



**Kenya Union of Commercial, Food and Allied Workers v Laxmi Hardware Limited
(Cause E060 of 2024) [2025] KEELRC 129 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 129 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E060 OF 2024
JK GAKERI, J
JANUARY 29, 2025**

BETWEEN

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**

AND

LAXMI HARDWARE LIMITED RESPONDENT

RULING

1. On 18th July 2024, the Applicant herein filed a suit against the Respondent together with a Notice of Motion under Certificate of Urgency seeking orders that:
 1. Spent.
 2. Spent.
 3. Pending hearing and determination of this matter the Honourable Court be pleased to issue Orders restraining the Respondent from victimizing, intimidating, coercing, harassing, terminating, dismissing or disciplining the Claimant/Applicants members whose names appear on the checkoff sheets on account of their trade union membership.
 4. Costs of this Application be provided for.
2. The Notice of Motion is based on the grounds set out on its face and the Supporting Affidavit sworn by Benjamin Tangara on 17th July 2024 who deposes that the respondent is a Hardware shop in Kisumu City and falls within the Applicants domain of representation.
3. The affiant deposes that the Applicant recruited 16 unionisable employees out of a possible 17 equivalent to 94% and they signed the check-off forms as proof of membership.



4. The affiant avers that the Applicant sent check-off forms to the Respondent on 27th March 2024 and on 13th June 2024 for purposes of deduction and remittance of union dues and a draft Recognition Agreement on 27th March 2024.
5. In response, the respondent filed a Notice of Preliminary Objection dated 5th September 2024 that:
 - i. The Claimant union lacks locus standi to institute the suit on behalf of the employees and thus not in line with sections, 2, 54 and 73 (3) of the *Labour Relations Act*.
 - ii. The union which ought to represent the employees is the Kenya Building Construction, Timber and Furniture Industries Employees Union where employees of the respondent's Industry fall under.
6. The applicant's response to the Respondent's Preliminary Objection is similar to its submissions and thus repetitive.

Respondent's submissions

7. The Respondent relies on the decision in *Law Society of Kenya V. Commissioner of Lands & Others* Civil case No. 464 of 2000 on the test of Locus Standi as sufficient interest to sustain its standing to sue in a court of law.
8. According to the Respondent, a Recognition Agreement would be sufficient interest as it enables the union to represent the employees and as the applicant and the respondent had no Recognition Agreement and CBA, thus the Claimant lacked standing before the court.
9. The Respondent submits that Recognition creates locus standi for a union to file trade disputes under Section 2 of the *Labour Relations Act*.
10. It is submitted that once a trade union secures recognition with an employer or employer's organization, other rights flow therefrom especially those under section 54 of the *Labour Relations Act* and the applicant in this case had no standing to institute any trade dispute.

Applicant/Claimant's submissions

11. On standing, the union relies on the provisions of Section 2 of the *Labour Relations Act* on the definition of "authorised representative" and "Recognition Agreement" and "trade dispute". Reliance is also made on the provisions of Section 54 of the Act on recognition of a trade union by an employer for purposes of collective bargaining, to urge that having recruited 16 out of a possible 17 employees of the respondent, the union had attained the threshold for recognition.
12. The applicant submits that the issues raised by the respondent do not raise a pure point of law without examining the facts of the case and must fail as the Notice of Preliminary Objection does not meet the threshold of a Preliminary Objection.
13. Reliance is made on the provisions of Section 22 of the Employment and *Labour Relations Act* on representation of parties before the court, to urge that applicant had Locus Standi to institute the instant suit.
14. As to which union out to represent the employees, the applicant union submits that Rule 6 (a) (1) of its Constitution and Rules covers employees of Warehouses and the respondent's employees are well placed.



15. Reliance is also made on the provisions of Article 36(1) and (2) of *the Constitution* of Kenya on the right to freedom of association and the right to join any association of one's choice, to urge that employees have the right to join a trade union of their choice and the employer has no right to choose a union for its employees.
16. The claimant union submits that the union cited by the employer had not claimed any membership within the respondent's employees and was not enjoined as an Interested Party.
17. According to the claimant union, the respondent's Notice of Preliminary Objection is misconceived, ill-advised and an afterthought and ought to be dismissed.

