Kenya County Government Workers Union Nyeri (Nyewasco Branch) v Nyeri Water & Sanitation Company Ltd (Employment and Labour Relations Cause E037 of 2023) [2025] KEELRC 440 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 440 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E037 OF 2023

ON MAKAU, J

FEBRUARY 20, 2025

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION NYERI (NYEWASCO BRANCH) ..... CLAIMANT

AND

NYERI WATER & SANITATION COMPANY LTD ..... RESPONDENT

(Before Hon. Justice Onesmus N Makau on 20th February, 2025)

RULING

1. The Claimant filed this suit challenging the implementation of the respondent's notice that it would contribute 15% and the employee be deducted 12% of basic salary pursuant to a Treasury Circular No. 18 of 2010. The claimant averred that the said notice was contrary a Collective Bargaining Agreement (CBA) between it and the Respondent dated 24th September 2021, and which took effect from 1st July 2021 to 30th June 2024. It further averred that the said Circular was not applicable to the Respondent since it is a Limited Liability Company and not a state corporation. It also averred that the memo was discriminatory as it did not affect the members under Article 13 (b) of the CBA titled Superannuation Fund Lap Trust who work in the same organization. Therefore, the Claimant prayed for judgement against the Respondent as follows:

    a. Be restrained by way of a permanent injunction from implementing and/or effecting the notice dated 11th December 2023 with regard to rate of contributions for all its employees registered under the occupational pension scheme (NYEWASCO Retirement Benefits and Life Assurance Scheme) at 15% for the employer and 12% for the employee based on the basic pay in contravention of the subsisting collective bargaining agreement that bases the contribution on gross salary.

b. A declaration that the existing collective bargaining agreement is more superior than the Treasury Circular Number 18 dated 24th November 2010.

c. A declaration that the deduction based on the Treasury Circular Number 18 dated 24th November 2010 on employees who were employed in June 2023 and confirmed in December 2023 is unlawful as it is against the existing collective agreement between the Respondent and the Claimant.

d. A declaration that the Respondent's memo dated 11th December 2023 guided by the Treasury Circular Number 18 of 24th November 2010 is discriminatory in that it does not affect the employees under Article 13 (b) of the CBA titled superannuation fund.

e. Costs of the suit.

f. Any other relief that the Court may deem fit to grant.

2. The Respondent opposed to the Claim vide its Statement of Response dated 22nd May 2023 where it denied the jurisdiction of this Court and gave notice that a preliminary objection to the suit would be raised on grounds that the suit offends the procedure of dispute resolution prescribed under clause 52 of the CBA and section 62(1) of the *Labour Relations Act* (LRA); and that the Claimant lacked locus standi to file the suit. It further averred that, although it was registered on 23rd September 1997 under the provisions of the *Companies Act*, County Government of Nyeri acquired full ownership of the Respondent through transmission of the shares previously held by the defunct Municipal Council of Nyeri in accordance with *the Constitution* 2010. Consequently, the Respondent averred that it is wholly owned by the County Government of Nyeri.

3. It admitted that it issued the internal memo of 11th December 2023 to its staff who are under the Occupational Pension Scheme following the adoption of the Treasury Circular by its Board on 1st September 2023. It averred that the circular was binding on all the parties to the CBA as the circular was issued following a review of all public service retirement benefits scheme pursuant to the provisions of the *Retirement Benefits Act*; that the circular was domesticated in the water sector by adoption of the 18th September 2018 WASREB directive, which directed compliance in a bid to protect consumers from liabilities accrued through pension schemes being passed on to them in tariffs; and that the memo was applied as approved by the Board as guided by the circular and WASREB directives.

4. The respondent further averred that the said circular put an end to superannuation benefits scheme and locked in the benefits converting all pension to Defined Contributions Schemes to be administered as prescribed under the Retirements Benefits Act.

5. Subsequent to the defence, the Respondent filed its Notice of Preliminary Objection dated 13th September 2024 urging the Court to strike out the entire suit with costs on the grounds that:

a. The suit offends the provisions of section 62(1) of the *Labour Relations Act* that requires a trade union to first report a trade dispute to the Minister for labour and Social protection for conciliation before proceeding to court.

b. This suit is abuse of the court process in light of the Clause 52 of the Collective Bargaining Agreement.

Submissions

6. In support of the objection, it was submitted for the respondent that there is no dispute that the claimant did not refer the trade dispute to the Minister for conciliation before commencement of the

suit as required under sections 62(1) and 73 of the LRA. It was further submitted that the statement of Claim did not contain reasons as to why the dispute was not reported to the minister for conciliation as required under Rule 5(3) of the ELRC Procedure Rules. Consequently, it was submitted that the failure to refer the dispute for conciliation without any reason, violated the doctrine of exhaustion and the suit ought to be dismissed for being premature.

7. For emphasis, reliance was placed on the case of Kenya Shoe & Leather Workers Union v Technoplast Ltd [2024] KEELRC 1785 (KLR), Kenya Ports Authority vs Joseph Makau Munyao & 4 others [2023] KESC112 (KLR) and Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR.

8. On the other hand, the Claimant submitted that neither the CBA nor the provisions of the law were coached in mandatory terms as the word "may" has been used as opposed to "shall". It argued that the objection is solely aimed at ousting the court's jurisdiction to hear the dispute contrary to Article 162(2)(a) of *the Constitution*.

9. In support of its failure to approach conciliation, the Claimant urged the court to consider the short notice period issued by the Respondent in the impugned memo which left it with no other option but to approach the court to prevent the imminent implementation of the changes in the pension deduction. Consequently, the Court was urged to find that the institution of the suit was not in contravention of any law and in case it finds that the parties ought to resolve the dispute through conciliation, then no one should be condemned to pay costs.

Determination

10. Having considered the rival submissions filed, the issues that arises for determination are:

    a. Whether the suit was prematurely filed before exhausting the alternative process prescribed by clause 52 of the CBA and section 62(1) of the LRA.

    b. Whether the claimant lacks the locus standi to bring this suit.

Premature suit

11. The Respondent' contended that the suit was prematurely filed and the Court lacks jurisdiction to entertain the as there is an alternative procedure of resolving the trade dispute through conciliation provided under section 62 of the LRA and Clause 52 of the CBA, before parties can approach the Court in accordance with Rule 5(3) of this Court's Procedure Rules.

12. Section 62 (1) provide that:

> "(1) A trade dispute may be reported to the Minister in the prescribed form and manner –
>
> a. by or on behalf of a trade union, employer or employers' organisation that is a party to the dispute; and,
>
> b. by the authorized representative of an employer, employers' organisation or trade union on whose behalf the trade dispute is reported."

13. The question that arises is whether the law allows a party to skip the conciliation process and approach the court without violating the exhaustion doctrine. Rule 5(3) of the retired ELRC Procedure Rules, 2016, which applies to this case, provided that;

> "(3) Where conciliation has not taken place, the statement of claim shall be accompanied by an affidavit sworn by the claimant or by the representative of the claimant attesting to the reasons why conciliation has not taken place."

14. However, the above option was not a carte blanche but only availed to very limited scope of disputes with extreme urgency. Section74 of the LRA 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 the trade union in accordance with section 62; or
>
> b. A redundancy where –
>
> i. The trade union has already referred the dispute for conciliation under section 62(4); or
>
> ii. The employer has retrenched employees without giving notice; or
>
> iii. Employers and employees are engaged in an essential service."

15. The dispute in this case does not fall within the above categorization and therefore, the claimant ought to have invoked conciliation process set out under Clause 52 of the CBA and section 62 of the LRA. Clause 52 of the CBA provides that:

> "(a) Should there be any difference between the parties herein mentioned regarding the interpretation, administration or alleged violation of this Agreement, either party thereto may request, in writing, a meeting with the other within seven (7) days of such request with a view to resolving the problem.
>
> (b) In the event of no settlement arising from Step(i) above, either party may refer the matter to the Ministry of Labour with a view to having the issue resolved within fourteen (14) days of receipt by the Ministry.
>
> (c) If no settlement is arrived at from the process at Step (ii) above, either party may report the issue to the Industrial Court for adjudication."

16. Failure to follow the alternative procedure provided in the CBA and the Statute rendered the suit premature, and fatally incompetent for violating the exhaustion doctrine. The said doctrine does not per se extinguish the jurisdiction of the Court but rather postpones it to a future date when the dispute becomes ripe for adjudication before the Court.

17. I gather support from Kenya Ports Authority vs Joseph Makau Munyao & 4 others [2023] KESC112 (KLR) where the Supreme Court held that:

> " Section 62 of the *Labour Relations Act* mandates the reporting of a trade dispute to the minister who thereafter appoints a conciliator. If the parties fail to reach a consensus section 73 allows an aggrieved party to file a claim at the Employment and Labour Relations Court."

Locus standi

18. In common parlance, locus standi refers to the right of a person stand before the court to agitate for right or seek a remedy from the Court. Not every person can refer a trade dispute to this Court. Section 73(3) of the LRA provides that:

> " A trade dispute may only be referred to the Industrial Court by the authorized representative of an employer, group of employers, employers' organisation, or trade union."

19. Section 2 of the Act defines an authorized representative as:

> " (a) general secretary of a trade union;
>
> (b) an employer or chief executive officer of an employer;
>
> (c) the secretary of a group of employers;
>
> (d) the chief executive or association secretary of employers' organisation; or
>
> (e) any person appointed in writing by an authorized representative to perform the functions of the authorized representative."

20. In the instant suit, the claimant is not a legal person and the person who has signed the affidavits is not the General Secretary of the Kenya County Government Workers Union. The suit is filed by a branch of trade union in its name yet section 25 of the LRA under which branches of a trade union are registered does not confer upon a branch of a trade union the status of a body corporate with capacity to sue or be sued. Only the trade union acquires such status upon registration under section 21 of the Act. For the reason that the claimant lacks the legal capacity to sue and that the suit is not initiated by the authorized representative of the relevant trade union, I find and hold that the claimant lacks the Locus standi before this suit.

Conclusion and disposition

21. I have found that the suit was filed prematurely before referring the same for conciliation under Clause 52 of the CBA and section 62 of the *Labour Relations Act* and as such it violated the exhaustion doctrine. I have further found that the suit does not concern the kind of trade disputes which warrants a party to approach the Court as a matter of urgency before referring the same to conciliation. I also have found that the claimant lacks the legal capacity to sue or be sued and the person who has initiated the suit is not the authorized officer of the relevant trade union as defined under section 2 of the Act. Consequently, I find merits in the preliminary objection by the respondent and proceed to strike out the entire suit with no costs since there is no legal person capable of being pursued to pay the same.

DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF FEBRUARY, 2025.

ONESMUS N MAKAU

JUDGE

ORDER

This ruling has been delivered to the parties via Teams video conferencing with their consent, 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.