



**Kenya Union of Commercial, Food and Allied Workers v New KCC Limited
(Cause 408 of 2017) [2023] KEELRC 386 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 386 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 408 OF 2017
DN NDERITU, J
FEBRUARY 16, 2023**

BETWEEN

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

AND

NEW KCC LIMITED RESPONDENT

RULING

I. INTRODUCTION

1. The Claimant filed this cause for and on behalf of TOM BITOK (the Grievant or Applicant) seeking various remedies as set out in memorandum of claim dated 21st September, 2017 filed in court on 22nd September, 2017.
2. It is clear from the pleadings that the Claimant filed this cause for and on behalf of the Grievant as its duly paid-up member and not in any other capacity. This is to say that the Claimant had not suffered any loss or damage “personally” and that all the remedies sought are for the benefit of the Grievant and not for the Claimant as such.
3. The memorandum of defence filed by the Respondent through Munyao, Muthama & Kashindi dated 3rd July, 2018 is equally categorical that the Claimant filed this cause in a representative capacity for and on behalf of the Grievant.
4. It is intriguing and unfortunate that this matter has not been heard since 2017.
5. On 7th February, 2022 the Applicant through Kipng’eno & Associates, Advocates, filed a Notice of motion dated 4th February, 2022 (the application) seeking the following orders –
 1. THAT this application be certified urgent, service thereof be dispensed with and be heard ex-parte in the first instance.



2. THAT this Honourable Court be pleased to grant an urgent hearing date for this application.
3. THAT this Honourable Court be pleased to grant leave to the Grievant to amend the Memorandum of Claim in terms of the Draft Amended Memorandum of Claim annexed hereto and marked "TB-1".
4. THAT this Honourable Court be pleased to give directions as to the filing and service of the said Amended Memorandum of Claim.
5. THAT the costs of this application be provided for.
6. The application is expressed to be brought Under Section 3 of the [Employment and Labour Relations Court Act](#), Rule 4(1), 6, 17(1)
 - & (3) of the Employment and Labour Relations Court (Procedure) Rules, and all other enabling provisions of the law.
7. The application is based on the following grounds as reproduced from the face of the application –
 1. The amendments as contained in the Draft Amended Plaintiff are necessary for determining the real questions in controversy between the Grievant and the Respondent.
 2. The amendments sought clarify the position put forth in the memorandum of Claim and subsequent pleadings thereafter of the Respondent.
 3. The proposed amendment is necessary for a fair and just adjudication and determination of the dispute between the parties herein.
 4. The KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS Respondent will not suffer any prejudice or injustice if the amendments sought are allowed.
 5. The amendments sought arise bonafide from the information available to the Grievant subsequent to the filing of the memorandum of Claim.
 6. The proposed amendments are crucial to the Grievant who wishes to properly set out the correct Claimant in this suit in order to comply with the provisions of Rule 6 of the Employment and Labour Relations Court(Procedure) Rules, 2016 in order to avoid a situation where the claim is defeated by virtue of the fact that it has been instituted in the name of wrong party who is in any event not a grievant in the matter.
 7. The proposed amendments are important for the Grievant who wishes to amend some typographical errors in the proceedings and claim his costs of the suit and terminal and other benefits which the Respondent failed to pay him when it arbitrarily terminated his contract of employment on 24th September, 2014.
 8. The proposed amendments to the claim are for the purpose of correcting defects or errors in the proceedings.
8. The application is supported by the affidavit of TOM BITOK, the Grievant, sworn on 4th February, 2022 with one annexure attached thereto in form of a draft amended memorandum of claim.
9. On 25th March, 2022 the Respondent filed grounds of opposition to the application dated 7th March, 2022 raising the following issues –



1. The Application as drawn and filed is bad in law, incompetent, misconceived and is an abuse of the process of the court for the reasons as set herein below.
 2. The suit herein was filed in September, 2017 by the Union as the Claimant yet the amendments sought in which the Grievant claims to have been the affected employee are alleged to have accrued dating back to 2014. The amendments sought to be introduced are thus outside the limitation period under the provisions of the *Employment Act*.
 3. Allowing an amendment by removing the initial Claimant and bringing in a new Claimant would mean that Tom Bitok is filing a claim and suit as against the Respondent beyond the limitation period provided for under Section 90 of the *Employment Act*. Bringing in a suit by the Grievant beyond the limitation period is prejudicial to the Respondent which is an exception to the general rule that amendments can be allowed at any stage before judgment.
 4. The Grievant has not demonstrated sufficient cause of the Court process and ought to be dismissed with costs.
 5. The Application as totally frivolous and an abuse of the Court process and ought to be dismissed with costs.
10. The Claimant filed a replying affidavit in opposition to the application sworn by PETER NGUGI on 15th February, 2022.
 11. The Grievant, with the leave of court, swore and filed a further affidavit in support of the application sworn by himself on 2nd May, 2022.
 12. When the application came up in court for directions on 30th March, 2022 it was, inter alia, agreed and directed that the application be canvassed by way of written submissions.
 13. Counsel for the Grievant filed written submissions on 13th June, 2022, Counsel for the Respondent filed on 19th July, 2022, and the Claimant filed on 28th July, 2022, through BONIFACE M. KAVUVI, the general secretary thereof.
 14. This ruling therefore is in regard to the said application.

II. GRIEVANT'S/APPLICANT'S CASE

15. The Applicant's position is contained in the supporting and further affidavit and the written submissions by his Counsel.
16. In summary the Applicant argues that although the Claimant filed this cause for and on his behalf, the Claimant failed to properly plead his case and hence the claim as filed does not capture the true nature of his entire claim against the Respondent. He accuses the Claimant of filing the cause in its own name instead of in his name.
17. The Applicant proffers that he wishes to pursue his claim independent of the Claimant and in his own name and to be presented in the matter by his counsel now on record. He pleads that the amendments sought shall bring out all the issues in controversy for a fair and just determination of the cause. He argues that the Respondent shall suffer no prejudice if the application is allowed.
18. The Applicant has annexed a draft copy of the intended amended memorandum of claim highlighting the amendments to be made if the application is allowed.



19. The Applicant states that at all material times to the cause he was a fully paid up member of the Claimant. He however accuses the Claimant of indifference and indolence in failing to file proper and appropriate pleadings in court and for not taking appropriate action to prosecute the cause.
20. Moreover, the Applicant accuses the Claimant for failing to brief him as and when need arose and for filing the cause in its name instead of in the name of the Applicant as the law provides. The Applicant argues that he is the real Claimant in this cause and accuses the Claimant of being an impostor.
21. The Applicant states that the threats issued by the Claimant in the replying affidavit is a clear indication of bad faith and insensitivity on the part of the Claimant and this is the more reason why the Applicant should be allowed to take up the matter and have it prosecuted by a counsel of his choice. He therefore pleads that the application to amend be allowed to enable him to pursue his claim to its logical conclusion.
22. In his written submissions Counsel for the Applicant submits that this court has wide discretion in allowing amendments to pleadings under Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules (the rules of this court). Counsel has cited *Eastern Bakery V Castelino (1958) EA 461* and *Kuloba V Oduol (2001) eKLR* in laying emphasis that this court should, unless for very good reasons, allow amendments to pleadings especially where the amendments sought are intended to enable the court to arrive at a fair and just conclusion of the issues in controversy between the parties.
23. Counsel submits that under Rule 6 of the rules of this court it is the Applicant who ought to have signed the claim and that the same ought to have been filed in his name. Counsel submits that while the Claimant has a right to represent a member of the union in court, the said right does not include the union filing a cause in its own name and assuming to “own” the cause as the union is not an aggrieved party. Counsel has cited *Kenya Petroleum Oil Workers Union V Petrosoft Kenya Limited (2017) eKLR* in support of the argument that the Claimant had no legal right to file the cause in its own name.
24. Counsel submits that under Section 22 of the *Employment and Labour Relations Court Act* a union such as the Claimant herein can only represent a member thereof but cannot file a cause in its own name for and on behalf of a grievant. Counsel submits that had the Legislature intended to have unions file claims in their own name for and on behalf of members nothing would have been easier than for the law to unambiguously and categorically state so.
25. It is on the basis of the foregoing that Counsel argues that the Applicant wishes to substitute his name in place of that of the Claimant to enable him to properly prosecute his cause. He cites Order 1 Rule 10 of the Civil Procedure Rules, 2010 to buttress the argument that this cause was filed in the name of the wrong party and it is thus necessary that the anomaly be rectified by way of the amendment sought through this application. He has cited *Janet Kaswii V Kathonzweni Financial Service Association (2014) eKLR* and *Gailey & Roberts Limited V Krishna & Sons Limited* in support of this argument.
26. Counsel submits that the Applicant has a constitutional right to be represented by a counsel of his choice as a component of his right to a fair trial and that this right may not be taken away.
27. Counsel insists that contrary to what is asserted and submitted by the Claimant and the Respondent in their respective submissions, the Applicant is not seeking to file a new cause as he was always the aggrieved party and the proper Claimant in this cause. Counsel submits that no prejudice whatsoever shall be suffered by either party if the amendments sought are allowed as the amendments shall allow this court to hear and determine all the issues in contest between the parties and also allow the Applicant to enjoy his constitutional rights of fair trial and choice representation, which rights may not be taken away other than in accordance with *the Constitution*.



