



**Kenya Hotels & Allied Workers Union v Aegis K. Limited t/a Leopard Beach Hotel
(Resort & Spa) (Cause E002 of 2020) [2023] KEELRC 1432 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1432 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E002 OF 2020**

AK NZEI, J

JUNE 9, 2023

BETWEEN

KENYA HOTELS & ALLIED WORKERS UNION CLAIMANT

AND

**AEGIS K. LIMITED T/A LEOPARD BEACH HOTEL (RESORT &
SPA) RESPONDENT**

RULING

1. The Claimant, which has pleaded that it is a Registered Trade Union within the provisions of Section 19 of the *Labour Relations Act 2007*, sued the Respondent herein vide a memorandum of claim dated September 22, 2020 and filed in Court on September 28, 2020, and pleaded:-
 - a. that the 285 grievants are employees of the Respondent, having been engaged on diverse dates, (and) whose service charge emoluments of Ksh 41,161,632 from the Respondent are long overdue and withheld unlawfully and unfairly.
 - b. that the withheld service charge arrears amounting to Ksh 41,161,632 are for the period between September 2018 and February 2020.
 - c. that service charge is a negotiated wage between the employer and employee being a commission arising from the sales of selected items, and is acknowledged within the hospitality industry.
 - d. that efforts by the Claimant on behalf of the aggrieved employees to compel the Respondent to pay the service charge were declined, prompting the Claimant to issue a strike notice; and that with intervention of the Ministry of Labour, a conciliator was appointed but his findings have also been ignored.



- e. that the claimant had no option but to invoke Section 69 of the *Labour Relations Act 2007* and refer the matter to this Court.
 - f. that withholding of the aggrieved employees' service charge contravenes Sections 17 and 18 of the *Employment Act*, which is an unlawful act amounting to unfair labour practice contrary to Article 41 of the Constitution of Kenya 2010.
 - g. that this Court has jurisdiction to intervene and to make appropriate orders within Section 12 of the *Employment and Labour Relations Court Act* and Article 23 of the *Constitution of Kenya 2010*.
2. The Claimant seeks the following reliefs:-
 - a. a finding that withholding of service charge arrears by the Respondent is unlawful.
 - b. an order that the Respondent do pay the service charge arrears in the sum of Ksh 41,161,632 within 30 days.
 - c. that the Court be pleased to order interest on the service charge arrears based on Court rates.
 - d. that the Respondent be ordered to pay costs of the suit.
 3. The Respondent filed a statement of Response to the Claimant's Memorandum of Claim in form of an affidavit sworn by one Kioko Musyoki; the Respondent's General Manager, sworn on October 3, 2022 and filed in this Court on October 4, 2022.
 4. It is deponed in the said affidavit/Response, inter-alia:-
 - a. that the Claimant's memorandum of claim dated 22/9/2020 that seeks payment of service charge of Ksh 41,161,632 as drawn and filed is frivolous, vexatious, unmerited and is an abuse of the Court's process.
 - b. that the claim is unfounded and cannot be granted to the Claimant Union as there does not exist a valid Recognition Agreement and a Collective Bargaining Agreement as between the Claimant and the Respondent.
 - c. that at the time of filing the instant cause, there already existed a valid Recognition Agreement and a Collective Bargaining Agreement as between the Respondent and another Registered Trade Union being Kenya Union of Domestic Workers, Hotels, Educational Institutions and Hospital Workers (KUDHEIHA).
 - d. that while it is true that the Claimant referred a dispute involving the alleged payment of service charge of Ksh 39,197,957.96 to the Minister for conciliation, the findings of the conciliator contained in the letter dated 26/5/2020 were explicitly clear that there was in existence a valid Recognition Agreement and Collective Bargaining Agreement between the Respondent and KUDHEIHA and none with the Claimant.
 - e. that the conciliator did not recommend payment of the outstanding service charge to the Claimant.
 - f. that keeping to its true character, the Claimant has failed to disclose to this Court a crucial and material fact that subsequently, another dispute was referred to conciliation at the instance of the Claimant where the issue in dispute was "Refusal to Sign Recognition Agreement and Remittance of Union Dues"; and that vide a letter dated 3/7/2020, the same conciliator stated



that the Claimant should be denied recognition and remittance of dues for want of compliance with legal requirements (set out) in [Labour Relations Act](#).