Analysis and determination

18. The issues for determination are:
 - i. Whether the respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection.
 - ii. Whether the notice of Preliminary Objection is merited.
19. The Court of Appeal decision in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* (1969) EA 696 is cited in determining what constitutes a Preliminary Objection and the parameters are well settled.
20. Law JA stated as follows: -

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 part 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.”
21. According to Sir Charles Newbold P.

A preliminary objection is in the nature of what used to be a demurer. It raises a pure part of law which is usually 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”
22. The Supreme Court cited the decision in *Mukisa Biscuit Manufacturing Ltd V West End Distributors Ltd* (Supra) in *Hassan Ali Joho & Another V. Salesman Said Shabal & 2 Others* (2014) eKLR and expressed similar sentiments as to what constitutes a Preliminary Objection as follows:

Thus, a Preliminary Objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed as they are prima facie presented in the pleadings on record.”
23. Clearly, a Preliminary Objection must be grounded on a settled principle of law and its application to undisputed facts leads to one conclusion.
24. A successful Preliminary Objection disposes of the suit before the court and must therefore be disposed of at the earliest possible instance after it is raised.



25. In the instant case, the respondent relies on the Claimant's lack of standing to institute the suit and that the Kenya Building Construction Timber and Furniture Industries Employees Union ought to represent its employees.
26. On Locus Standi, the respondent argues that the claimant/applicant must have sufficiency of interest to sustain its standing to sue and the same is grounded on the presence of recognition agreement between the applicant and the respondent and as there was none, the applicant lacks standing.
27. Section 54 of the *Labour Relations Act* provides that;
1. An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
 2. A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.
 3. An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.
 4. The Minister may, after consultation with the Board, publish a model recognition agreement.
28. These provisions are fortified by the provisions of Section 57 (1) of the Act that:

An employer group of employer or an employers' organization that has recognized a trade union in accordance with provisions of this part shall conclude a collective agreement with the recognized trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.”

29. From the foregoing provisions, it is discernible that a recognition agreement is only required for purposes of collective bargaining. It is also proof that the union has members among the employees of the employer as it is signed after attainment of the threshold of recruiting a simple majority of all unionisable employees.
30. In *Kenya Shoe and Leather Workers Union V. Modern soap Factory* (2018) eKLR; Ndolo J observed as follows:

To my mind, a trade union has many roles and although collective bargaining which is premised on recognition is a premier one the other roles such as association 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...

To say that the right to representation must be preceded by recognition of the members' 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”

Rika J. expressed similar sentiments in *Kenya Shoe & Leather Workers Union V. Falcon Tanners Ltd NBI Cause No. 826 of 2012*.



31. The sentiments of the learned Judge were upheld by the Court of Appeal in *Modern Soap Factory V. Kenya Shoe and Leather Workers Union* (2020) eKLR where the court expressed itself as follows:

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...

32. And as the Court of Appeal underscored, Section 22 of the *Employment and Labour Relations Court 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 represented by an advocate, an office bearer or official of the party's trade union or employers' organization and, if the party is a Juristic person, by a director or an employee specially authorized for that purpose"

33. In *Modern Soap Factory V. Kenya Shoe and Leather Workers Union* (Supra) the Court of Appeal stated:

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...

34. On recognition agreement, the Court was unambiguous, that

...it is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages 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..."

35. From the foregoing, it is clear that the respondents' contention that the applicant lacks locus standi to institute the instant suit on behalf of employees is not sustainable.

36. Finally, the respondent's contention that its employees ought to be represented by another union is inconsistent with the provisions of *the Constitution* of Kenya germane to freedom of association and fair labour practices and does not meet the threshold in *Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd* (Supra).

37. In the end, it is clear that the respondent's Notice of Preliminary Objection is devoid of merit and it is accordingly dismissed.

38. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH DAY OF JANUARY, 2025.

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.