28. Counsel submits that the application to amend the claim has been made in good faith and at the earliest opportunity, before the trial commences, and that this shall enable all the parties to amend their pleadings, if need be, for the court to hear and determine all the issues in controversy. Counsel submits that there is no prejudice to be suffered by the Respondent let alone prejudice that may not be compensated by way of costs.

III. CLAIMANT'S CASE

29. The Claimant's position is expressed in the replying affidavit of PETER NGUGI and the written submissions signed by BONIFACE M. KAVUVI, the secretary general thereof.
30. The deponent in the replying affidavit states that the Claimant has legal capacity to file the cause for and on behalf of the Applicant who is a member thereof based on the provisions of Section 22 of the [Employment and Labour Relations Court Act](#).
31. He states that the Claimant filed this cause in good faith for the benefit of the Grievant and that the Claimant is ready and willing to prosecute the cause to its logical conclusion.
32. However, the deponent threatens that the Claimant shall apply to have the entire claim withdrawn to enable the Applicant to file a new cause in his own name, fashion, and style. The Claimant threatens that either way the Applicant should be prepared to meet the costs so far incurred by the Claimant in filing the claim and conducting it this far.
33. In the written submissions the Claimant has cited Section 22 of the [Employment and Labour Relations Court Act](#) as the law that grants a trade union the power and authority to file a claim for and on behalf of a member(s).
34. It is submitted that the Grievant has not approached the Claimant with a request that the claim be amended as proposed and hence the application is premature and in bad faith. It is submitted that the Applicant did not draw or file the claim and hence it is not his pleading and as such he cannot apply to amend a pleading that he does not own.
35. The Claimant has cited Kenya Shoe and Leather Workers Union V Falcon Tanners LTD (2013) eKLR in support of the argument that a trade union has the locus standi not only to act and represent a member thereof in court but also to file a claim in its own name for and on behalf of the members who are aggrieved. The decision in Kenya Shoe and Leather Workers Union V Modern Soap Factory (2013) eKLR has also been cited in support of this argument, among other decisions.
36. The Claimant supports and associates with the position taken by the Respondent below in opposition to the application.

III. RESPONDENTS' CASE

37. The Respondent's position is conveyed through the grounds of opposition and the written submissions by its Counsel.
38. Counsel has advanced the argument that what the Applicant is trying to do through this application is to file a new cause of action outside the limitation period of three years provided for under Section 90 of the [Employment Act](#). Counsel has cited Ndirangu V Henkel Chemicals E.A. Ltd (2013) eKLR in support of that position. It is submitted that the Applicant is not and has never been a party in this cause and hence he cannot legally take over a cause in which he is not a party.



