Kenya Plantation & Agricultural Workers Union v Flamingo Horticulture Kenya Limited (Employment and Labour Relations Cause E049 of 2024) [2025] KEELRC 557 (KLR) (12 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 557 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS CAUSE E049 OF 2024

AN MWAURE, J

FEBRUARY 12, 2025

BETWEEN

KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT

AND

FLAMINGO HORTICULTURE KENYA LIMITED ..... RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary Objection dated 17th September 2024 in opposition to the Claimant/Applicant's Notice of motion and memorandum of claim both dated 6th August, 2024 on the following grounds that:
    1. The Claimant/Applicant has neither invoked nor exhausted the statutory laid down dispute resolution mechanisms under section 10 as read with section 62 of the *Labour Relations Act*, 2007.
    2. The Claimant/Applicant has neither invoked nor exhausted the statutory laid down dispute resolution mechanisms under section 54(6) and (7) as read with Section 62 of the *Labour Relations Act*, 2007.
3. Both parties canvassed the Preliminary Objection through written submissions.

Respondent's submissions

4. The Respondent submitted that trade disputes arising are typically referred to the Cabinet Secretary, who appoints a conciliator. If the conciliator is unable to resolve the dispute between the parties, the parties thereafter can file the trade dispute with the court for a hearing and determination.

5. The Respondent relied on Section 10 of the Labour Relation Act which states as follows:

> " If there is a dispute about the interpretation or application of any provision of this Part, any party to the dispute may refer the dispute in writing—
>
> a. to the Minister to appoint a conciliator as specified in Part VIII; or
>
> b. if the dispute is not resolved at conciliation, to the Industrial Court for adjudication."

6. The Respondent also relied on section 62(1) of the *Labour Relations Act* which states as follows:

> 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 authorised representative of an employer, employers' organisation or trade union on whose behalf the trade dispute is reported.

7. The Respondent relied on Petition No. 3 of 2016: Albert Chaurembo Mumba & 7 Others V Maurice Munyao & 148 Others where the Supreme Court held that:

> "(116) The foregoing verdict also finds support in an adage principle administrative law of "Exhaustion of Administrative Remedies"... to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Court must exercise restraint in exercising their jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with mandate to deal with such specific disputes in the first instance... The Court of Appeal in Geoffrey Muthinja & Another V Emmanuel Muguna Henry & 1756 other [2015] eKLR held that:
>
> "We see this as crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands courts to encourage alternative means of disputes resolution."

8. From the above case, the Respondent's argument is that the dispute resolution mechanisms established by statute, the court is required to restrain its jurisdiction by giving the said dispute resolution mechanisms a chance to be used in the first instance.

9. The Respondent submitted that a trade dispute concerning the recognition of a trade union for collective bargaining purposes is considered a trade dispute. Such disputes must be referred to the Cabinet Secretary to appoint a conciliator. If the dispute remains unresolved after conciliation, the jurisdiction of this Honourable Court can then be invoked. The Respondent relied on Section 54(6) and (7) of the *Labour Relations Act* which provides as follows:

> 6. If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of the recognition agreement,

the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.

7. If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency."

10. The Respondent relied on the case of Kenya National Highways Authority V Tangerine Investments Limited [2023] KECA 79 (KLR) where the Court of Appeal held that the interpretation of the words "may" and "shall" in legal documents can be contentious, as their meanings can vary based on context. The primary rule for interpreting these terms is to ascertain the true intention of the legislature by considering the entire statute. Courts should adopt interpretations that reflect the legislature's intent and harmonize with the statute's purpose. When multiple interpretations are possible, courts should prefer the one that advances the remedy and suppresses the mischief envisioned by the legislature. The goal is to understand the real intention of the legislature by analysing the statute as a whole.

11. The Respondent submitted that the word "may" in sections 10, 54(6) & (7), and 64 of the *Labour Relations Act* is obligatory. Therefore, the intent and purpose for which these provisions were enacted should be considered.

12. The Respondent also submitted that the true intention of Sections 10, 54(6) & (7), and 64 of the *Labour Relations Act* was to ensure that disputes concerning the freedom of association of employees and recognition of a trade union should be first being heard and determined by way of conciliation through facilitation by the Cabinet secretary before the jurisdiction of this court can be invoked.

13. The Respondent urges this Honourable Court to strike out the suit with costs.

Claimant's submissions

14. The Claimant submitted that the Respondent violated its employees' rights in joining its union as stipulated under Article 41 of *the Constitution*.

