



**Kenya Petroleum Oil Workers Union v Petro Oil Kenya Limited (Cause 24 of 2019) [2023] KEELRC 2558 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2558 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 24 OF 2019  
M MBARÚ, J  
OCTOBER 19, 2023**

**BETWEEN  
KENYA PETROLIUM OIL WORKERS UNION ..... CLAIMANT  
AND  
PETRO OIL KENYA LIMITED ..... RESPONDENT**

**RULING**

1. The ruling herein relates to Notice of Preliminary Objections filed by the respondent, Petro Oil Kenya Limited and dated 14 March 2023 and on the grounds that;
  1. As set out in paragraphs 8 and 9 of the Replying Affidavit, the claimant does not have the locus standi to represent any of the employees of the respondent in terms of section 54(1) of the *Labour Relations Act*.
  2. By reason of the Tripartite Agreement that was signed by the representatives of the Federation of the Kenyan Employers (FKE), Central Organisation of Trade Unions (COTU-K) and the Government dated 20<sup>th</sup> April 2020, the claimant is estopped from reneging from the said Tripartite Agreement. The respondent relies on paragraphs 5 and 6 of the Replying Affidavit.
  3. The law relied on by the claimant is for the law to cite and punish the respondent for contempt of court does not grant the court jurisdiction to do so.
2. For these reasons, the respondent prays that the application dated 14<sup>th</sup> March 2023 be struck out with costs to the respondent.
3. These objections arose after the claimant filed application dated 14 March 2023 seeking for leave institute contempt of court proceedings against the respondent and the court to cite the directors and CEO of the respondent for committal to civil jail for a period of 6 months for contempt. The contempt be purged for failure to honour court orders issued on 13 December 2019.



4. The orders of 13 December 2019 was the judgment and decree thereof dated 20 January 2020 on the orders that the respondent should sign the Recognition Agreement with the claimant within 30 days; parties to conclude CBA negotiations within 70 days after signing the Recognition Agreement and the claimant to serve the respondent with Gazette Notice issued under section 48(2) of the Labour Relations Court (LRA) and once served, the respondent to deduct and remit trade union dues to the claimant.
5. On this background, parties attended and agreed to address the objections by way of written submissions and also attended court to highlight.
6. The respondent submitted that in the application dated 13 March 2023, the claimant is seeking leave to commence and cite the respondent's directors and CEO for contempt which is a combination of matters. The claimant ought to seek leave to commence contempt proceedings then file a substantive motion to cite the respondent and its directors. Each level has its own procedures and citation for contempt should not be joined with other matters particularly where leave is not granted or not as held in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda & 3 others* [2014] eKLR. The claimant cannot grant itself leave and proceed to seek to prosecute the respondent or its directors for contempt. The final objective of the claimant is to have Benson King'ori the general manager of the respondent punished for contempt of court allegedly committed by the respondent. The motions of lifting the company veil must be addressed before the officer of the respondent can be cited for contempt as held in *Mark Njoroge Nguthi v James Muthembwa* [2010] eKLR that an omnibus application should be discouraged as they confuse issues.
7. The respondent is a limited liability company with its directors and should be treated independent from its officers. To cite the CEO for contempt is irregular. He is not cited as being a director or shareholder contrary to the principles outlined in the case of *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR and in this regard, the application by the claimant is misdirected.
8. Before the claimant can move to cite the respondent for contempt, internal audit is important. The unionisable employees working for the respondent are 168 yet the claimant's members are 71. Under section 54(1) of the *LRA*, the claimant can only be recognised by the respondent if it enjoys a simple majority of the unionisable employees.
9. The judgment herein issued on 13 December 2019 and the membership of the claimant from the unionisable employees was 269 and the claimant had recruited 159 members then enjoying a simple majority. This has changed to 71 members.
10. Without the requisite membership, the claimant lacks *locus standi* to prosecute this matter as held in *Mistry Amar Singh v Serwano Wafunira Kulubya* Privy Council Appeal No. 33 of 1961.
11. The claimant submitted that on the objections by the respondent, the principles outlined in *Mukisa Biscuit Manufacturing Ltd v West End Distributors* [1969] EA that preliminary objections should relate to pure points of law and not matters which require call of evidence. The assertions that the claimant lacks *locus standi* in terms of section 54(1) of the *LRA* such matter was already addressed in the judgment of the court delivered on 13 December 2019 and the respondent is estopped from addressing such matter at this stage. Recognition is not necessary to urge the instant objections, having been determined by the court. The judgment stands and there is no appeal.
12. The respondent has filed a list of unionisable employees and those who are members of the claimant, but this is not an application seeking review of the judgment. To urge an objection that the claimant lacks standing, there is need to call evidence as the issues raised are not pure points of law.



- 13 The orders of the court issued through judgment herein cannot be suspended through a Tripartite Agreement. Where such an agreement was done in good faith, this ought to have been filed in court as held in *Banking, Insurance & Finance Union v Kenya Bankers Association* [2021] eKLR and in the case of *Kenya Engineering Workers Union v East African Foundry Works Ltd* [2021] eKLR the court addressed the matter of Tripartite Agreement but this has not been given any legal effect for lack of it being filed in court particularly where the respondent signed it to avoid obeying the court judgment.
- 14 The claimant submitted that the court is clothed with jurisdiction to hear contempt proceedings application similar to the High Court and this being a superior court, similar jurisdiction exists as held in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR.

