



Kenya Union of Domestic, Hotels, Educational Institutions and Hospitals Workers (KUDHEIHA) v Kaplong Mission Hospital (Board of Management) & another (Cause E013 of 2022) [2023] KEELRC 2349 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2349 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE E013 OF 2022
DN NDERITU, J
OCTOBER 5, 2023**

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS AND HOSPITALS WORKERS (KUDHEIHA) CLAIMANT

AND

KAPLONG MISSION HOSPITAL (BOARD OF MANAGEMENT) 1ST RESPONDENT

KENYA CATHOLIC SECRETARIAT 2ND RESPONDENT

RULING

I. Introduction & Background

1. In a memorandum of claim dated July 4, 2022 the claimant herein, a trade union, through Joseph Okwach, Industrial Relations Officer, commenced this cause seeking the following –
 1. That, the 1st Respondent be compelled to withdraw the said closed contract imposed on these employees unilaterally with the sole intention of defeating the claimant’s quest for recognition agreement.
 2. That, the 1st /2nd Respondent be compelled to sign the recognition agreement within 30 days of the judgment to safeguard the claimant’s membership rights.
 3. That, the 1st Respondent be compelled to commence CBA negotiations and conclude within the next 90 days and the same be filed in court.
 4. That, the 1st Respondent be ordered to remit union dues for all who have appended their signature on the check off.



5. That, an order be issued against intimidation, harassment and victimization of the unionized employees.
6. Costs of the suit be borne by the 1st Respondent
2. The above prayers clearly illustrate that the claimant has come to court in a representative capacity, which is allowed in law, but the alleged members of the union are not named in the body of the claim although some names appear in the documents annexed to the claim.
3. Both the respondents entered appearance on July 20, 2022 through Muma & Kanjama Advocates. I have perused the file and there is no defence or response to the claim on record.
4. On October 19, 2022 the Respondents filed two separate applications both dated October 18, 2022 seeking various orders that would, if successful, have far reaching consequences and probably render this cause untenable.
5. In its notice of motion (the first application) the 1st respondent prays that –
 1. That the claim against the 1st Respondent be struck out.
 2. That, costs of the suit and this Application be provided for by the Claimant/Respondent.
6. The application is expressed to be brought under Section 1A & B, 3A of the *Civil Procedure Act* and Order 1, rule 3 & 14 and Order 51, rule 1 of the *Civil Procedure Rules*. It is based on the grounds on the face of it and supported with the affidavit of SR Judith Emmaculate sworn on October 18, 2022.
7. In the second application the 2nd respondent is seeking the following orders –
 1. That, the claim against the 2nd Respondent be struck out.
 2. That costs of the Suit and this Application be provided for by the Claimant/Respondent
8. This second application is expressed to be brought under Sections 1A & B, 3A of the *Civil Procedure Act*, Order 1 rules 3 & 14, Order 2 rule 15, and Order 51 of the *Civil Procedure Rules*.
9. The application is based on the grounds on the face of it and supported with the affidavit of the Very Rev FR Ferdinand Lugonzo.
10. In response to the two applications the claimant filed one replying affidavit purportedly sworn by Joseph Okwach dated March 16, 2023. The court notes that this affidavit is neither drawn nor executed in the manner provided for in the *Oaths and Statutory Declarations Act* in that it does not contain a jurat indicating where and when it was sworn and the same is not duly commissioned before a commissioner for oaths, a magistrate, a notary public, or any other qualified person in law to administer oaths. For the foregoing reasons, the said purported replying affidavit is hereby struck out.
11. The court directed that the two applications be canvassed by way of written submissions. Counsel for the respondents filed two sets of written submissions one in regard to each application. The claimant's representative filed two sets of written submissions one in regard to each application. The court notes that the submissions in regard to the first application are not signed as required by law that all filed pleadings and documents be authenticated by the executing person appending a signature on the same. The court shall disregard the same as they cannot be authenticated as duly signed and filed by the said officer.
12. This ruling is hence in regard of the said two applications and I shall deal with each application separately as hereunder.



II. Application by the 1st Respondent

13. In the memorandum of claim the claimant has described the 1st respondent as “a mission hospital situated in Bomet County, operating under the Catholic Diocese of Kericho.” The legal or juristic personality of the 1st respondent and its capacity to sue and be sued is neither pleaded nor disclosed. The description quoted herein suggests that the hospital is either owned, controlled, administered, and or managed by the Catholic Diocese of Kericho which is not a party in this cause.
14. In the supporting affidavit SR Judith Emmaculate deposes that the 1st respondent is a charitable institution belonging to the Catholic Diocese of Kericho. It is categorically stated that the 1st respondent is not a legal entity and hence has no capacity to be sued.
15. The above averments find no answer from the claimant. Even after the court examines the struck out replying affidavit it finds no answer to the above issues on the legal capacity of the 1st respondent as a party in this cause.
16. What the claimant ought to have done when the issue of the legal capacity of the 1st respondent to be sued was raised was to obtain factual evidence confirming the legal personality or otherwise of the 1st respondent. It is the claimant who brought this cause to court and hence legally obliged to demonstrate that the right parties with legal capacity are before the court. It does not matter that there was another cause that had been filed against the 1st respondent wherein the issue of its legal capacity was not raised. Now that it has been raised in this cause it is incumbent upon the claimant to illustrate and demonstrate that indeed the 1st respondent is a legal personality or a juristic person capable of being sued.
17. In the written submissions counsel for the 1st Respondent has emphasized that it has no legal capacity to be sued in its own name. Counsel has cited various authorities on the legal consequences and implications of filing a cause against a non-legal entity. It is the established law that a party who has no legal capacity to sue cannot be sued and any proceedings against or by such a party amounts to nothing, it is null and void. Counsel has cited *Housing Finance Corporation of Kenya V Embakasi Youth Development* (2004) eKLR and *Peter Taracha & Another V International Pentecostal Holiness Church & Another* (2016) eKLR among other decisions in support of this position.
18. On the basis of the materials placed before me, the application and the supporting affidavit, and the submissions by counsel this court is not in doubt that the claimant has failed to demonstrate that indeed the 1st respondent is a legal entity capable of being sued. It shall be an exercise in futility for the claimant to proceed against a party against whom court orders and decrees are inexecutable for lack of legal capacity. It also means that the 1st respondent has no capacity to own property in its own name and as such proceeding against such a party shall be a fishing expedition or a wild goose chase.
19. For the foregoing reasons, the claim against the 1st respondent is hereby struck out and the name of the 1st respondent removed from this cause and the proceedings herein.

