of an employment matter or the recognition of a trade union which has not been acceded to by the other party to the dispute; or
>
> b. is in an essential service, the Minister may, in addition, refer the dispute to the Industrial Court.
>
> 3. A trade dispute may only be referred to the Industrial Court by the authorized representative of an employer, group of employers, employers' organization, or trade union."

20. In our view, sub-section (2) (a) of section 73 of the *Labour Relations Act* cannot be read in isolation. It must be read together with the other sub-sections of that section. In essence, section 73 (2) provides the conditions for leapfrogging the mandatory provisions of Part VIII of the Act. Section 73(1) is clear that a trade dispute can only be referred to the court by a party to the dispute where it is not resolved after conciliation. The 1st respondent has not provided any evidence of failure of the conciliation process so that the pathway to court could be opened to it. The 1st respondent has equally failed to show that the conditions that allows the bypassing of conciliation had been met in respect to its claim.

21. To buttress our position, suffice to rely on the holdings in Teachers Service Commission (TSC) vs. Kenya Union of Teachers (KNUT) & 3 Others [2015] KECA 239 (KLR) that:

> "
>
> "48. The Employment & Labour Relations Court also has jurisdiction to adjudicate disputes arising from referrals. The referrals arise out of failure to resolve the dispute after conciliation. This is in terms of section 73 of the *Labour Relations Act*." (Per P.M. Mwilu, JA (as she then was)).

and

> "The LRA provides in sections 62-73 for dispute resolution mechanism. The mechanism requires that the dispute be reported to the Minister first, who

then appoints the conciliator and if the dispute is not resolved, reference to the Industrial Court should be resorted to." (Per E.M. Githinji, JA)

22. Flowing from the fact that the conciliation process had not been exhausted by the 1st respondent at the time the claim was filed, it follows that none of the parties could enjoy the jurisdiction of the ELRC by referral. Therefore, there was no dispute which had crystalized, thereby requiring the determination of the ELRC. Furthermore, the 1st respondent did not demonstrate that there was any reason recognized by statute for bypassing the conciliation process. Our jurisdiction to interfere with the learned Judge's decision is therefore properly invoked by the appellants because it is apparent from the impugned ruling that the learned Judge failed to consider matters which she should have considered before arriving at her decision.

23. The end result is that we find merit in the appellants' preliminary objection to the claim on the ground that it violated section 62 of the *Labour Relations Act*. It follows that we must allow the appeal, set aside the ruling and order of the ELRC made on 9th July 2019. Consequently, we uphold the preliminary objection by the appellants and strike out the 1st respondent's claim dated 26th February 2019 in its entirety.

24. Concerning the costs, we have considered the fact that the appeal arose from the trial court's failure to render itself conclusively on the appellants' preliminary objection. We have also taken into account the fact that the 1st respondent's operations are mainly funded by remittances deducted by employers from the earnings of their members. In the circumstances, the order that finds favour with us in respect to costs, and which we hereby issue, is that each party shall bear their own costs of the appeal and the proceedings before the ELRC.

25. The end result is that the appeal is allowed in the terms already stated, and the parties will bear their own costs of the appeal and those of the proceedings before the trial court.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL 2025

W. KARANJA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR