Kenya Medical Practitioners Pharmacists & Dentists Union v Kiambu County Government & 2 others & another (Employment and Labour Relations Cause E122 of 2023) [2024] KEELRC 755 (KLR) (8 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 755 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E122 OF 2023

K OCHARO, J

APRIL 8, 2024

BETWEEN

KENYA MEDICAL PRACTITIONERS PHARMACISTS & DENTISTS UNION ..... CLAIMANT

AND

KIAMBU COUNTY GOVERNMENT & 2 OTHERS ..... 1ST RESPONDENT

MUA INSURANCE (K) LTD ..... 2ND RESPONDENT

RULING

Background

1. The present suit was commenced by a Memorandum of Claim dated 14th February 2023, seeking the following reliefs: -

    a. A determination that the Respondents' actions of unilaterally changing the medical terms infringe on the Claimant Union's Constitutional right to fair labour practices.

    b. A permanent order restraining the Respondents from unprocedurally and irregularly changing the medical terms of the Claimant Union members without the prior notification, consultation and approval by the Claimant Union.

    c. An order compelling the Respondents to consult and conduct public participation before awarding any insurance company the tender to provide medical insurance cover for the Claimant Union's members.

    d. A permanent order restraining the Respondents and the Interested Party whether by themselves or their representatives, servants, agents and/or assigns from effecting and/or implementing the Memo/Letter dated 10th February 2023 (CGK/GEN/CORR/CS/

VOL.1/15) issued by the 2nd Respondent changing the terms and conditions of employment of the Claimant Union's members.

e. A permanent order restraining the Respondents and Interested Party whether by themselves or their representatives, servants, agents and/or assigns from changing the Medical Insurance Cover from the current NHIF cover to the Interested Party and/or any other medical insurance provider with inferior terms without consultations with the Claimant.

f. The Honourable Court be pleased to grant such other orders as it may deem fit to grant.

g. An order as to the costs of the suit.

2. In response to the Claim, the 1st, 2nd and 3rd Respondents filed a Memorandum of Response dated 13th August 2023; while the Interested Party filed a Memorandum of Response dated 8th August 2023.

3. After the filing of the responses, the Respondents filed Notices of Preliminary Objections dated 19th September 2023 and 21st September 2023. The gravamen of the objections was that the Claimant Union and its Officials are destitute of the legal capacity to practice law by dint of Section 9 of the *Advocates Act*, and this Court lacks jurisdiction to entertain the suit herein as the doctrine of exhaustion of remedies militates against it, respectively.

4. The Claimant rendered moot the objection embodied in the Notice dated 19th September 2023 by appointing the law firm of Julius Juma & Company to represent it. The law firm filed herein a Notice of Appointment of Advocates dated 21st September 2023. This ruling is therefore in respect of the objection contained in the Notice of Preliminary Objection dated 21st September 2023.

5. Following the directions of this Court that parties canvass the remaining preliminary objection by way of written submissions, the 1st – 3rd Respondents filed submissions dated 16th October 2023, and the Claimant filed submissions dated 18th November 2023.

The Respondent's Submissions.

7. The Respondents submitted that the suit herein offends the doctrine of exhaustion because Article VIII CBA between the Claimant Union and the 1st Respondent, stipulates that any grievance on alteration and or breach of terms of the CBA should first be subjected to the mechanism provided for Under part VIII of the *Labour Relations Act*, for resolution. This part of the Act provides that a dispute reported to the Minister by any party be referred to a conciliator to be appointed by the Minister, for the time being in charge of Labour. It is only after the conciliation process has failed that the matter is lodged at the Employment and Labour Relations Court for a resolution. In the instant case, therefore, the Claimant was enjoined to raise the matter with the 1st Respondent's Management and if there was no settlement reached, refer the matter to the Minister. This, the Claimant bypassed.

8. The Respondents' Counsel urged this Court to adopt the definition of the exhaustion doctrine obtaining in the case of the Speaker of the National Assembly v Karume [1992] KLR, and note the importance of the doctrine as expressed in Rich Productions Ltd. V Kenya Pipeline Company & Another, Petition No. 173 of 2014.

9. The Respondents' Counsel further submitted that the Claimant Union hasn't given any sufficient explanations as to why it is bypassing the mechanism provided by the CBA and Statute. This matter offends the exhaustion principle. It is in court prematurely.

10. The Respondents argued that the Claimant's case is anchored on a CBA which expired by effluxion of time way back in 2017. This fact is not disputed by the Claimant. The 1st Respondent's obligations

to the Claimant and discharge thereof cannot be measured upon the basis of the expired CBA. What the 1st Respondent owes the Claimant's members is therefore the general duties just like it does to all of its staff.

The Claimant's Submissions.

11. The Claimant's Counsel submitted that the Claimant initiated the alternative dispute resolution contemplated in the CBA, by presenting a memorandum to the 1st Respondent seeking an audience on the matter in question. The said memorandum was received by the Respondent on the 10th of February, 2023. However, just a few hours after receiving the memorandum, the 1st Respondent issued a Memo implementing the contested medical scheme. With this, it became clear to the Claimant that the 1st Respondent was not keen on any discussion, hence the move to court. In these circumstances, whether or not the Claimant exhausted the alternative dispute resolution mechanisms, is a question that can only be adequately answered, where evidence has been received from the parties. This renders the preliminary objection one that is not properly taken, in terms of the Mukisa Biscuits v West End Distributors Ltd [1969] E. A 696, case.

12. It was further submitted that under Section 12[1][b], this Court is vested with the authority to hear and determine disputes between a trade union and an employer of its members. This jurisdiction cannot be taken away by the application of the doctrine of exhaustion when it is clear that the Respondents failed to subject themselves to the alternative mechanism. In this situation the Court is not powerless, it should go ahead and handle the matter and remedy the Claimant. In this submission, reliance was placed on the case of Musalia Mudavadi & 4 Others v Angela Gathoni Wambura & 2 Others [2019] eKLR.

Analysis and Determination

13. I have carefully considered the grounds embodied in the Notice of Preliminary Objection, the submissions by the parties and the decisions relied upon, and the following single issue emerges for determination;

    a. Whether the doctrine of exhaustion was offended by the Claimant.

14. This question posed is a jurisdictional issue, and should this Court answer it in the affirmative, the natural consequence shall be for it to down its tools and proceed no further with the proceedings herein. This view finds support in many judicial decisions including that in the case of RC v KKR [2021] eKLR in paragraph 26 where the Court stated as follows: -

> " 26. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -
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> Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...".

15. The Claimant's Counsel submitted that the preliminary objection raised by the Respondents cannot be said to be one properly taken as I get him, for the reason that to determine it, it shall require that some facts be ascertained thereby necessitating taking of evidence from the parties. As to what the

law dictates, I agree that this principle espoused by the Claimant is correct. Also see Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696.

16. However, I am not persuaded that the argument can be applied in the instant matter to unseat the Respondents' preliminary objection. The Respondents' preliminary objection is multi-prong. The Claimant has conveniently avoided addressing the issue of the bypassed statutory mechanism under the *Labour Relations Act*, which the CBA acknowledges, and under the Public Procurement Act and the Regulations thereto. These do not require the taking of evidence to support. The Claimant narrowly submitted on the preliminary objection, and this I state with great respect. I come to a clear view, that the preliminary objection is properly taken.

17. The Respondents argue that there exists a dispute resolution mechanism under Articles VII (b) and (c) of the Collective Bargaining Agreement entered into by the parties in 2017, and Part VIII of the *Labour Relations Act* Cap 233 of the Laws of Kenya.

18. Articles VII (b) and (c) of the Collective Bargaining Agreement between the Claimant and 1st Respondent on 1st July read as follows:

> "b. Collective Claims
>
> These shall mean any claims for alteration of terms of service regarding matters specified in Clause 2 (b) of this Agreement, which may affect all employees of any group of the County Government of Kiambu.
>
> i. Such claims shall be raised in writing with the Employer by the Union's General Secretary or his authorised representative one month before the expiry of the current agreement; within which period the parties will endeavor to reach a settlement. All agreements jointly reached shall be committed in writing and signed by both parties.
>
> ii. In the event of failure to reach a settlement of the dispute within the period, the dispute shall be processed in accordance with the provisions of the *Labour Relations Act* and *the Constitution* of Kenya.
>
> c. Collective Grievance
>
> These shall mean grievances arising from a breach, real or alleged, of existing terms of service in the matters specified in Clause 2(b) of this Agreement, which may affect all employees or any group of employees of the County Government of Kiambu such grievances shall be raised by the members' representatives with the immediate superior in the first instance and in the event such grievance cannot be satisfactorily resolved, they then may immediately be referred by the Union's Secretary General or his representative to the higher levels of Management in writing. In the event of failure to settle the matter, provisions of the *Labour Relations Act* 2007 and *the Constitution* of Kenya shall apply."

