



Banking Insurance and Finance Union (Kenya) v National Health Insurance Fund & another (Employment and Labour Relations Cause E466 of 2023) [2023] KEELRC 2631 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2631 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E466 OF 2023
BOM MANANI, J
OCTOBER 26, 2023

BETWEEN

BANKING INSURANCE AND FINANCE UNION (KENYA) CLAIMANT

AND

NATIONAL HEALTH INSURANCE FUND 1ST RESPONDENT

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS 2ND RESPONDENT

RULING

Background

1. The Claimant has sued the 1st Respondent in a bid to compel the latter to recognize it as the legitimate Trade Union that represents unionizable employees of the 1st Respondent. Further, the Claimant seeks for orders to compel the 1st Respondent to commence collection and remittance of trade union dues from employees of the 1st Respondent who have signed up as members of the Claimant.
2. The Claimant avers that it has secured membership of more than 50% of the 1st Respondent's unionizable employees. According to the Claimant, most of these employees were hitherto members of the 2nd Respondent but have since withdrawn their membership in favour of joining the Claimant.
3. The Claimant contends that despite securing the aforesaid threshold, the 1st Respondent has failed to recognize it for purposes of collective bargaining in contravention of the [Labour Relations Act](#). Further, it is the Claimant's case that despite the 1st Respondent being issued with the requisite notices regarding these changes, it continues to collect and remit trade union dues to the 2nd Respondent in contravention of the law. The Claimant has therefore moved to court for the various orders aforesaid.



4. Contemporaneous with the substantive claim, the Claimant filed an application under certificate of urgency. In the application, the Claimant prays for interim orders to restrain the 1st Respondent from collecting union dues from its employees who have joined the Claimant and remitting the same to the 2nd Respondent. Further, the Claimant seeks orders to compel the 1st Respondent to remit the said dues to it (the Claimant).

Preliminary Objection

5. Upon being served with the Claimant's pleadings, the 2nd Respondent filed a Notice of Preliminary Objection. The grounds of the objection are as follows:-
 - a. That the application as signed and filed is fatally incompetent, bad in law and incurably defective as it contravenes clear provisions of the [Labour Relations Act](#), 2007 and the rules of this court.
 - b. That the suit as filed is premature and contravenes the dispute resolution mechanism as expressly provided in the [Labour Relations Act](#), 2007 for a dispute of this nature.
 - c. That the honourable court lacks jurisdiction to entertain this suit until the dispute resolution mechanism as laid down under the [Labour Relations Act](#), 2007 is exhausted.
6. The court directed that the preliminary objection be heard by way of written submissions. The parties have since filed their respective submissions.

Analysis

7. What qualifies as a preliminary point of law is now well settled. This is articulated in the celebrated decision of Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696 which both parties have relied on.
8. A preliminary point of law must be confined to pure points of law. Such objection must not be compounded with elaborate facts which the court will be required to ascertain before upholding it.
9. The objection should be capable of ascertainment by simply looking at the pleadings as filed against the applicable law. Where the objection requires the court to wade into the process of ascertainment of facts that ought to be considered during trial, it ought to be rejected.
10. The first ground of objection is that the pleadings by the Claimant have been signed by an officer of the Claimant who is not authorized to sign and present court processes on its behalf. It is the 2nd Respondent's case that since the pleadings have been signed by the Claimant's 1st Deputy General Secretary, they offend the provisions of section 73 (3) as read with section 2 of the [Labour Relations Act](#) regarding who can institute proceedings on behalf of the Claimant.
11. Section 2 of the [Labour Relations Act](#) provides in part as follows:-

“ Authorized representative” means:-

 - a. the general secretary of a trade union;
 - b. an employer or the chief executive officer of an employer;
 - c. the secretary of a group of employers;
 - d. the chief executive or association secretary of an employers' organization; or



