



Kenya Union of Commercial, Food and Allied Workers v Builders Warehouse (Kenya) Limited (Cause E068 of 2023) [2023] KEELRC 1596 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1596 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E068 OF 2023
BOM MANANI, J
JUNE 29, 2023

BETWEEN

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

AND

BUILDERS WAREHOUSE (KENYA) LIMITED RESPONDENT

RULING

Background

1. The current dispute relates to the right to recognition of a trade union. The claimant is a registered trade union under the [Labour Relations Act](#), 2007. On the other hand, the respondent is an employer in the Republic of Kenya.
2. In exercise of its mandate under the [Labour Relations Act](#), the claimant asserts that it has recruited seventy (70) of the respondent's approximately one hundred and five (105) employees as its members. Consequently, the claimant has written to the respondent seeking recognition for purposes of collective bargaining on behalf of its members in terms of section 54 of the [Labour Relations Act](#). At the same time, the claimant has asked the respondent to commence deducting and remitting union dues from the salaries of the said employees in terms of section 48 of the Act.
3. The claimant alleges that the respondent has resisted this request. According to the claimant, this resistance is an attempt by the respondent to exclude the claimant from representing its members who are in the employment of the respondent.
4. On the other hand, the respondent argues that upon receiving the claimant's demand for recognition and deduction and remittance of union dues, it commenced the process of verifying employees who had taken up membership with the claimant. According to the respondent, this exercise was necessary in order to ascertain the claimant's assertions that it had met the threshold for recognition. The



respondent states that the verification exercise revealed that a number of the employees who had initially taken up membership with the claimant had withdrawn their membership whilst others had left employment.

5. The respondent asserts that as at the time of responding to the claimant's current action, it had no employee who was a member of the claimant. Consequently, the claimant lacks the requisite threshold to pursue recognition under section 54 of the *Labour Relations Act*.

Preliminary Objection

6. Immediately upon entering appearance in the cause, the respondent's advocates filed a notice of preliminary objection to the action. The objection is premised on the following grounds:-
 - a. That the claimant lacks the requisite *locus standi* to sustain the current action before this court.
 - b. That by dint of sections 48 and 54 of the *Labour Relations Act*, the current proceedings are premature.

Analysis

7. The question regarding what qualifies to be a preliminary objection is now well settled. The parameters of a point of law were elaborated in the celebrated decision of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969]EA 696.
8. A preliminary objection must comprise a pure point of law. Further, a preliminary objection can only be taken up when the primary facts in the dispute are not contested. It cannot be raised where the facts in the case require to be ascertained through evidence. The court expressed itself on the matter as follows:-

“...A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”
9. In the matter before me, it is the claimant's case that it has recruited seventy (70) of the one hundred and five (105) employees of the respondent as its members. According to the claimant, this qualifies it to be recognized by the respondent for purposes of collective bargaining.
10. On the other hand, the respondent contests the correctness of the claimant's assertion. According to the respondent, the employees that the claimant alleges to have recruited have either withdrawn their union membership or quit employment. Consequently, the claimant has not met the threshold for recognition.
11. Undoubtedly, there is no agreement between the parties whether the claimant has recruited from the respondent's workforce sufficient unionizable employees to meet the threshold for recognition as prescribed under section 54 of the *Labour Relations Act*. The correctness of the position taken by either of the parties on the matter requires to be established through evidence. This being the case, it cannot be said that the facts in the case are agreed. In terms of the guidelines in the *Mukisa Biscuits case* (supra), this is not the kind of dispute that qualifies for the raising of a preliminary objection.