### Determination

- 15 On the objections by the respondent dated 14 March 2023 the issues raised by the respondent are whether the claimant has standing to represent the employees of the respondent in terms of section 54(1) of the *LRA*; whether by reasons of the Tripartite Agreement signed on 20 April 2020 the claimant is stopped from reneging on it; and whether the law the claimant has applied to cite the respondent for contempt gives court jurisdiction.
- 16 Indeed, as the claimant asserts, preliminary objections should be on pure points of law. In *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA this is given emphasis that;
- 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...
- 17 Therefore, for a preliminary objection to succeed the following tests ought to be satisfied, that it raises a pure point of law, if it is argued on the assumption that all the facts pleaded by the other side are correct, and that, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
- 18 Under section 54(1) of the *LRA*, an employer is allowed to recognise a trade union that enjoys simple majority in membership from all unionisable employees.
- 19 It is not in dispute that judgment herein issued on 13 December 2019. Part of the orders in the judgment is that the respondent should recognise the claimant and execute the Recognition Agreement within 30 days. A decree hereof has since issued.
- 20 Upon the judgment of the court, the issue of recognition was determined, that fact ascertained, a change of such status is not by unionised employees resigning from the claimant's membership. Far from it.
- 21 Upon recognition, whether this is actualised or not, the judgment of the court has since determined such matter and any change with regard to recognition of the claimant by the respondent can only be by way of review, appeal or application of section 54(5) of the *LRA*;
- (5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.
- 22 The claimant, having been found by the court to have achieved the threshold secured under section 54(1) of the *LRA*, the right to enjoy recognition cannot be negated by the subject members and employees of the respondent withdrawing their membership outside the provisions of section 54(5) of



the LRA. The legal procedures of section 54(1) having been completed and determined by the court, to undo that Recognition, such requires the process outlined under section 54(5) of the LRA.

23 For this purpose, the claimant enjoys standing with the court.

24 Even in a case where the respondent has not executed the Recognition Agreement, recognition of a trade union by an employer such as the respondent is not a bar to the trade union representing the interests of its members in court. The sole purpose of recognition is to give the trade union the legal standing under Section 54 of the LRA to enter into negotiations on terms and conditions of employment resulting in a collective agreement (CBA).

25 The claimant has the proper standing herein.

26 On the Tripartite Agreement signed on 20 April, 2020 between FKE, COTU-K and the government, the judgment herein cannot be changed, reviewed or negated through an agreement outside of these proceedings. This is similar to a consent drafted by parties and kept in their files without the adoption by the court as its order. Such remains a document of reference but not based on a court order capable of enforcement. Similarly, the Tripartite Agreement and the good intentions therein to be effective and enforceable must be registered with the court for adoption to gain the legal enforceability and order of the court.

27 This is aptly captured in the case of Wema Foundation Trust Company Limited v County Government of Nairobi City & another [2022] eKLR that;

“ ... It is trite law that the parties who would want to have the court to adopt a consent judgment must be present in court on the day when the document is presented for adoption and confirm the same to the one they both signed and agreed on.

28 To ascertain the import and implications of the Tripartite Agreement relied upon by the respondent, call of evidence is necessary to determine its effect and hence removed from matters which ordinarily should form the basis of a preliminary objection.

29 With regard to the court’s powers and jurisdiction to hear and address contempt of court applications and proceedings therefore, this is a superior court of record and given power to punish any contempt, once established to the required degree. The sole purpose being that the rule of law demands compliance with court orders.

30 In Tribe Hotel Ltd v Josphat Cosmas Onyango [2018] eKLR the Court of Appeal in addressing the jurisdiction of the court in addressing contempt of court proceedings held that where the court established that there is contempt through wilful disobedience of any judgment, decree or order or direction or other process of the court, an inquiry of such matter must be gone into with a finding. See Kenya Tea Growers Association v Francis Atwoli and 5 Others [2012] eKLR and Teachers Service Commission v Kenya National Union of Teachers & 2 others [2013] eKLR where the court held that;

... The plain reading of this provision [article 162(2) of the Constitution] is that the Industrial Court [Employment and Labour Relations Court], being a superior court with the status of the High Court, has similar powers to those assigned by the High Court in all matters arising out of employment and labour relations.

The term 'High Court' in section 5(1) of the Judicature Act would therefore include the Industrial Court and the Environment and Land Court established under article 162(2)



of the Constitution. That clears any doubts on the jurisdiction of this Court to punish for contempt of court.

- 31 The objections by the respondent through notice dated 14 March 2023 are hereby found without merit and are dismissed with costs to the claimant. The parties shall revert back to application dated 14 March 2023 filed by the claimant which shall be heard on the merits.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 19<sup>TH</sup> DAY OF OCTOBER 2023.**

**M. MBARŪ**

**JUDGE**

