



Kenya Union of Hair & Beauty Workers v Style Industries Limited (Cause 450 of 2018) [2023] KEELRC 1862 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1862 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 450 OF 2018
NZIOKI WA MAKAU, J
JULY 25, 2023**

**BETWEEN
KENYA UNION OF HAIR & BEAUTY WORKERS CLAIMANT
AND
STYLE INDUSTRIES LIMITED RESPONDENT**

RULING

1. The respondent asserts that the claimant's suit is untenable Mr Ouma for the respondent asserts that the preliminary objection is contained in the defence statement filed by the respondent in August 2018. He argues that the preliminary objection is brought under section 54 of the *Labour Relations Act*. He stated that section 2 defines a recognition agreement. The respondent submits there is no recognition agreement between claimant and respondent. He asserts that paragraph 3 of statement of claim makes the assertion the claimant has mandate to represent the interests of the grievants. He asserts that in paragraph 5 it asserts it files the suit on behalf of its members. The respondent submits that there is no proof that the grievants were or are members of the claimant. The respondent asserts that the Union has filed substantive documents including payslips and that a cursory look at the payslip does not allude to deduction of union dues. Mr Ouma argues that would on the face of it show they were members. He referred to the case between *Kenya Private Security Workers Union v Lavington Security Limited*, Cause No 377 of 2013 [2013] eKLR, where Ndolo J made reference to and asserted that the right to representation is confirmed by membership which is a right recognised by article 41 of *Constitution*. He argued that in absence of proof the Union has no *locus standi* to represent the grievants. The respondent argued that the court should uphold the objection and strike out the claim. He cited the case of *Transport and Allied Workers Union v DHL Global Forwarding (K) Limited* (Cause No 745 of 2010) (unreported) cited by Ndolo J in her decision in the *Kenya Private Security Workers Union v Lavington Security Limited* case. He thus submitted the court should uphold the objection and strike out the claim.



2. The claimant was opposed to the preliminary objection. Mr Burugu submitted that though there is nothing filed in opposition, he argued that the preliminary objection is not on a pure point of law. He asserts the court is being asked to address issues of fact and further that the respondent has modified its preliminary objection. He argued that the preliminary objection per its response was to the effect that the Union was not competent to represent the grievants as there is no recognition agreement. He submitted that the respondent supports the claimant's case that the recognition agreement is not a pre-requisite for the representation. He cited the case of *Kenya Union of Commercial, Food and Allied Workers v Water Resource Management Authority & another* [2015] eKLR and submitted that the position is settled per the finding of Marete Njagi J Mr Burugu submitted that the absence of recognition agreement does not curtail the representation. He submitted that section 54 of the *Labour Relations Act* does not refer to the appearance in court but the negotiation for a CBA. He referred to section 4 of *LRA* which gives employees the right to join the Union. He submitted that the Union is entitled upon recruitment of more than 5 members to representation and he argued that section 8 of the *Employment Act* states the union can represent the employee before a labour office. He argued that by parity of reasoning the same logic can be applied to appearance before the court. He thus prayed that the preliminary objection be dismissed with costs as it is nothing more than delaying tactic.
3. In a brief reply on points of law raised in Mr Burugu's arguments, Mr Ouma submitted that the authority cited by the claimant focuses on the right to join a union with respect to recognition agreement. He submitted that the authority cited by the respondent is that membership of a union is a requisite. He argued that the law does not envision a union just going to a workplace and then representing the employees. He argued that the employee/employer relationship had been severed at the time the Union brought the claim to court. He thus urged the court to uphold the objection.
4. The matter of recognition is defined in the *Labour Relations Act 2007* as follows:- "recognition agreement" means an agreement in writing made between a trade union and an employer, group of employers or employers' organisation 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' organisation. The claimant is a trade union and it is common ground there is no recognition agreement. The claimant Union argues that this is no bar or impediment in regard to representation as article 41 and section 4 of the *Labour Relations Act* provides that employees have a right to join a union of their choice. Section 48 of the *Employment Act* recognizes the representation of an employee by a trade union official before the labour officer. The section provides as follows:

"In any complaint made under section 47, no advocate shall represent a party in the proceedings before a labour officer, but any party may be assisted or represented by an official of a trade union or an official of an employers' organisation notwithstanding the fact that the official is an advocate."
5. The claimant argues that the representation contemplated is by parity of reasoning, in the claimant's view, before the labour officer is parri passu that before the court. Whereas this is a matter the court is being invited to make a determination on, there is insufficient material to enable the court determine whether the claimant Union has *locus standi* before hearing the parties on the respective positions raised by either side.
6. The parameters for raising a preliminary objection were set out succinctly in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696. In that case, the Court of Appeal



for East Africa held that a preliminary objection must be on a pure point of law. The court at page 700 paragraphs D-F per Law JA (as he then was) had this to say:

"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."

7. Further in the same decision, at page 701 paragraph B-C, Sir Charles Newbold P stated thus:

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.

8. The respondent has raised what at first flush is temptingly akin to a preliminary objection. I say so advisedly, as the respondent has raised what requires further scrutiny by the court. The court must of necessity ascertain the status of the claimant Union vis-à-vis the grievants who are stated to be its members. As the court has to ascertain a fact – to wit – *inter alia*, whether the claimant Union had a recognition agreement and whether the grievants were members of the trade union or not. In the premises the court will decline the invitation to strike out the suit and order that the parties proceed to hearing on the merits barring any procedural impediments.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2023

NZIOKI WA MAKAU

JUDGE