12. Further, the respondent relies on alleged withdrawal of its employees from the claimant's membership that occurred in February 2023 to assail the competence of a suit that was filed in January 2023. With respect, it is doubtful whether it is tenable to rely on events that arose after institution of the suit to suggest that the suit as instituted was a nullity.
13. In respect of the concept of *locus standi*, I understand the law to be that every trade union which believes that it has attained the threshold for recognition under section 54 of the [Labour Relations Act](#) has a right to demand for recognition by the employer. The fact that the employer contends otherwise does not deprive the trade union of the *locus standi* to stake a claim for recognition. If the employer has evidence to demonstrate that the trade union's assertion is incorrect, the action will eventually fail. However, this does not mean that the trade union lacked the *locus standi* to stake the claim for recognition in the first place.
14. Further, whether a trade union has met the threshold for recognition under section 54 of the [Labour Relations Act](#) is both a matter of fact and law. To the extent that the threshold to be attained is fixed by a legal rule, the issue is one of law. And to the extent that the trade union has to present evidence to demonstrate that it has recruited the requisite numbers to surmount the threshold, it is a matter of fact. Consequently, the matter being one of a mixture of law and fact is unsuitable for resolution through a preliminary objection.
15. The other matter that the respondent raises is that the claimant ought to have referred the dispute to the Cabinet Secretary Ministry of Labour and Social Protection before approaching the court. Therefore, the current action offends the principle against exhaustion of alternative remedies. The respondent relies on section 54 (6) and (7) of the [Labour Relations Act](#) to advance this argument. The provisions state as follows:-
 - a. If there is a dispute as to the right of a trade union to be recognized for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of part viii.
 - b. 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.
16. It is true that this section requires parties to a recognition dispute to refer the matter to conciliation. However, it is noteworthy that the section is not couched in mandatory terms.
17. Apart from section 54 (6) & (7) aforesaid, it is noteworthy that section 74 of the Act also grants a trade union the right to file a recognition dispute in court if the matter raises an urgent issue for resolution. It is noteworthy that this latter provision is not expressed to be subject to section 54 (6) & (7) aforesaid.
18. Importantly, section 74 of the [Labour Relations Act](#) does not make conciliation a pre-condition for approaching the court over a recognition dispute. My understanding of this latter provision is that it provides a trade union an avenue to directly approach the court with a recognition dispute which raises an issue that cannot be adequately addressed through conciliation notwithstanding the procedure suggested under sections 54 (6) & (7) of the [Labour Relations Act](#).
19. In the case before me, the claimant asserts that the respondent was threatening its members with adverse action if they did not withdraw from membership of the union. The claimant therefore moved the court under certificate of urgency to seek restraining orders. In my view, such orders cannot issue



- through conciliation. They can only be obtained through court action. Therefore, the current action was properly commenced before court.
20. The final matter that is raised by the respondent is that the claimant ought to have obtained an order for deduction and remittance of trade union dues from the Cabinet Secretary, Ministry of Labour and Social Protection under section 48 of the [Labour Relations Act](#) before moving the court. That instead, the claimant sidestepped this procedure and approached the court directly. Therefore, the action before court is premature.
 21. It is unclear whether the respondent considered the import of paragraph 10 of the claimant's affidavit in support of the application for restraining orders and paragraph 9 of the memorandum of claim as read with annexure two (2) of the claimant's annexures on this latter objection. The position expressed by the claimant in the aforesaid documents is that it obtained authority from the Ministry requiring the respondent to make the contested deductions and remittances. The claimant states that the Ministry's authority in this respect was issued *vide* legal notice No 7 of January 5, 2022.
 22. The legal notice referred to is in the Kenya Gazette. It is a document that the court takes judicial notice of. The notice requires employers with more than five (5) employees who are members of the claimant to deduct union dues from such employees and remit them to the claimant.
 23. In the face of this notice, the claimant did not require to revisit the matter with the Ministry. All that was required of the claimant was to draw the respondent's attention to the ministerial order and require compliance. If there was perceived noncompliance by the respondent, the claimant was entitled to approach the court on the matter subject to demonstrating that the relief sought could not, whether wholly or partially, issue through conciliation. A preliminary examination of the annexure dated January 5, 2023 demonstrates that the claimant drew the respondent's attention to the Ministerial Order.

Determination

24. The upshot is that the respondent's objection to the claimant's suit lacks merit. Consequently, it is dismissed.
25. Notwithstanding the foregoing, I note that there is disagreement between the parties regarding whether the claimant still retains membership of employees of the respondent that comprises 50% plus 1 of the latter's unionizable workforce. The parties hold contrasting positions on the matter. This being the case, it is necessary that the court independently ascertains the accuracy of the positions taken by the parties. In the court's view, this requires an audit of the respondent's workforce to confirm the position.
26. In the premises and in exercise of the powers conferred upon this court under section 22 of the [Employment and Labour Relations Court Act](#), I direct that a labour officer from the Ministry of Labour and Social Protection be appointed by the Commissioner of Labour or his authorized agent to verify the status of membership of the respondent's employees to the claimant and to file a report on the matter in court. Such verification and preparation of the appropriate report to be undertaken within thirty (30) days of this order.
27. In the meanwhile, and for the avoidance of doubt, the temporary orders that were issued on February 2, 2023 shall remain in force pending determination of the application dated February 1, 2023.
28. There is no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF JUNE, 2023



B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.

B. O. M MANANI