39. Counsel argues that the Applicant ought to first apply to be joined in the cause as a party before seeking to amend the pleadings. It is submitted that the application is in abuse of court process and intended to delay the trial of the cause and to obstruct the course of justice. Further, it is submitted that the Claimant has not demonstrated lack of interest in pursuing the claim for and on behalf of the Applicant or inability to do so and there is thus no need for the amendments sought.
40. On the basis of the foregoing the Respondent prays that the application be dismissed with costs.

III. DETERMINATION

41. Upon careful consideration and analysis of the evidence and submissions from all the three sides, it is clear that there are a number of issues for determination by this court as follows –
- a. Does a trade union possess the legal capacity to file a cause or a claim for and on behalf of its members in its own name?
 - b. Is the Applicant a party in this cause?
 - c. Should the application be allowed?
 - d. Costs.
42. On issue (a) the straight answer is in the affirmative. 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 may act in person or be 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.”
43. The above issue on representation of a member by a trade union has come up for determination in the past and the same appears to have been fairly settled by the Court of Appeal in *Modern Soap Factory V Kenya Shoe and Leather Workers Union* (2020) eKLR wherein the Court stated in part that – “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.”
44. In the foregoing decision the Court of Appeal affirmed the holding of Rika J in *Kenya Shoe & Leather Workers Union V Falcon Tanners Ltd* wherein the Judge had held that – “There is no legal obscurity on the right of representation of the employees by the trade union. The law including the Industrial Court Act and the *Labour Relations Act*, extends the right of representation of the employee in court, to the Trade Union, acting through its authorized officers.”
45. In the understanding of this court the Court of Appeal, in the foregoing decision, extended the meaning of the word “representation” in Section 22 of the *Employment and Labour Relations Court Act* to include the filing of a cause in the name of the union for and on behalf of its members besides having authorized officers and or officials of the union appearing in court for such members so long as *the constitution* of such union allows such an adventure.
46. Were it not for the holding of the Court of Appeal as above, this court holds a different opinion. Except in cases of an administrator of the estate of a deceased person, cases of minors or persons who have no legal capacity to institute causes on their own for various reasons recognized in law, and in instances where a person holds a power of attorney, this court holds the view that no other person or body have the requisite legal capacity or locus standi to file a cause for and on behalf of another person, in own name.