- g. that unless and until the Claimant complies with the law in terms of recruitment of members from the Respondent's pool of unionisable employees, any purported action by it as against the Respondent is premature, frivolous, vexatious and unwarranted.
 - h. that at all material times, the Respondent had a valid Recognition Agreement with KUDHEIHA and the Union of Hotel Keepers and Caterers Association, where the Respondent is a member.
 - i. that there existed another law suit being Mombasa ELRC Cause No 54 of 2020 filed by a rival Trade Union (KUDHEIHA) against the Respondent involving the same issue of alleged non-payment of service charge amounting to Ksh 41,904,630.40 and that on November 18, 2021, the Court adopted a consent of the parties as final orders of the Court, and the Respondent has already began honoring the terms of the said consent by remitting union dues to KUDHEIHA.
 - j. that the law expressly bars any Court from trying any suit or issue in which the matter is directly and substantially in issue in a former suit between the same parties or between parties under whom they, or any of them claim; litigating under the same title in a Court competent to try such subsequent suit, or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.
5. Documents annexed to the Respondent's said Response/Affidavit include the conciliator's said letters dated 26/5/2020 and 3/7/2020 respectively, and a Collective Bargaining Agreement between the Union of Hotel Keepers and Caterers Association (where the Respondent is a member) and KUDHEIHA.
 6. On December 1, 2022, the Respondent filed a Notice of Preliminary Objection dated November 29, 2022, calling for the memorandum of claim dated 22/9/2020 to be struck off on the basis that the Claimant lacks locus standi to commence, represent or maintain the cause, and stated:-
 - a. that there is no Recognition and Collective bargaining Agreement between the Respondent and the Claimant Union as required under Section 54 (6&7) of the [Labour Relations Act 2007](#) in the statement of claim dated 22/9/2020.
 - b. that the Respondent applies that the cause be struck out in limine and/or dismissed with costs.
 7. On 7/12/2022, the Claimant sought, and was allowed to file an affidavit in response to the Preliminary Objection, which he subsequently did on 17/1/2023. This is the Replying Affidavit of Wycliffe Sava Mundu sworn on 16/1/2023. The Claimant did not, in the said affidavit, deny that there does not exist a Recognition Agreement and a Collective Bargaining Agreement between the Claimant and the Respondent. The Claimant did not even allude to existence of the same, and did not demonstrate that such agreements exist between it and the Respondent. Instead, the Claimant deponed that further to Section 73(3) of the [Labour Relations Act](#), the scope of *locus standi* has been settled under Articles 22(2) (d) of the [constitution](#) that grants the Claimant the right to institute Court proceedings on behalf of its members; Article 36 which gives right to freedom of association and Article 41 of the [Constitution of Kenya](#).
 8. It is to be noted that in the present suit, the Claimant seeks to enforce employment and labour relations rights of both itself and its members vis-à-vis the Respondent herein. The rights sought to be enforced are enacted in the employment and labour relations statutes, which are basically the [Employment Act](#)



and the Labour Relations Act. The Constitutional rights that the Claimants seek to rely on are enacted in the said statutes. The Claimant cannot go round the said statutes and seek to rely on the constitution itself, unless it is challenging the validity and/or constitutionality of such statutes, alleging that the remedies provided therein are inadequate, or are raising a question of interpretation or application of the Constitution.

9. The Court of appeal stated as follows in the case of Summaya Athman Hassan v Paul Masinde Simidi & Another [2019] eKLR:-

“...The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st Respondent filed a petition directly relying on the provisions of the constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution. We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra), that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in the *Communication’s Commission Case* (supra).”

10. Turning to the question of whether the Claimant had locus standi to institute the suit herein, it becomes necessary to define what *locus standi* is. Black’s Law Dictionary, 9th Edition defines *locus standi* as follows:-

“The right to bring an action or to be heard in a given forum.”

11. The Respondent pleaded and submitted that the Claimant did not have locus standi to bring the suit herein and to sustain it, as there was no Recognition Agreement and a Collective Bargaining Agreement between the Claimant and the Respondent, that such agreements existed between the Respondent and a different Trade Union known as KUDHEIHA.

12. Section 2 of the Labour Relations Act defines a Recognition Agreement as:-

“an agreement in writing made between a trade union and an employer, group of employers’ organization regulating the recognition of the trade union as the representative of the interests of unionizable employees employed by the employer or by members of an employer’s organization.”

13. It is clear from the foregoing statutory definition that it is a Recognition Agreement which gives a trade union the legal capacity/locus standi to be a representative of the interests of unionizable employees employed by a particular employer. There was no such agreement between the Claimant and the Respondent in the present case, and the Claimant was never the representative of the interests of the Respondent’s unionizable employees. It follows that the Claimant had no locus standi to institute the



present suit purporting to enforce interests of the Respondent's unionizable employees. The Court of appeal stated as follows in *Alfred Njau & 5 Others v City Council Of Nairobi* [1983] eKLR:-

“the term locus standi means a right to appear in Court and conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceeding.”

14. The Court stated as follows in *Charitable Organisations [kyevaco] v Board Of Governors Maina Wanjigi Secondary School* [2015] eKLR:-

“.....without Recognition of the trade union as the representative of the interests of unionizable employees employed by the employer or by members of an employers' organization, such a trade union without Recognition cannot file a trade dispute within the meaning of the *Labour Relations Act*. The starting point would be to apply the provisions of Section 54(3) &(6) for such a union to have locus standi in dealing with trade disputes...”

15. The essence of the law the world over is to bring order in the society. The labour movement is part of the society, hence the existence of employment and labour relations laws. There must be order in the manner in which unionizable employees in the employment of any employer are unionized, in an orderly and structured manner; and enforcement of their rights must be sought by a representative/ trade union duly recognized by the employer vide a Recognition Agreement as by law provided. A trade union which believes that it has been denied recognition unfairly or contrary to the applicable law should first seek to enforce its right of recognition under Section 54(3) and (6) of the *Labour Relations Act* and attain locus standi before seeking to enforce the rights of an employer's unionizable employees.

16. Turning to the Respondents preliminary objection, it was stated as follows in *Mukisa Biscuits Manufacturing Co Ltd v West End Districutors Ltd* [1969] EA 696:-

“..... a Preliminary Objection consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if urged 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.”

17. It was further stated in the Mukisa Biscuits case (supra)

“...a Preliminary Objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which was urged on assumption that all the other facts pleaded by the other party were correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion...”

18. In the present case, it is a common ground that there does not exist any Recognition Agreement and a Collective Bargaining Agreement between the Claimant and the Respondent. The Respondent pleaded as much. In the absence of a Recognition Agreement which, by dint of Sections 2 and 54(3) of the *Labour Relations Act*, ought to be the foundation of all legal engagements between the Claimant Trade Union and the Respondent employer, the Claimant Trade Union does not have, and has never had legal capacity and/or locus standi to be a representative of the interests of unionisable employees of the Respondent herein. The respondent's Preliminary Objection is well founded, and I uphold the same.



19. Consequently, and having considered written submissions filed by both parties herein, I find and hold that the suit herein is incompetent, and the same is hereby struck off with no order as to costs.
20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH JUNE 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

