



Kenya Union of Pre-Primary Education Teachers v County Public Service Board Kakamega County Government & another; Salaries and Remuneration Commission (Interested Party) (Employment and Labour Relations Cause E010 of 2022) [2023] KEELRC 512 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 512 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E010 OF 2022**

JW KELI, J

FEBRUARY 23, 2023

BETWEEN

KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS APPLICANT

AND

**COUNTY PUBLIC SERVICE BOARD KAKAMEGA COUNTY
GOVERNMENT 1ST RESPONDENT**

**COUNTY SECRETARY KAKAMEGA COUNTY GOVERNMENT 2ND
RESPONDENT**

AND

SALARIES AND REMUNERATION COMMISSION INTERESTED PARTY

RULING

1. The Claimant vide statement of Claim dated April 27, 2022 filed in court on the May 5, 2022 sought the following reliefs:-
 - (a) That this honourable court be pleased to order the 1st and 2nd Respondents to convert the engagement of the grievants to Permanent and Pensionable terms considering the applicable ECDE teachers schemes of service, the terms and conditions under the *Employment Act* whichever is more favourable to the grievants with effect from November 2016.
 - (b) That this honourable court do order the 1st and 2nd Respondents to pay the 408 grievants herein, the salary difference between the actual salary as per appropriate job groups and the Kshs 10,000/- they have been earning with effect from November 2016 when the order for regulation was issued in the High Court decision in Petition 127 of 2014.



- (c) That this honourable court do order that NSSF deductions be submitted to NSSF for all other months for which gratuity under prayer 4 does not cover in respect to the 408 grievants.
 - (d) That the Respondents be ordered to pay the grievants herein gratuity at the rate of 31 percent of the total basic pay for the entire period between January 2015 to April 2020.
 - (e) That this honourable court be pleased to order that the Teachers Service Commission and the salaries and Remuneration Commission to strictly offer technical support and ensure compliance with the orders of this court in the process of conversion and with regard to the terms and conditions of service for the grievants.
 - (f) That costs of this suit be provided for by the Respondent's.
2. The Respondents filed the instant Notice of Preliminary Objection dated November 15, 2022 together with reply to the claim and list of the documents. The objection was to effect that the court lacked jurisdiction to hear and determine the claim and sought for claim to be struck off with costs on grounds:-
- (a) That there is no recognition agreement between the Respondents and the Claimant pursuant to the provisions of Sections 54(1) and 54 (2) of the *Labour Relations Act, 2007* to clothe the Claimant with authority to file a trade dispute on behalf of Early Childhood Development Education (ECDE) teachers employed by the County Government of Kakamega.
 - (b) That the Claim is an abuse of court process, vexatious and frivolous and should be struck out.

Authorities:-

- (a) *Kenya Union pre-primary Education Teachers v Secretary, Kirinyaga County Public Service Board & 2 others* [2022]eKLR
 - (b) *Kenya Union of Employees of Voluntary and Charitable Organizations (KUEVACO) v Board of Governors & Maina Wanjigi Secondary School* [2015]eKLR, and
 - (c) *Communication Workers' Union v Safaricom Limited* [2014] eKLR
3. The court directed the notice of preliminary objection be canvassed first by way of written submissions.
4. The Respondents written submissions drawn by Vivianne Mmbaka Komwonyo, County Attorney for the Respondents were filed on the January 12, 2023.
5. The Claimants written submission on the Notice of Preliminary Objection drawn by Samuel Apiyo were dated January 23, 2023.

Determination

6. The Objector addressed the following issues under their submissions:-
- (a) Whether the preliminary objection is sustainable in law.
 - (b) Whether the Claimant has the locus standi
 - (c) Whether the claim as filed should be struck out.
7. The Claimant addressed merit of the Notice of Preliminary objection.



8. The Court is of the considered view that the issue to be addressed under the Notice of Preliminary Objection is whether it is merited.

The Respondents/Objectors submissions

9. The Respondents submit that the Preliminary Objection herein is proper before this Honourable Court and place reliance on the *locus classicus* of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors* as quoted in the case of [Kenya Union of Employees of Voluntary and Charitable Organizations \(KUEVACO\) v Board of Governors & Maina Wanjigi Secondary School](#) [2015] eKLR wherein the court stated that:-

“ 13. The very old principles on the question of preliminary objections set out in 1969 still reverberate to this day. These principles were laid down in *Mukisa Biscuits Manufacturing Co Limited v Westend Distributors Ltd* (1969)EA 696, where the Court held that such an objection must be on a point of law that may dispose of the suit and should not contain issues of facts that require to be ascertained..”.

