



## IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL NO. 37 OF 2019

BETWEEN

MODERN SOAP FACTORY.....APPELLANT

AND

KENYA SHOE AND LEATHER WORKERS UNION.....RESPONDENT

*(Being an appeal from the Ruling of the Employment & Labour Relations Court*

*at Mombasa (L. Ndolo, J.) delivered on 31<sup>st</sup> July 2018 in ELRCC No. 615 of 2014)*

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### JUDGMENT OF THE COURT

1. This appeal arises from a ruling of the Employment and Labour Relations Court (ELRC) at Mombasa (*L. Ndolo, J.*) delivered on 31<sup>st</sup> July 2018 dismissing a preliminary objection taken by the appellant that the respondent trade union did not have *locus standi* to lodge a claim before the ELRC on behalf of its members, employees of the appellant.
2. In brief, the background is that on 5<sup>th</sup> December 2014, the respondent, a registered trade union, lodged a claim against the appellant before the ELRC on behalf of two employees of the appellant, namely Stephen Kimilu and Chitsala Mahendakazi. Whilst acknowledging that it did not have a recognition agreement with the appellant, it averred in its memorandum of claim that the said employees were unfairly terminated from employment and sought relief, by way of reinstatement and compensation, on their behalf.
3. In its memorandum of reply to the claim, the appellant, whilst denying that the employees were unfairly terminated, pleaded that in view of the admission by the respondent (claimant in the lower court) that there was no recognition agreement with the appellant, “*the claimant herein has no locus standi to bring these proceedings and this cause ought to be dismissed and struck out with costs.*”
4. Subsequently, on 19<sup>th</sup> December 2017, the appellant filed a preliminary objection contending that “*the claimant and the alleged employees are strangers and have no locus standi to bring this claim against the [appellant] as the grievant membership with the union is disputed*” and further that the respondent “*lacks locus standi to lodge the memorandum of claim...as it offends the express and unequivocal provisions of Section 54 of the Labour Relations Act.*”
5. In response to the preliminary objection, the respondent maintained that the employees “*were union members*” and that it had *locus standi* to lodge the claim; that under its constitution it had the power to represent its members and therefore the preliminary objection had no basis.
6. The preliminary objection was heard before *Ndolo, J.* who, after considering written submissions by the parties determined, in the impugned ruling of 31<sup>st</sup> July 2018, that the respondent had *locus standi* to represent the employees and dismissed the preliminary objection. Aggrieved, the appellant lodged the present appeal.
7. In its memorandum of appeal, the appellant has faulted that decision on eight grounds. However, in his written submissions and address during the hearing of the appeal, learned counsel for the appellant, *Mr. Ondego*, condensed the complaints into two. He submitted that in the absence of a recognition agreement between the respondent and the appellant, the respondent did not have sufficient interest to sustain its standing to sue on behalf of the employees; that the respondent could not therefore represent the employees in this matter. He referred us to the case of *Law Society of Kenya vs. Commissioner of Lands and 2 others [2001] eKLR* for the argument that a party must have a sufficiency of interest to sustain its standing to sue in a court of law. Furthermore, it was argued, the Judge should have heeded directions

that had previously been given in the matter and adopted the decision of the court on a similar issue in ELRC No. 197 of 2014.

8. It was submitted that a trade union derives *locus standi* to institute a trade dispute from Section 2 of the Labour Relations Act; that for a trade union to have standing with the employer so as to act as a representative of the interests of unionisable employees “*recognition*” is required as well as compliance with Section 54 of the Labour Relations Act which requires such union to represent more than a simple majority of unionisable employees; that the Judge was therefore wrong in holding that there is no connection between recognition and representation. Further, it was urged that there is no averment by the respondent in its pleading before the lower court that the employees are its members.

9. On his part, **Mr. Maina**, learned counsel for the respondent submitted that the Judge was right in holding that the respondent has *locus standi* to represent its members in court without recognition agreement; that the right do so is provided under Section 22 of the Employment and Labour Relations Court Act; that the union is empowered under its constitution to represent its members; that the appellant has not demonstrated that the Judge overstepped the powers of the court; and that it was established that the employees were members of the respondent as the appellant was indeed deducting and remitting union dues to the respondent.

10. We have considered the appeal and the submissions by counsel. The only issue that arises for determination in this appeal is whether a trade union has *locus standi* to represent its members in court in a dispute between an employee (who is member of the union) and an employer in the absence of a recognition agreement between the union and the employer. In other words, can a trade union that does not have a recognition agreement with an employer represent members of its union in court in a dispute between such member and the employer?

11. In addressing that question, the learned Judge expressed:

***“To my mind, a trade union has many roles and although collective bargaining which is premised on recognition is a premiere one, the other roles such as association generally and representation in particular, are equally important. What is clear is that Section 54(1) of the Labour Relations Act creates no nexus between recognition and representation.”***

And later in the same ruling:

***“To say that the right to representation must be preceded by recognition of the member’s trade union is to lock out a whole body of employees who belong to minority trade unions, to say nothing about the ensuing onslaught on fair competition among trade unions.”***

12. A different view on the same question was previously expressed by **Mbaru, J.** of the ELRC in the case of **Communication Workers Union vs. Safaricom Ltd [2014] eKLR** where she stated:

***“The question here with regard to locus standi is that the Claimant union has no recognition with the Respondent and even where such recognition is lacking; there is no CBA between the parties to regulate terms and conditions of work. Without recognition by an employer, a trade union, even where registered as such, becomes a bystander waiting by the roadside for instructions. Similar to a lawyer, though having a first class honours lacks a certificate of practice as an advocate of the High Court of Kenya. Such a lawyer though well versed in law and well suited to give legal advice to various citizens lacks capacity to stand in court as an advocate representing a client.”***

13. **O. Makau, J.** concurred in that view in **Kenya Shoe & Workers Union vs. Modern Soap Factory Ltd, Mombasa ELRC Cause No. 241 of 2017**, stating:

***“I agree with Mbaru J’s opinion in the Communication Workers Union case, that without recognition by an employer, a trade union, even where it is registered to represent workers in a sector, remains a bystander to the disputes between the workers and their employers. However, if the workers are members of the union, the union can only assist them in disputes just as a lawyer does without substituting the litigants names from the pleadings.”***

14. **Rika, J.**, also of the ELRC, on the other hand, in **Kenya Shoe & Leather Workers Union vs. Falcon Tanners Ltd, Nbi Cause No. 826 of 2012** was clear that:

***“There is no legal obscurity on the right of representation of the employees by the Trade Union. The law including the Industrial Court Act and the Labour Relations Act, as correctly argued by Mr. Maina, extends the right of representation of the employees in court, to the Trade Union, acting through its authorized officers.”***

15. Based on the foregoing, there are conflicting positions taken by the ELRC on the question under consideration. In our judgment, we can see no reason why a registered union, whose constitution so empowers, should not have standing to institute a claim on behalf of its members and to represent its members in court.

16. Article 41 of the Constitution of Kenya on labour relations protects the right of every person to fair labour practices and the right, among others, to join a trade union, which in turn has the right to determine its activities. Article 258 of the Constitution on enforcement of the Constitution provides in Article 258(2)(d) that an association acting in the interest of one or more of its members may institute proceedings where the Constitution is contravened or threatened with contravention. In the same spirit, Section 22 of the Employment and Labour Relations Act provides that:

***“In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party’s trade union or employers’ organisation and, if the party is a juristic person, by a director or an employee specially authorised for that purpose.”***

17. We can see no reason therefore to fault the conclusion by the Judge that the respondent has *locus standi* to institute the claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact. Where there is a contest as to whether an employee is a member of a union, evidence would be required to settle that question. It is not a matter that is amenable for determination on the basis of a preliminary objection. [See ***Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] E A 696.***]

18. A recognition agreement is defined under Section 2 of the Labour Relations Act as an agreement in writing made between a trade union and an employer, group of employers or employers’ organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers’ organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in court. As the learned Judge correctly stated, the two roles are distinct.

19. The result is that this appeal is devoid of merit. It is accordingly dismissed with costs to the respondent.

**DATED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2020.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**