III. Application by the 2nd Respondent

20. In the supporting affidavit by Very Rev Ferdinand Lugonzo, the general secretary, the 2nd respondent alleges that the cause does not disclose a reasonable action against it. It is deposed that there is no entity in the name of Kenya Catholic Secretariat. It is stated that the secretariat for the Bishops was formerly known as Kenya Episcopal Conference but is now known as Kenya Conference of Catholic Bishops and that the same is nothing more than a secretariat for the Catholic Bishops in Kenya.



21. It is stated that the Kenya Conference of Catholic Bishops has no control or management portfolio over Catholic institutions including the 1st Respondent. It is stated that the 2nd respondent is not the legal owner of the 1st respondent and as such there are no grounds in suing it as a respondent. It is reiterated that the subject hospital is owned, managed, administered, and operated by the Catholic Diocese of Kericho and hence the 2nd respondent has no basis in negotiating or executing a collective bargaining agreement (CBA) with the claimant on behalf of the employees working in the hospital.
22. It is claimed that if the cause is allowed to proceed as instituted the 2nd respondent shall be highly prejudiced as it shall be defending a cause in which no liability may be attached to it.
23. In the memorandum of claim the 2nd respondent is described as “Kenya Episcopal Conference (Catholic Secretariat) is the headquarters of all Catholic Churches and institutions operating within the Republic of Kenya”. This is different from the names applied in the header of the memorandum of claim. It is apparent that the claimant may need to amend the claim to align the same with the proper name of the 2nd respondent if the claim is to proceed to hearing.
24. The replying affidavit by the claimant in response to both applications has already been struck out for being incompetent and as such the facts alleged in the supporting affidavit have not been challenged or controverted.
25. The 2nd respondent has not denied its legal capacity to be sued, own property, or its juridical existence. This is unlike the 1st respondent which was categorical that it is neither a natural or juridical person and hence not a legal person or entity. It is for this reason that the court arrived at the decision it did above in regard to the 1st application.
26. The only order or prayer against the 2nd respondent in the claim is in prayer 2 wherein the claimant is seeking that both the respondents be jointly compelled to sign the recognition agreement.
27. However, the court has looked at the documents annexed to the memorandum of claim and noted that in a letter dated August 8, 2005 from the 2nd respondent to Federation of Kenya Employers (FKE) the 2nd respondent declares that it has an oversight role over all Catholic institutions as managed by various dioceses.
28. Further, in a letter dated December 6, 2020 addressed to the claimant by the administrator of the 1st respondent the said administrator points out that the 2nd respondent is the only “mandated organ to transact on behalf of all Kenya Catholic Mission Hospitals and Kaplong Mission Hospital falls under this establishment.”
29. In the foregoing circumstances, it is clear that in whatever capacity the 2nd respondent has a role in the management, operations, supervision, and oversight of the subject hospital. This can only be ventilated, explained, established, and or confirmed through hearing of the cause. However, as stated above the claimant needs to indicate the proper name of the 2nd respondent as disclosed by the 2nd respondent above.
30. I have carefully gone through the submissions by the 2nd respondent’s counsel but there is no reason given that would at this stage convince the court that the 2nd respondent is improperly joined in this cause. Clearly, there is a prima facie connection between the 2nd respondent and the claim herein and in any event, there is at least one prayer against the 2nd respondent. It is the considered view of this court that this matter should proceed to hearing and the court shall make its findings based on the evidence tendered from both sides and as such determine to what extent the 2nd respondent is liable and what orders may issue against it.



31. This second application is thus denied at this stage. The submissions by counsel for the respondents are not convincing to this court in exonerating the 2nd respondent from all the liability or blame in this cause. It is only fair that the matter be heard on merits as against the 2nd respondent.

IV. Determination

32. For all the foregoing reasons, this court finds that the first application is merited and the same is allowed with no order as to costs. The name of the 1st respondent is consequently removed from these proceedings.

33. The second application is devoid of merits and the same is hereby dismissed accordingly with costs in the cause.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT KERICHO THIS 05TH DAY OF OCTOBER, 2023.

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**DAVID NDERITU
JUDGE**