10. The Respondents submit that the present Preliminary Objection is on a pure point of law and on uncontested facts that the Claimant herein lacks the *locus standi* to sue the Respondents for the reason that the claimant and the Respondents do not have a recognition agreement as envisaged by the provisions of Section 54(1) and 54(2) of the [Labour Relations Act, 2007](#).
11. The Respondents submit that the Claimant in their bundle of documents have not filed any recognition agreement between them and Respondents. Further, the Respondents filed and served the claimant with their “ Reply to statement of Claim”. (hereinafter referred to as “the reply”) on November 16, 2022 which reply the claimant acknowledged receipt when the matter was mentioned before this Honourable Court on November 30, 2022. At paragraph 13 the Reply, the Respondents raised a preliminary objection on the *Locus standi* of the Claimant on account of the fact that there is no recognition agreement between them and the Respondents and further, that the Claimant had not demonstrated that it represents a simple majority of unionisable Early Childhood Development Education teachers working for the County Government of Kakamega . On receipt of the Reply by the Respondents, the Claimant neither filed a response to the Reply nor filed any supplementary documents to rebut the Respondents’ averments despite having adequate and sufficient time to do so thus the Respondents averment on lack of a recognition agreement is not contested.
12. It was the Respondents’ submission that the Claimant herein lacks the *locus standi* to sue the Respondents in this particular instance for the reason that the claimant and the Respondents have no recognition agreement contrary to the provisions of section 54(1) and 54(2) of the [Labour Relations Act, 2007](#).
13. Sections 54 (1) and (2) of the [Labour Relations Act, 2007](#) provides thus-
- (1) An employer, including an employer in the Public Sector shall Recognize a trade union for purposes of collective bargaining if that made union represents the simple majority of unionisable employees.
 - (2) A group of employers, or an employers organization , including an organization of employers in the public sector, shall recognize a trade union for the purpose 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' organization within a sector.”

14. The *Labour Relations Act, 2007* defines a recognition agreement at Section 2 as-

“Recognition agreement means an agreement in writing made between a trade union and an employer, group of employers or employers' organization regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organization.”
15. The issue then is whether the Claimant has any recognition agreement with the Respondents. The Respondents submit that as has been outlined herein above, there exists no recognition agreement between the Claimant and the Respondents herein which assertion has not been rebutted or denied by the Claimant despite having had sufficient time and notice to do the produce the same.
16. The Respondents rely on the case of *Communication Workers' Union v Safaricom Limited* [2014] eKLR wherein the Respondent filed a preliminary objection that the Claimant did not have the *locus standi* to file the suit against it for they had no recognition agreement between them. The Honourable Lady Justice M Mbaru made a finding that:-
 - “ 14. Therefore, where there is a union such as the Claimant herein and on employer such as the Respondent herein, for there to be a legal relationship biding upon the parties, an agreement in writing, regulating the recognition of the trade union as the representative of the interests of the unionsable employees employed by the employer is imperative. Once there is such recognition, a trade union becomes the legal entity to enter into written agreement concerning the terms and conditions of employment for the member/employees of the employer they represent . Such agreements must be registered with the industrial court to take effect as under section 59 of the Labour Relations Act. Such representation is further regulated by the provisions of Part VII of the Labour Relations Act.
 17. The question here with regard to locus standi is that the claimant union has no recognition with the Respondent and even where such recognition is lacking, there is no CBA between the parties to regulate terms and conditions of work. Without recognition by an employer, a trade union , even where registered as such, becomes a by- stander waiting by the road side for instructions. Similar to a lawyer, though having a first class honour lacks a certificate of practice as an advocate of the High court of Kenya. Such a lawyer though well versed in law and well suited to give legal advise to various citizens lacks the capacity to stand in court as an advocate representing a client”.
17. In the above cited authority, the court allowed the objection raised by the respondent and struck out the suit but allowed the grievants room to approach court directly with their claims.
18. In similarly in the case of *Kenya Union Pre- Primary Education Teachers v Secretary, Kirinyaga County Public Service Board & 2 Others* [2022] eKLR, vide a Ruling delivered on March 23, 2022 , the Hon Justice D K Njagi Marete upheld a Preliminary objection on the ground that the Claimant had no



recognition agreement with the Respondent while allowing the objection, he pronounced himself thus-

“A recognition agreement is primal in any relationship between an employer and a union. That was not the case..”.

