



REPUBLIC OF KENYA



KENYA LAW
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Kirinyaga University UASU Chapter v Kirinyaga University & another (Employment and Labour Relations Petition E031 of 2023) [2025] KEELRC 187 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 187 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E031 OF 2023**

BOM MANANI, J

JANUARY 30, 2025

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23,
24, 27, 28, 35, 41, 48, 50, 52, 159, 162, 165, 258, 259 AND
260 OF THE CONSTITUTION**

AND

**IN THE MATTER OF VIOLATION OR THREATENED VIOLATION
OF ARTICLES 1, 2, 6(3), 10, 20, 21, 22, 23, 24, 25, 27, 28,
35, 40, 41, 43, 48, 49, 50(1), 159, 160, 161, 162, 165, 258,
259 AND 260 OF THE CONSTITUTION**

AND

**IN THE MATTER OF SECTION 5 OF THE UNIVERSITIES ACT,
2012**

AND

**IN THE MATTER OF THE SECTION 4 AND 5 OF THE FAIR
ADMINISTRATIVE ACTION ACT NO 4 OF 2015**

AND

**IN THE MATTER OF A DETERMINATION ON THE ACADEMIC
WORKLOAD AND PART-TIME TEACHING POLICY FOR THE
ACADEMIC STAFF OF KIRINYAGA UNIVERSITY**

BETWEEN

KIRINYAGA UNIVERSITY UASU CHAPTER PETITIONER

AND



RULING

Background

1. This ruling is on the preliminary objection that was raised by the Respondents through the Notice of Preliminary Objection dated 4th October 2024. In the objection, the Respondents contend as follows:-
 - a. That the suit contravenes the provisions of sections 62(1) and 73 of the *Labour Relations Act* as well as rule 5(3) of the Employment and Labour Relations (Procedure) Rules which require a Trade Union to first report a trade dispute to the Cabinet Secretary for Labour and Social Protection for conciliation before proceeding to court.
 - b. That this court has no jurisdiction to hear the matter prior to exhaustion of the alternative dispute resolution mechanisms in light of section 9(2) of the *Fair Administrative Action Act*, No. 4 of 2015.
 - c. That the Petitioner and the 1st Respondent do not have a Recognition Agreement which accords the Petitioner the right to represent members of academic staff of the 1st Respondent and hence it lacks legal capacity to institute or otherwise maintain the present suit.
 - d. That the Petition is fatally defective in substance, law and fact and therefore an abuse of the court and should be dismissed with costs.
2. The parties filed submissions on the preliminary objection. According to the Respondents, the law obligates a Trade Union to submit to conciliation before it can approach the court regarding any trade dispute. However, if and when this is not done, the Trade Union must file an affidavit together with its Statement of Claim setting out the reason why it did not submit to conciliation in the first instance.
3. The Respondents contend that the Petitioner did not comply with these requirements of the law. They contend that the Petitioner neither submitted the instant dispute to conciliation nor presented to court an affidavit setting out the reasons why it skipped conciliation. As such, the suit is fatally defective and ought to be struck out.
4. The Respondents rely on the decision of Kenya Shoe & Leather Workers Union v Technoplast Ltd (2024) KEEELRC 1785 (KLR) to support their contention. In the case, the learned trial Judge expressed the view that a suit which is filed by a Trade Union without complying with the above requirements of law is incompetent.
5. The Respondents further argue that clause 9 of the Recognition Agreement between UASU and the 1st Respondent requires that any trade dispute affecting them be reported to the Cabinet Secretary, Ministry of Labour who will in turn appoint a conciliator to determine the matter. They contend that this fortifies their position that the Petitioner ought to have referred the instant dispute to conciliation.
6. The Respondents also refer to the Supreme Court decision in the case of Kenya Ports Authority v Joseph Makau Munyao & 4 others (2023) KESC 112 (KLR) to support their position. They contend that in the decision, the court underscored the need for a Trade Union to first submit to conciliation before instituting proceedings in court.



7. The Respondents also refer to the decision in *Banking Insurance and Finance Union (K) v KCB Bank (K) Limited; Dishon Ochieng Achiro and 70 others (Interested Parties) (2019) eKLR*, in which the court underscored the need for a Trade Union to exhaust the conciliation procedures under the *Labour Relations Act* before approaching the court. The court expressed the view that a suit which is filed in contravention of this requirement is premature.
8. The Respondents also refer to the Court of Appeal decision in *Geoffery Muthinja and another v Samuel Muguna Henry & 1756 other (2015) eKLR*, in which the court underscored the position that parties to a dispute ought to exhaust all available alternative dispute resolution procedures in resolving the dispute before they can approach the court. The court expressed the view that courts of law ought to be the last and not first ports of call in instances where parties have alternative procedures for resolving their disputes.
9. The Respondents argue that the 1st Respondent does not have a Recognition Agreement with the Petitioner. They contend that the Petitioner is a stranger to the Recognition Agreement between UASU and Kirinyaga University. As such, it has not capacity to institute the instant suit.
10. In response, the Petitioner contends that the dispute between them was indeed submitted to conciliation when the court referred the matter to mediation. However, it (the matter) was not resolved because the Respondents walked out of the mediation process.
11. The Petitioner contends that the dispute before court relates to violation of constitutional rights. As such, it is distinguishable from the plethora of decisions which the Respondents have relied on to advance their case.
12. The Petitioner contends that section 62 of the *Labour Relations Act* does not make it obligatory for a Trade Union to report a dispute to the Cabinet Secretary, Ministry of Labour for purposes of conciliation before it (the Trade Union) can approach the court over the matter. In the Petitioner's view, the section is couched in discretionary terms.
13. The Petitioner argues that the Respondents cannot invoke the exhaustion principle to frustrate the trial by the court since they frustrated the mediation process which would have offered the parties an alternative mechanism for resolving the dispute. It contends that after the mediation process failed, this court became seized of the matter.
14. The Petitioner contends that rule 5(3) of the Employment and Labour Relations Court (Procedure) Rules deals with claims and not constitutional petitions. As such, it has no application to the instant proceedings.
15. The Petitioner contends that the Respondents did not take up the issue of conciliation when the Petition was filed. As such, it contends that the quest to strike out the matter for failure to submit to conciliation, coming up at this moment in time, is an afterthought.
16. The Petitioner contends that as a registered chapter of the UASU, it has capacity to sue. Besides, it contends that the *Constitution* grants anyone locus standi to petition the court when there is a threat to violate a right.

Analysis

17. The question whether a party has the liberty to approach a court of law with a dispute before he has exhausted the available alternative dispute resolution mechanisms in respect of the dispute has been the subject of protracted discussion by various courts. Both the Court of Appeal and the Supreme Court have expressed their position on the matter.



18. It is clear from various decisions that parties to a dispute are bound to exhaust the available dispute resolution procedures before they can approach the court with the dispute unless the aforesaid procedures are incapable of granting them a suitable remedy. What I understand from this is that as a general principle, courts of law must not admit suits if the parties have not exhausted the available dispute resolution mechanisms. However, this principle may be departed from if the parties are able to demonstrate that the available alternative dispute resolution processes are incapable of granting them a suitable remedy.
19. Judges of the Employment and Labour Relations Court have expressed themselves differently on the import of section 62(1) of the [Labour Relations Act](#). It is clear from the decisions cited by the Respondents that some Judges of the court consider the provision as mandatory. As such, they consider a suit filed in disregard of it as incompetent. Yet, others hold the view that the provision is permissive. As such, they posit that compliance with it is not mandatory (see for instance [Kenya Union of Commercial, Food and Allied Workers v Worldwide Movers \(K\) Limited \(Cause E539 of 2022\)](#) [2022] KEELRC 14668 (KLR) (6 October 2022) (Ruling), [Kenya Engineering Workers Union v R.M. Patel & Partners \(Cause E018 of 2021\)](#) [2022] KEELRC 4035 (KLR) (23 September 2022) (Judgment) and [Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Company Ltd](#) [2015] eKLR).
20. The foregoing notwithstanding, the Court of Appeal in the case of [Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union](#) [2018] eKLR expressed the view that the aforesaid provision does not impose an obligation on the parties to submit to conciliation. The court held that the section was permissive in nature.
21. As such and whilst appreciating the need to resolve labour disputes through alternative dispute resolution mechanisms, the court observed that parties to a dispute under the [Labour Relations Act](#) were under no obligation to submit to conciliation before they could approach the court over the same dispute. However, it (the Court of Appeal) emphasized that a trial court retained the discretion to refer a dispute under the Act to conciliation in suitable cases.
22. I have looked at the decision by the Supreme Court in [Kenya Ports Authority v Joseph Makau Munyao & 4 others \(2023\)](#) KESC 112 (KLR). Whilst it is true that the court underscored the need to exhaust the alternative dispute resolution procedure under Part 8 of the [Labour Relations Act](#), it is apparent that it (the Supreme Court) was not invited to consider whether the procedure was obligatory or discretionary. As such, it (the Supreme Court) did not pronounce itself on this aspect. Consequently, the only decision by the superior court regarding whether the procedure is mandatory is by the Court of Appeal in the case of [Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union](#) [2018] eKLR.
23. Having regard to the aforesaid decision by the Court of Appeal which is binding on this court, I arrive at the conclusion that the conciliation procedure under section 62 (1) of the [Labour Relations Act](#) is not a mandatory precondition for parties to approach the court. However and in recognition of the constitutional dictate under article 159 of the [Constitution](#) to promote alternative mechanisms for dispute resolution, I hold the view that where the law provides for alternative dispute resolution procedures, it is desirable that parties should strive to exhaust these mechanisms before they can approach the court unless they demonstrate that the alternate dispute resolution mechanisms are incapable of yielding suitable results.
24. The Petitioner has not suggested that the conciliation procedure under Part 8 of the [Labour Relations Act](#) is incapable of providing a suitable solution to the current dispute. As such, I consider that it would have been better if it (the Petitioner) had submitted to conciliation before approaching the court.