47. However, the Court of Appeal has pronounced itself as above and the decision is binding on this court and that opinion hence carries the day. The Court of Appeal has held that a trade union or an employer organization is a recognized agent in law with the requisite legal capacity and locus standi to file a cause for and on behalf of the members in its own name and it so held. The first issue is hence returned in the affirmative.
48. Counsel for the Applicant has vehemently argued that the Claimant had no locus standi in filing the claim in its own name. Counsel probably did this oblivious of the converse side of this argument. If for a moment this court held that the Claimant had no locus standi in filing this cause, then it would mean that there is no cause before this court and hence there are no proper pleadings capable of being amended. It would also mean that the Applicant cannot apply to be substituted in place of the Claimant in a non-existent cause. I say no more on this issue other than that there is a proper cause before this court as filed by the Claimant for and on behalf of the Applicant.
49. Issue (b) is whether the Applicant is a party in this cause. Rule 2 of the Employment and Labour Relations Court (Procedure) Rules defines a party in a cause in the following terms – “means a person, trade union, employer, employers’ organization or any corporate body directly involved or affected by an appeal or a claim to which the court has taken cognizance or who is a party to a collective agreement referred to court for registration.”
50. Through the above definition this court takes the view that the Applicant is a party and has always been so since the inception of this cause. It is for the benefit of the Applicant that the Claimant filed this cause. The Applicant is directly involved and affected by the proceedings and the outcome of the proceedings in this cause. Viewed from a different angle, this cause would not stand in the absence of the Applicant as the Claimant would have no locus standi.
51. In the circumstances, this court holds the view that the Applicant is a proper party in this cause and has a legal right to make whatever application that he may deem fit for hearing and determination by this court on merit. The application herein is one such application.
52. Issue (b) is hence determined in the affirmative that the Applicant is and has always been a party to this cause. It is so held.
53. Issue (c) is where the rubber meets the road. In the understanding of this court the Applicant is stating in so many words that he has lost faith and confidence in the commitment and ability of the Claimant to conduct this matter on his behalf to logical conclusion. He thus wants to prosecute the matter in his own name and through counsel of his choice. He accuses the Claimant of indolence and lack of sophistication and professionalism in the manner it drafted and presented the claim to court and prosecution of the cause this far.
54. It is a constitutional right for a party to a cause to be represented by counsel of his choice. That is a component of the right to fair hearing and due process. It is not a right that may be taken away under Article 25[c] of *the Constitution* except in very peculiar circumstances as set out in Article 23 of *the Constitution*.
55. The Applicant is seeking, through the application, to remove the name of the Claimant from the cause and have the same proceed in his own name and that he be represented by his counsel now on record. He also seeks to amend his claim to reflect the real issues in controversy for determination by this court.
56. It is important to note that this cause has not taken off for hearing. Although the pleadings have closed it is in the view of this court not too late in the day to allow the amendments sought as the Respondent shall have an opportunity to amend its response to the claim if it so desires.



57. It is in the amended response that the Respondent may raise all the issues it has raised in response to this application in regard to statutory limitation of the claim in time, and those issues shall of course be heard and determined on merit. It is in the considered view of this court that the amendments sought to be made to the memorandum of claim shall not in any way prejudice the Respondent or the Claimant. As noted above the Claimant is in this cause merely in a representative capacity for the Applicant who has now decided to navigate the rest of the legal journey in his own name as represented by a counsel of his choice.
58. It is by now clear that this court is bound to allow the application for amendment with a corresponding leave to the Respondent to amend the response to the claim.
59. Contrary to the view expressed by the Claimant, this cause does not belong to it. The threat to withdraw the claim and force the Applicant to file a new cause, which is bound to be statutorily time barred, is empty, in bad faith, and misconceived. The Applicant is and was always a party in this cause and the Claimant cannot withdraw the cause without the consent from the Applicant. In any event, would it not be illegal, cynical, immoral, and irresponsible for the Claimant to purport to withdraw the cause just because the Applicant has expressed his desire to prosecute the same in his own name through a counsel of his choice? In my view it would be so for the Claimant, as a trade union, to act against and hurt the interests of a member who was duly paid up at all material times to this cause.

60. Rule 14(6) of the Rules of this Court provides that – “A party may amend pleadings before service or before close of pleadings: Provided that after close of pleadings, the party may only amend pleadings with leave of court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.”
61. Clearly and evidently, since the Respondent has a legal corresponding leave to amend its pleadings no prejudice may be occasioned to it as the hearing of the cause has not commenced.
62. As for the Claimant it would make sense to take a dignified exit and thank the Applicant for affording it the opportunity to represent him this far. I do not think issuing threats on costs and withdrawal of the cause paints a picture of a union committed to serving its members with dignity and respect. I leave it at that.
63. In the entire circumstances of this application and the cause it is ordered that costs of this application be in the cause.

III. ORDERS

64. Flowing from the foregoing the following orders issue –
 - a. That the Applicant be and is hereby granted leave to amend the memorandum of claim as proposed in the draft amended memorandum of claim annexed to the application.
 - b. That the Applicant shall file and serve an amended memorandum of claim within 14 days of this ruling.
 - c. That the Respondent shall file and serve an amended response to the claim within 14 days of service of the amended memorandum of claim.
 - d. That the costs of the application shall be in the cause.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS.16TH DAY OF FEBRUARY, 2023.

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DAVID NDERITU
JUDGE