- e. any person appointed in writing by an authorized representative to perform the functions of the authorized representative.” Emphasis added by underlining.
12. Section 73 (3) of the Act provides as follows:-
“A trade dispute may only be referred to the Industrial Court by the authorized representative of an employer, group of employers, employers’ organization or trade union.”
13. Rule 5(1)(a) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as follows:-
“Where a labour dispute is referred to the Court in accordance with the provisions of the Labour Relations Act, the statement of claim shall be signed by the authorized representative of the party referring the labour dispute to the Court.”
14. The 2nd Respondent argues that the Claimant’s Statement of Claim and application for interim orders ought to have been signed by its General Secretary. Alternately, the pleadings ought to have been signed by an officer of the Claimant with the written authority of its General Secretary.
15. The 2nd Respondent contends that Tom O Odero is not the Claimant’s General Secretary. It is contended that the said Tom Odero is the Claimant’s 1st Deputy General Secretary. Therefore and except with the written authority of the Claimant’s General Secretary, he was not entitled to sign the Statement of Claim in the suit.
16. The 2nd Respondent contends that the said Tom O Odero has not placed before the court evidence to show that he had the authority of the Claimant’s General Secretary to sign the Statement of Claim. Thus, the 2nd Respondent argues that the pleadings by the Claimant are, ipso facto, incompetent, incurably defective and bad in law.
17. I have looked at the pleadings that were filed by the Claimant. The Statement of Claim was signed by Tom O Odero. Similarly, the Certificate of Urgency and application for interim orders dated 8th June 2023 were signed by Tom O Odero.
18. In the Certificate of Urgency, Tom O Odero describes himself as the 1st Deputy General Secretary of the Claimant. Evidently and by this admission, this official is not the General Secretary of the Claimant. Therefore and in terms of sections 2 and 73(3) of the Labour Relations Act, he could only have signed the pleadings in the cause with the written authority of the Claimant’s General Secretary.
19. The law requires that when the General Secretary of a Trade Union delegates his authority to a third party to represent the Union, he should do so in writing. As such, any individual who purports to have such authority from a Trade Union’s General Secretary must demonstrate this fact. The record does not show that at the time of filing this action, the Claimant filed proof that its General Secretary had authorized Tom O Odero to sign the Statement of Claim on its behalf.
20. However, when this objection was raised by the 2nd Respondent, the Claimant’s General Secretary purported to file an affidavit seeking to introduce evidence to show that he had given written authority to Tom O Odero to sign the pleadings on behalf of the Claimant. Since the affidavit was filed without leave of the court, it was struck out.
21. The question for determination is whether it is proper at this stage for the court to determine, by way of a preliminary point of law, if Tom O Odero had the authority of the General Secretary to sign the



pleadings on record. It is true that the law requires that pleadings by a Trade Union be signed by the union's General Secretary or some other person with the written authority of the union's General Secretary. However, there is no legal requirement that the documents evidencing such authority be filed alongside the pleadings.

22. In all instances where the law requires that a particular instrument be filed together with pleadings in a suit, this is expressly stated. For instance, rule 4(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (ELRC Rules) which deals with filing of verifying affidavits provides as follows:-

“A statement of claim filed under paragraph (1) shall be accompanied by an affidavit verifying the facts relied on.” Emphasis added by underlining.

23. Similarly, rule 9(3) of the ELRC Rules which deals with the procedure for instituting representative suits provides as follows:-

“The statement of claim shall be accompanied by a schedule of the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant.” Emphasis added by underlining.

24. Rule 9(2) of the ELRC Rules on representative suits provides as follows:-

“Where a suit is instituted by one person, that person shall, in addition to the statement of claim, file a letter of authority signed by all the other parties.” Emphasis added by underlining.

25. Whilst it is true that a party purporting to act for a Trade Union ought to have the written authority of the union's General Secretary, the question whether such authority has been given is a matter of fact which can only be established through evidence. This is because unlike in the various instances that I have referred to above, there is no express legal requirement that the authority of the General Secretary to other union officials to institute proceedings on behalf of the union must be filed alongside the Statement of Claim.

26. I have seen the affidavit verifying the Statement of Claim and the affidavit in support of the application for interim reliefs which were both sworn by one Joseph Lepapa Tipape. The two affidavits describe the said Joseph Lepapa Tipape as the Claimant's National General Secretary. Although the two affidavits do not expressly speak to the fact of the said Joseph Lepapa Tipape having authorized Tom O Odero to sign the Statement of Claim, they nevertheless are evidence of the fact that the said Joseph Lepapa Tipape is not only aware of the proceedings but he also supports them.

27. However, since the law requires that such authority be expressly granted in writing, the court cannot infer from the aforesaid affidavits that Joseph Lepapa authorized Tom O Odero to act for the Claimant. That notwithstanding, the court cannot ignore the reality that the said Joseph Lepapa signed the affidavit that verifies the Statement of Claim and he has not denied that he granted Tom O Odero authority to institute the case. Having regard to the fact that the General Secretary of the Claimant has signed the affidavit that verifies the Statement of Claim, it cannot be ruled out that he had given his approval for the Statement of Claim to be signed by Tom O Odero.