25. The other matter which the Respondents have raised relates to the capacity of the Petitioner to institute the current proceedings. They contend that because the Petitioner has no Recognition Agreement with the 1st Respondent, it lacks locus standi to file the proceedings.
26. A Trade Union does not require a Recognition Agreement with an employer before it can represent its members in court proceedings against the employer. Under section 54 of the *Labour Relations Act*, a Recognition Agreement is only necessary for purposes of negotiating a Collective Bargaining Agreement. This point was made by the Court of Appeal in the case of *Modern Soap Factory v Kenya Shoe and Leather Workers Union* [2020] eKLR.
27. The Respondents also posit that as a branch office of UASU, the Petitioner has no capacity to sue or be sued. On the other hand, the Petitioner contends that it is a registered chapter of UASU with powers to act on behalf of members of UASU.
28. Whether the position expressed by the Petitioner in response to the Respondents' aforesaid assertion is valid is a matter of law and fact which requires to be established through evidence. As such, the Respondents' contention cannot be resolved through a preliminary objection which is confined to points of law.
29. Finally on this aspect of the case, I note that the Respondents rely on the decision in the case of *University Academic Staff Union (UASU) Jomo Kenyatta University of Agriculture and Technology Chapter v Jomo Kenyatta University of Agriculture and Technology (JKUAT)* [2006] KEHC 896 (KLR) to anchor their contention that a branch office of a Trade Union has no capacity to sue on behalf of members of the parent Trade Union. It is however worth of noting that the aforesaid decision was rendered in the context of the now repealed Trade Unions Act. Therefore, it cannot be invoked to interpret provisions of the *Labour Relations Act*. As a matter of fact, some decisions of the court express the position that a branch of a Trade Union which is registered under the *Labour Relations Act* can sue on behalf of members (*Universities Academic Staff Union (UASU) (Kenyatta University Chapter) v Kenyatta University* [2021] eKLR).
30. Importantly, the decision in *University Academic Staff Union (UASU) Jomo Kenyatta University of Agriculture and Technology Chapter v Jomo Kenyatta University of Agriculture and Technology* (supra) was made under the retired constitutional dispensation when the rules on locus standi were overly constrained. With the promulgation of the *Constitution* of Kenya 2010, there was a paradigm shift on the subject of locus standi. By virtue of articles 22 and 258 of the *Constitution*, any person is entitled to institute proceedings alleging that a right under the *Constitution* has either been violated or is under threat of violation.
31. In the instant Petition, the Petitioner has instituted the case alleging violation of various constitutional rights including the right to fair labour practices under article 41 of the *Constitution*. As such and if not for anything else, it (the Petitioner) was entitled to commence the proceedings courtesy of articles 22 and 258 of the *Constitution*.

Determination

32. Having regard to the foregoing, I make the following orders:-
 - a. The preliminary objection by the Respondents is without merit and is dismissed.
 - b. Although the Petitioner had no obligation to refer the current dispute to conciliation under section 62(1) of the *Labour Relations Act*, the court nevertheless directs the parties to attempt conciliation of their disagreement. This order is made in recognition of the Respondents' desire to attempt conciliation of the matter. Further, it is made pursuant to the power donated to



this court under section 15 of the [Employment and Labour Relations Court Act](#) as read with article 159 of the Constitution.

- c. As such and in terms of section 15(4) of the [Employment and Labour Relations Court Act](#), the court stays proceedings in the cause pending the conciliation process.
- d. The court directs the parties to expeditiously liaise with the Commissioner of Labour at the Ministry of Labour and Social Protection to appoint a conciliator to resolve the dispute.
- e. Having regard to the fact that attempts to resolve the dispute through mediation failed, the court is cautious not to allow the parties to abuse the proposed conciliation process to drag the matter. As such, it is ordered that the conciliation process be concluded within four (4) calendar months of this order and the conciliator's report be presented to court for further directions.
- f. Costs of the objection shall abide the final outcome of the case.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JANUARY, 2025.

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Petitioner

..... for the Respondents

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