19. The Claimant asserted that it initiated the alternative dispute resolution mechanism provided for under the CBA and specifically Article VII [b][1], when it issued a memo to the 1st Respondent but which Memo, the Respondent gave a wide berth. In my view, when this happened [if it happened], the Applicant was obliged to deem it as the disagreement contemplated under VII [b] [ii], proceeding

in accordance with the mechanism provided for under the Labour Relation Act. The Claimant didn't give the matter this approach. It cannot be available to them to state that since the 1st Respondent failed to embrace the initiated process under Article VII [b][i], they had a right to come to court directly. They had an unexplored avenue under VII[b][ii].

20. In addition to the above, I have noted that Article I (F) of the subject Collective Bargaining Agreement entered into on 1st July 2017 provides that:

> " In the event the parties to this agreement fail to resolve the dispute in the interpretation, application or execution of this agreement, the dispute shall be reported to the Ministry responsible for labour relations in line with the labour laws."

21. Describing the doctrine of exhaustion of available remedies, the Court of Appeal in the case of Speaker of National Assembly vs Karume [1992] KLR 21, aptly stated;

> " Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

22. In the post-2010 Constitution legal landscape, the Court of Appeal again expressed itself on and set for the constitutional rationale and basis of, the doctrine in Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others [2015] eKLR, thus;

> " 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 fora of last resort and not the first port of call the moment a storm brews.... 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 mechanisms in place for the resolution outside the courts... This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

23. I come to an inescapable conclusion that the Collective Bargaining Agreement provided an alternative dispute resolution mechanism, which the Claimant didn't exhaust before approaching this Court.

7. It is important to point out that the *Labour Relations Act*, of 2007, provides for a mechanism to be embraced and utilized by disputants whenever there is a trade dispute. No doubt the dispute that arose between the parties herein was a trade dispute. Sections 62 (1) and (2) of the *Labour Relations Act* Cap 233 of the Laws of Kenya which provide that: -

> " Reporting of trade disputes to the Cabinet Secretary
>
> (1) A trade dispute may be reported to the Cabinet Secretary 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.

(2) A person reporting a trade dispute shall—

(a) serve a copy by hand or registered post on each party to the dispute and any other person having a direct interest in the dispute; and

(b) satisfy the Cabinet Secretary that a copy has been served on each party to the dispute by hand or by registered post."

24. A trade dispute is defined in Section 2 of the Act as "a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union." The instant dispute would certainly fall within this definition.

25. Under Section 65 of the Act, once the Minister receives the report of the trade dispute, he is required to appoint a conciliator to attempt to resolve the same. Under Section 73 of the Act, only if conciliation fails will the dispute be referred to the Industrial Court.

26. There is no dispute that the Claimant didn't employ this statutory mechanism before bringing its matter to court for resolution.

27. It is important to point out at this point that the doctrine of exhaustion, like other doctrines of law has exceptions. However, it should be noted that where a party alleges that the circumstances of his matter are in the nature that the doctrine shouldn't for the interest of justice be allowed to apply to his case, or that his case should be exempted from applicability of the doctrine, the onus is on the party to place sufficient material before the Court to justify the exemption. In my view, the most appropriate time to seek the exemption or justify the non-applicability should be immediately after filling the suit, and by way of an application. By way of an application, for the purpose first, of allowing the adversary to oppose or consent to the sought exemption, and second, to secure the order of the court on the exemption or otherwise.

28. For clarity of record, it is important to point out that in this Court's view, that the CBA entered into on 1st July 2017 was at all material times valid and deemed in place. Article 1 (A) provides that the Agreement shall be effective from 1st July 2017 and shall remain in force for four (4) years until amended or renewed.

29. The Claimant challenges the legality of the procurement exercise and contends that the same was not transparent. Section (1) (h) of the *Public Procurement and Asset Disposal Act* Cap 412 of the Laws of Kenya, bestows authority on the Public Procurement Regulatory Authority to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review. Further, Section 28 (1) (a) of the Act gives authority to the Public Procurement Administrative Review Board to review, hear and determine tendering and asset disposal disputes. In my view, considering the nature of the Claimant's claim, the first port of call ought to have been any of these forums created under the Act for the resolution of public procurement and disposal of assets disputes.

30. For the above stated reasons, I decline to hear the present suit as the parties have not exhausted the available dispute resolution mechanisms under the CBA and the statutes herein above mentioned.

31. In the upshot, the Respondents' objection contained in their Notice of Preliminary Objection dated 21st September 2023 succeeds. This suit is dismissed with costs.

32. It is so ordered.

READ, DELIVERED AND SIGNED THIS 8th DAY OF APRIL, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Juma for the Claimant

Mr. Muhizi for Interested Party.

Mr. Ometto for the Respondents

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.

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OCHARO KEBIRA

JUDGE