28. Thus, whether Joseph Lepapa Tipape granted Tom O Odero the authority to institute these proceedings on behalf of the Claimant is a matter of fact which can only be determined through evidence. In my view therefore, such matter is not suitable to be determined as a preliminary point of law. It is up to the Claimant to demonstrate through production of evidence at the time of hearing of



- the pending interlocutory application and the main action that the officer who signed the pleadings on record was authorized to do so.
29. The 2nd Respondent has also urged the court to strike out the suit for offending the exhaustion principle. It is contended by the 2nd Respondent that the suit was filed before the Claimant utilized the dispute resolution mechanisms that are provided for under the [Labour Relations Act](#).
30. Section 54 of the [Labour Relations Act](#) provides as follows:-
- i. An employer, including an employer in the public sector, shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
 - ii. A group of employers, or an employers' organization, including an organization of employers in the public sector, shall recognize a trade union for the purposes 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.
 - iii. An employer, a group of employers or an employer's organization referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organization recognizes a trade union.
 - iv. The Minister may, after consultation with the Board, publish a model recognition agreement.
 - v. An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.
 - vi. 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.
 - vii. 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.
 - viii. When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.
31. Under Parts VIII and IX of the [Labour Relations Act](#), an elaborate dispute resolution procedure for collective labour disputes is laid out. A party who has such dispute is required to report it to the Ministry of Labour which will then appoint a conciliator to adjudicate on the matter. It is only if the conciliator fails to resolve the dispute that parties are entitled to approach the court over the matter.
32. Although section 74 of the Act contemplates the filing of disputes relating to recognition before court under certificate of urgency, section 54(7) of the Act appears to suggest that such action may only be taken after the conciliator has failed to find a solution to the grievance. In effect, the way that the statute is couched appears to suggest that any collective labour dispute can only be filed in court after it has gone through conciliation.
33. It is not in doubt that the [Labour Relations Act](#) provides for alternate dispute resolution procedures as argued by the 2nd Respondent. It is also not in dispute that parties with collective labour disputes should submit such disputes to the dispute resolution mechanisms under the Act before approaching the court.



34. However, this requirement is not absolute in nature. It only applies where the alternative dispute resolution forum is capable of granting the litigant a suitable remedy. Where it is evident that the remedy that the litigant seeks cannot be granted by the alternate dispute resolution forum, the party is entitled to bypass the forum and approach the court directly.

35. In *Kamba & 8 others v County Public Service Board, Machakos County Government & 2 others* (Employment and Labour Relations Cause E099 of 2023) [2023] KEELRC 2227 (KLR), the court expressed itself on the matter as follows:-

“I agree with the position expressed by the Respondents that where the law provides for an alternative mechanism for resolving a dispute, parties should pursue that mechanism before invoking the court’s jurisdiction. That said, it is generally acknowledged that the court will not insist on this approach if the alternative dispute resolution mechanism is incapable of providing the parties with a suitable remedy.”

36. I have looked at the pleadings instituting the instant claim and the accompanying application for interim reliefs. The Claimant seeks reliefs to restrain the 1st Respondent from remitting the disputed union dues to the 2nd Respondent. It is doubtful that a conciliator can issue such interim reliefs.

37. A party in need of such relief is at liberty to approach the court directly. Such request will permit such party to bypass the alternate dispute resolution procedure under the *Labour Relations Act* and approach the court but only for purposes of seeking the interim injunctive reliefs.

38. In addressing this matter, the court in *Kamba & 8 others v County Public Service Board, Machakos County Government & 2 others* (Employment and Labour Relations Cause E099 of 2023) [2023] KEELRC 2227 (KLR) expressed itself as follows: -

“In my estimation, a grievant that is in urgent need of interim relief of injunction in the first instance will be deprived of a suitable remedy if his options for dispute resolution are restricted to the PSC. This, in my view, provides sufficient justification for such grievant to bypass the grievance resolution procedure that is prescribed under section 77 of the County Government Act but only for purposes of pursuing the interim relief that is sought. Having regard to the foresaid, I am satisfied that the Claimants’ circumstances presented an exceptional reason for them to approach the court.”

Determination

39. For the reasons that I have set out in the body of the ruling, I decline to allow the preliminary objection by the 2nd Respondent.

40. I find that the Claimant was entitled to approach the court but only to the extent of seeking the interim injunctive orders that are sought in the pending application.

41. Once the pending application for interim injunctive reliefs has been dispensed with and subject to proof that the matter was instituted with the authority of the Claimant’s General Secretary, this action will be referred to conciliation.

42. I make no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 26TH DAY OF OCTOBER, 2023

B. O. M. MANANI

JUDGE



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