19. In *Kenya Union of Employees of Voluntary and Charitable Organizations (KUEVACO) -vs- Board of Governors & Maina Wanjigi Secondary* (*supra*) , the Hon Lady Justice Monica Mbaru pronounced herself thus when faced with the question of *locus standi* vis a vis recognition agreements-

"14. On the question of locus stand, in the case of law Society of Kenya versus Commissioner of Lands and Others, Nakuru High court, Civil Case No 464 of 2000, KLR 706 the Court held that the test of *locus standi* to be met, a party must have a sufficiency of interest to sustain its standing to sue in a court of law. In this case, such sufficiency would take the form of Recognition of the trade union by the employer so that the trade union may be able to represent those employees that form part of the union should any dispute arise. 4. Section 4 of the Labour Relations Act allow all employee to join a trade union of their choice and section 54 (1) obligates an employer to recognize a trade union for purposes of negotiating a collective bargaining Agreement (CBA) which becomes binding on both parties. Before having a CBA an employer must first recognize the union in terms of section 54(3) of the Act. Such a CBA must be registered with the court as under Section 59 of the Labour Relations act. In this case, the Claimant admits there is no Recognition by the Respondent as they have not signed a Recognition Agreement with the Claimant Union to enable both parties have a CBA . The evidence of lack of Recognition Agreement and CBA , the claimants lacks standing before the court.

19. Even where the law safeguard the rights of employees to unionise, such unionization must be recognized in law to enable the union represent employees. In this case, the Claimant has not demonstrated that they have recognition with the Respondent and thus lacks standing to institute the suit for an on behalf of the grievant.”

The Claimant’s Submission

20. The Claimant submits that Section 54(1) provides thus:-

“An employer, including an employer in the public sector, shall recognized a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.

Section 54(2) provides thus:

“A group of employers, or an employers’ organization , including an organization of employers in the public sector, shall recognize a trade union for purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers...”

21. That it comes out clearly that owing to grounds of the preliminary objection, being the provisions as quoted above and with specific focus on the emphasis as laid, it is trite a trade union is recognized by



an employer for purposes of Collective Agreement and there is no mention that such recognition is a prequalification for union to represent its members in court.

22. Bill of rights.

Article 22 of the [Constitution of Kenya](#) provides thus

22(1) “ Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened” .

The same provision of Article 22 of the [Constitution](#) is replicated at Article 258 for avoidance of doubt. Further, Article 22 (2) (d) , goes to the very core of the instant preliminary objection and states thus:-

“22(2) ... court proceedings under Clause (1) may be instituted by:

(d) An association acting in the interest of one or more of its members

Article 27 (1) of the [Constitution](#) provides thus

27(1) “Every person is equal before the law and has the right to equal protection and equal benefit of the law”.

Legal disposition

Your ladyship, this Honourable court derives its mandate from Article 162 (2) of the [constitution](#) as read with Section 12 of the [Employment and Labour Relations Court Act](#).

Under Section 2 of the Act, a trade union is defined as:-

“ A trade union “ , means a registered association of employees whose principal purpose is to regulate relations between employees and employers...

Under section 12 of the Act, this honourable court is clothed with exclusive original appellate jurisdiction to her and determine all disputes referred to it ‘ including .

- (c) Disputes between an employer and a trade union
- (d) Disputes between trade unions
- (e) Disputes between an employers organization and a trade union
- (f) Disputes between a trade union and a member thereof.

Section 22 of the Court Act further clothes the Claimant herein with unwavering authority to act as a party to proceedings before this court as hereunder.

22 Representation before the court.

“ In any proceedings before the court or a subordinate Employment and labour relations court, a party to the proceedings may act in person or be represented by an advocate. An office bearer or official of the party’s trade union “ .

23. The Claimant submits that it is clear from the foregoing that a trade union is not barred from instituting a suit in this court and it is not implied in any way. That the instant preliminary objection does not raise a pure point of law as expected under the celebrated *Mukisa Biscuits* case as the issue of



recognition itself comes with arithmetic satisfaction informed by the precondition of simple opposed to satisfaction of pure point of law as opposed to the *Mukisa biscuits* case.

In disqualifying the authority relied upon by the objector in (*Communication Workers v Safaricom* case the Claimant put reliance on the authorities in (*KICFAW Union v Water Resource Management Authority* [2015] eKLR where the court opined thus

".....is the position taken by this court on jurisdiction in the authority of communication workers -vs- Safaricom, the total and indomitable position and interpretation of the law/.... I do not agree on the finality and totality of these processes in ousting a party from litigation on behalf of its members....."

I can almost bet that it was not the intention of the legislature to lock out this period of action from recognitions trade union activity in law. It equally cannot have been the intention of Parliament to lock out such recruited membership of trade union ... if the spirit of paragraphs 17 and 18 of the authority of *Communication Workers*. The spirit of ousting members representation by trade unions that have no recognition agreements and or Collective bargaining Agreements, then the easier option would have been to express this explicitly in the black and white. I therefore find it difficult to pursue this analogy in toto.

24. That this is the same court in the authority presented by the Objector's in *Kunoppet -vs- Kirinyangacase* , it would only be fair to down play the conflicting decisions on the same matter by the same court and the little we say about it, the better. It however comes out that the *Kunoppet -vs- Kirinyaga* case is untenable as it is unreliable.

25. The Claimant further relies on the authority in the decision in *Kenya County Government Workers Union -vs- Bomet Water and Sanitation Co Ltd* (22022) eKLR where court in decision at paragraph 31 holds thus:-

" 31. The standing or rated unions to sue on behalf of its members is now settled. The court of appeal in its decision in (*Mordein Soap Factory v Kenya Shoe And Leather Union* Civil Appeal No 37 of2019. Recognition agreement It is not the basis upon which the trade union represents its members in court.

32. It follows therefore that a trade union can sue on behalf of its members and infact it does not require to have a recognition agreement with the employer to do so".

26. The Claimant further relies on the Court of Appeal decision in *Modern Soap Factory v Kenya Shoe and Leather Workers Union* [2020] eKLR, where at paragraph 15, The Honourable court stated thus.

" 15. Based on the foregoing, there are conflicting position taken by the ELRC on the question under consideration, On our judgment, we can see no reason why a registered union whose constitution so empowers should not have standing to institute a claim on behalf of its members and to represent its members in court.

17. We can see no reason therefore to fault the conclusion by the Judge that the respondent (union) has locus standi to institute the claim on behalf of its members.. it is not a matter that is amenable for determination on the basis of a preliminary objection".



27. The Claimant submits that in essence put reliance on the following authorities with the same reasoning amongst of authorities pointing to a clear jurisprudence. *Kenya private Universities Workers Union v Aga Khan University Hospital* [2019] eKLR *Kenya Union of Commercial, Food And Allied Workers v Water Resource Management Authority and Another* [2015] eKLR *Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers v Bai Hang Cheng* [2021] eKLR *Kenya Union of Domestic Hotels Education Institutions and Hospital Workers v Bai Hang Cheng* [2021] Eklr
28. That it is clear that the Objectors relied on authorities which have been overruled by the court of Appeal. That lastly, the Preliminary Objection has been brought in utmost bad faith and with an intention to slow down the wheels of justice given that there had been tow attempts by the parties to have an out of court settlement and file consent but in both occasions, the very Respondents who sought leave for such process frustrated the same . it should be noted that the Preliminary objection has been brought after hearing and this offends good order.

On the basis of the above reasoning, the claimant do pray that this honourable court do find that the instant preliminary objection is devoid of merit hence be dismissed with costs to the Claimant/ Respondent.