15. The Claimant reiterated sections 10, 62(1) and 54(6) & 7 of the *Labour Relations Act*.

16. The Claimant relied on Section 86(1) of the *Employment Act* which stipulates as follows:

    1. Subject to the provisions of this Act whenever—

        a. an employer or employee neglects or refuses to fulfill a contract of service; or

        b. any question, difference or dispute arises as to the rights or liabilities of either party; or

        c. touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Employment and Labour Relations Court.

17. The Claimant submitted that the word "may" is discretionary and optional meaning that no party is under obligation to refer cases through a conciliator though it is recommended.

18. In Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union [2018] KECA 847 (KLR) the Court of Appeal stated that it is not mandatory for a dispute to be reported to the Minister for determination and that the same can be referred directly to court for hearing and determination under certificate of urgency.

19. The Claimant submitted that the Preliminary objection is malicious, defective, and bad in law denying the Respondent's workers right to join its trade union to exercise their rights under Article 41 of *the Constitution*.

20. In conclusion, the Claimant urges this Honourable court to dismiss the Preliminary objection with costs.

Analysis and determination

21. Article 41(2) of *the Constitution* provides as follows:

> 2. Every worker has the right—
>
> a. to fair remuneration;
>
> b. to reasonable working conditions;
>
> c. to form, join or participate in the activities and programmes of a trade union; and
>
> d. to go on strike."

22. Sections 10, 62(1) and 54(6) & 7 of the *Labour Relations Act* have been reiterated in the preceding part of this ruling.

23. In Speaker of the National Assembly V Karume [1992] KECA 42 (KLR) the Court of Appeal held that when *the Constitution* or an Act of Parliament outlines a specific procedure for addressing grievances, that procedure must be strictly adhered to.

24. In Kenya National Union of Teachers (Knut) V Nancy Njeri Macharia & Teachers Service Commission [2020] KEELRC 1029 (KLR) the court stated that the doctrine of exhaustion of remedies is that if a statute provides an administrative remedy, the Claimant must first seek relief from the administrative body before going to court. This doctrine aims to maintain harmony between courts and administrative agencies and prevent courts from being overwhelmed with cases that could be resolved administratively.

25. In this instant case, when the Claimant had received communication from the Respondent via a letter dated 29th May 2024 that Flamingo Horticulture Kenya Limited had not attained the requisite threshold for union membership, the Claimant ought to have given alternative dispute resolution a priority since the same is provided under Sections 10, 62(1) and 54(6) & 7 of the *Labour Relations Act*. This Honourable Court is also a champion in promoting alternative dispute resolutions provided under Section 15(4) of the Employment and *Labour Relations Act* and which provides as follows:

> "If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration."

26. The conciliator would have been in in a better position to ascertain if the Respondent had the requisite threshold for union membership.

On that basis the court holds this was a matter that should have been referred to alternative dispute resolution mechanism and if not resolved then it should be filed in court at that point. This is in compliance with Article 159(2)(c) of *the Constitution* and the other provisions cited above under the *Labour Relations Act* and the *Employment and Labour Relations Court Act*.

27. In the case Petition No. 3 of 2016 Albert Chaurembo Mumba (Supra). The Supreme Court held: -

> " ----- where there exists an alternative method of dispute resolution established by legislation the court must exercise restraint in exercising their jurisdiction conferred by *the Constitution* and will give deference to the dispute resolution bodies established by the statutes with mandate to deal with such specific disputes in the first instance."

This pronouncement from the apex court makes it clear the priority given to the alternative system by the Judiciary.

28. The court is well advised that the statute in Section 10 of the *Labour Relations Act* state that matter may be referred to the Minister.

The applicant therefore in their submission says this provision is not mandatory.

It may not be mandatory but is obligatory that where there is a doctrine of exhaustion it should be pursued first before the party takes the matter to court. This is in keeping with the provision in *the Constitution* that Courts should promote alternative forum of dispute resolution in Article 159(2) (c) of *the Constitution*. This is observed in the case of Kenya National Union of Teachers (Knut) - Vs- Nancy Njeri Macharia (Supra) (alternative forms of dispute resolution) prevent courts from being overwhelmed with cases that could be resolved administratively."

29. The court is satisfied this matter should first be stayed and not struck out and referred to a conciliator of the parties choice. The court will then receive report from the conciliator after the process is exhausted. The parties are given 60 days to meet the conciliator and case will be mentioned on 12th May 2025 for progress report.

30. The Preliminary objection is therefore allowed.

31. Costs of this Preliminary objection will be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12TH DAY OF FEBRUARY, 2025.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE