



Kenya Union of Non-Governmental Organizations, Employees & Human Rights Providers v Chief Coffe Department of Health Homabay & 2 others (Cause E078 of 2021) [2023] KEELRC 2386 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2386 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E078 OF 2021
CN BAARI, J
OCTOBER 5, 2023**

BETWEEN

KENYA UNION OF NON-GOVERNMENTAL ORGANIZATIONS, EMPLOYEES & HUMAN RIGHTS PROVIDERS CLAIMANT

AND

CHIEF COFFER DEPARTMENT OF HEALTH HOMABAY ... 1ST RESPONDENT

LIVERPOOL VOLUNTARY COUNSELLING & TESTING (LVCT HEALTH) 2ND RESPONDENT

COUNTY GOVERNMENT OF HOMABAY 3RD RESPONDENT

RULING

1. For determination herein, is the 1st and 3rd respondents' notice of preliminary objection dated July 7, 2023, seeking the striking out of the claimant's claim on the basis that the parties herein do not have a recognition agreement rendering the claim as filed unsustainable.
2. Parties urged the preliminary objection orally on June 21, 2023. Counsel for the 1st and 3rd respondent argued that it is the obligation of a trade union to be recognized and that the process of recognition spelt out under section 54 (6) of the *Labour Relations Act* was not followed, hence the claimant lacks locus to bring this claim and pray that the claim be struck out with costs.
3. Mr Ngere for the claimant argued that the claimant did a letter to the minister and followed all procedures to the letter, but that no response was received from the minister.
4. It is the claimant's argument that it has exhausted all dispute resolution mechanisms to no avail, and hence the filing of this suit. It is counsel's further argument that the respondents refused to sign a



recognition agreement with the claimant union and hence the reason there does not exist a recognition agreement between them and the respondents.

5. It is the claimant's argument that the purpose of this suit herein, is for this court to compel the respondent to recognize it.

Determination

6. The law on preliminary objections was spelt out in the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where the court stated as follows:

“ 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... It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

7. The respondents' objection is premised on the provisions of section 54 (6) of the *Labour Relations Act* that requires that parties refer a dispute relating to recognition to conciliation in the first instance.

8. The procedure for recognition of trade unions for purposes of collective bargaining has been laid out in section 54 of the *Labour Relations Act* as follows: -

- (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
- (2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise 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' organisation within a sector.
- (3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.
- (4) The Minister may, after consultation with the Board, publish a model recognition agreement.
- (5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.
- (6) If there is a dispute as to the right of a trade union to be recognised 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.
- (7) 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.
- (8) 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.”



9. Section 54(6) though not couched in mandatory terms, no doubt provides a mechanism for resolution of a dispute such as that in this matter by way of conciliation. Further, if the legislature did not intend that a dispute on whether or not a union should be recognized by an employer does not have to be conciliated, nothing would have been easier than to expressly say so.
10. A purposive interpretation of this section points me to the conclusion that the entire section 54 of the *Labour Relations Act*, was meant to be adhered to as is- meaning that a party has to first subject themselves to conciliation before seeking the court's intervention on an impasse over recognition.
11. The Court of Appeal in *County Government of Nyeri & Anor. v Cecilia Wangechi Ndungu* [2015] eKLR held that:

“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”
12. The claimant's counsel's admitted in his submissions before court that the issue herein, was not subjected to conciliation as required by the law and, further argued that the union wrote to the minister to appoint a conciliator in the matter, but that the minister did not respond to their letter.
13. The claimant has not in its pleadings mentioned having involved the minister in the dispute with the respondents on its recognition. Further, the correspondences on the recognition are only between the parties herein, while nothing shows that the claimant indeed reached out to the minister for purposes of conciliation of the dispute between it and the respondents.
14. I in the circumstances, agree with the respondents that the claimant's claim violates the provisions of section 54 (6) of the *Labour Relations Act*, 2007, and which then ousts this court's jurisdiction on the matter.
15. A question of jurisdiction is a pure point of law, and without jurisdiction, a court must down its tools.
16. The upshot is that the court lacks jurisdiction to entertain the claimant's claim and is for striking out, and which I hereby do.
17. Parties shall bear their own costs in the interest of social partnership.
18. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 5TH DAY OF OCTOBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Claimant



N/A for the Respondents

Christine Omolo- C/A

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