Decision

29. It was not in dispute that the Claimant represented the Pre-Primary Education Teachers in the County who are employees of the Respondent . The issue discerned by the Court from the objection was that the Respondent had no recognition agreement with the Claimant pursuant to provisions of Section 54 (1) and 54(2) of the *Labour Relations Act 2007* to clothe the Claimant with authority to file trade dispute on behalf of every childhood development education (ECD) teachers employed by the County Government of Kakamega.
30. Section 54(1 &2) of the *Labour relations Act* reads. :-
- “ A group of employers, or an employers’ organization , including an organization of employers in the public sector, shall recognize a trade union for purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers...”
31. The Objector also stated that the claim was an abuse of court process vexatious and frivolous and should be struck out. The objector submits their objection meets the threshold in locus classicus of *Mukisa Biscuits Manufacturing Co Ltd*. Where the court held that Preliminary Objection must be on a point of law that may dispose off the suit and should not contain issues of fact that require to be ascertained. The objector submits that they raised issue of lack of recognition agreement under their response to the statement of claim that the Claimant had not demonstrated that it represents a simple majority of unionsable ECDE teachers of the 2nd Respondent , the Claimant having not filed a reply, the lack of recognition agreement was uncontested issue.
32. On the merit of their objection based on lack of recognition agreement, the Respondents to buttress their objection to the suit relied on the decision in *Communication Workers Union v Safaricom Limited* [2014]eKLR (Supra) where Justice Mbaru upheld Preliminary Objection on basis of lack of recognition agreement between the parties and held the Claimant lacked locus stand.
33. The Objector further relied on the *Kenya Union of Pre- Primary Education Teachers v Secretary Kirinyaga County Public Service Board & 2 Others* [2022] eKLR where Justice Marete upheld an objection on ground that the Claimant lacked recognition agreement with the Respondent holding



it was the primal in any relationship between an employer and a union . The objector further relied on similar decision to the foregoing by Justice Mbaru in *Kenya Union of Employees of Voluntary and Charitable organizations (KJEVACO) v Board of Governor and Maina Wanjigi Secondary School* holding that the union ought to have sufficient interest to sustain its Locus stand which took the form of recognition agreement.

34. The Claimant in response submissions outlined above relied on Article 22 of the [Constitution](#) to effect that every person has a right to institute Court Proceedings claiming violation of rights and that court proceedings may be instituted by an association acting in the interest of one or more of its members.
35. That section 2 of the [Employment and Labour Relations Court Act](#) defines a trade union to mean a registered association of employees whose principle purpose is to regulate relations between employees and employer . Section 22 of the Act further provides right of the unions to represent parties in proceedings before court. The Claimant sought to disqualify decision relied on by objector in *Communication Workers v Safaricom* (supra) by reliance on authority in *KUCFAW Union v Water Resource Management Authority* [2015] eKLR why the court disagreed and held that it was not the intention of Parliament to oust members representation by union for lack of recognition agreements and or Collective Bargaining Agreements.
36. The Claimant further relied on decision of court in *Kenya County Government Workers Union v Bomet Water & Sanitation Co Ltd* [2022] eKLR where the court upheld Court of Appeal decision in *Modern Soap Factory v Kenya and Leather Workers Union* [2020] eKLR where the Court of Appeal held that it saw no reason why a registered union whose institution so empowers , should not have standing to institute a claim on behalf of its members and to represent them in court.
37. The Court of Appeal further held that the issues of *locus standi* was not amenable to determine on basis of a preliminary objection.

Decision.

38. There was no dispute as to the membership of the Claimant that it represents pre-primary Education Teachers as per its constitution. The issue was the lack of recognition agreement with the Respondent. The Court of Appeal settled the issues of representation by unions in *Modern Soap Factory v Kenya Shoe & Leather Workers Union*[2020]eKLR as cited by the Claimant in paragraph 17 as follows:-

“ 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 the union is a question of fact. Where there is a contest as to whether an employee is a member of a union, evidence would be required to settle that question. It is not a matter that is amenable for determination on the basis of a preliminary objection”.
39. The court of Appeal decision is binding on this court pursuant to hierarchy of courts. The said decision has not been set aside. It is law.
40. The court applying the said decision finds that the issue of membership of the employees of the ECDE of the 2nd Respondent is a question of fact.
41. That a recognition Agreement under Section 2 of the [Labour Relations Act](#) is not equivalent of membership of the union. It is a bilateral agreement between an employer and the union and its main purpose is for negotiation of terms of Service which leads to Collective Bargaining Agreement between the parties.



42. The court upholding the said decision of Court of Appeal in *Modern Soap Factory* case holds that the recognition agreement is not the basis upon which unions represent its members in court as the roles are distinct.
43. The Notice of Preliminary Objection dated November 15, 2022 is dismissed for being premature and for lack of merit with costs to the Claimant in the cause.
44. It is so ordered

DATED , SIGNED AND DELIVERED AT BUNGOMA IN OPEN COURT ON 23RD FEBRUARY 2023.

J W KELI,

JUDGE.

IN THE PRESENCE OF :-

Court Assistant: Brenda Wesonga

Claimant:-Samuel Opiyo

Respondent:-Abuko for 1st Respondent

