



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 18 OF 2017**

**KENYA ENGINEERING WORKERS' UNION .....CLAIMANT**

**VERSUS**

**JOKALI HANDLING SERVICES LIMITED.....1<sup>ST</sup> RESPONDENT**

**ABYSSINA IRON & STEEL LIMITED-KISUMU.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. The ruling herein, relates to the 1<sup>st</sup> Respondent's Notice of Preliminary Objection dated 15<sup>th</sup> November, 2021.
2. The Objection is premised on the following grounds:
  - i. That the Claimant does not have any executed and registered Collective Bargaining Agreement with the 1<sup>st</sup> Respondent;
  - ii. That the Claimant in approaching and/or coming before this Honourable Court flouted Section 62 of the Labour Relations Act, No. 14 of 2007;
  - iii. That the Claimant flouted Rule 6 of the Industrial Court (Procedure) Rules, 2010, in coming before this Court and/or approaching this Honourable Court; and
  - iv. The Claimant flouted Section 54 of the Labour Relations Act, 2007 in coming before this Honourable Court.
3. The 1<sup>st</sup> Respondent prays that any motion filed in the cause and the entire suit as against it, be accordingly struck out and/or dismissed with costs.
4. The Preliminary Objection (P.O) was argued before this court on 15<sup>th</sup> December, 2021. Ms. Muema, submitting for the 1<sup>st</sup> Respondent, argued that her client does not have a relationship with the Claimant and as such, this suit is not properly before this court.
5. Counsel for the 1<sup>st</sup> Respondent submitted that Section 62 of the Labour Relations Act, 2007, requires that when a dispute concerning recognition arises between a Trade union and an employer, a conciliator is appointed to resolve the dispute through conciliation. It is her position that the 1<sup>st</sup> Respondent was never accorded an opportunity to attempt conciliation.
6. She further argues that no conciliation agreement was filed before this court at the time of filing this suit. Ms. Muema avers that Rule 6 of the Act is mandatory and that any claim filed under the Labour Relations Act, must be accompanied by a report of the conciliation process, supported by minutes of the process. It is her case that this court was approached before the mechanisms envisaged under the Act were exhausted.
7. Ms. Muema further argued that no certificate by the Conciliator was issued as required under Section 69 of the Labour Relations Act to signify that conciliation took place before the matter was brought to court.
8. The 1<sup>st</sup> Respondent urged the Court to allow the P.O, but instead of striking out the suit, the court allows parties to exhaust the dispute resolution mechanism provided under the Act.

9. Mr. Makali appearing for the Claimant, opposed the P.O. He argued that the suit and the application therein was filed under Section 74 of the Labour Relations Act. It is his position that the issue has already been heard and the redundancy declared unprocedural and unlawful and the 1<sup>st</sup> Respondent advised to issue new redundancy notices in line with Section 40 of the Employment Act, 2007.

10. It is Mr. Makali's case that the 1<sup>st</sup> Respondent proceeded to lodge an application for stay of the orders of the court, which it has now abandoned to pursue this P.O. He argues that this is an attempt by the 1<sup>st</sup> Respondent to set aside orders of this court through the back door.

11. Mr. Makali argues that Section 74 of the Labour Relations Act requires that a matter is referred to court under certificate of urgency if it relates to redundancy. It is his position that Section 62 is not a mandatory provision as it is not capped in mandatory terms.

12. Mr. Makali further argues that Section 69 provides a time frame within which to resolve disputes, and where the dispute is not resolved, a party is free to move the court. He asserts that Section 54 of the Labour Relations Act that the Claimant has relied on, does not apply to this suit. It is his position that the Section only applies to recognition of trade unions for purposes only, of Collective Bargaining.

13. It is Mr. Makali's further submission that Rule 6 of the Industrial Court (Procedure) Rules, 2010, does not exist as what is in force, are the Employment and Labour Relations Court (Procedure) Rules, 2016.

14. The Claimant concludes by urging that the 1<sup>st</sup> Respondent has thrown out the opportunity given to it to effect proper redundancy notices and hence the Preliminary Objection should be struck out with costs.

15. Mr. Abande Counsel for the 2<sup>nd</sup> Respondent opposed the P.O and argued that it does not qualify as a P.O, for reason that the issues raised therein, require facts for purposes of approval.

16. Mr. Abande argues that a Preliminary Objection is a pure point of law, which if upheld, has the desired effect of discontinuing the entire suit. It is his position that questions as to whether there was a recognition agreement and conciliation, are issues of facts that can only be determined by the court upon hearing the case on merit.

17. It is Mr. Abande argument that the matter should be heard and determined by the court on merit. He further argues that the issues subject of the P.O, are issues of procedure and only the court can determine whether or not procedures were followed. He prays that the preliminary Objection be dismissed with costs.

#### **Determination**

18. The legal position regarding Preliminary Objections was well laid down in the case of *Mukisa Biscuit Manufacturing Co. Ltd –vs West End Distributors Ltd (1969) EA 696*, where the court held 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... a Preliminary Objection is in the nature of what used to be a demurrer. 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.”**

19. Counsel for the 1<sup>st</sup> Respondent's first issue with this suit, is that it is not properly before this court, for reason that there does not exist a relationship between the 1<sup>st</sup> Respondent and the Claimant. The question for the court, is whether this is an issue of law that can exhaustively be determined without hearing the case on merit. The straight answer is no. This is a factual issue and which can only be determined through hearing the matter on merit.

20. The second issue the 1<sup>st</sup> Respondent raises, is the issue of exhaustion of the existing dispute resolution mechanisms provided under Section 62 of the Labour Relations Act, 2007, before seeking redress from the court. Section 62 provides:

**“(1) A trade dispute may (emphasis mine) be reported to the Minister in the prescribed form and manner—**

**a. by or on behalf of a trade union, employer or employers' organisation that is a party to the dispute; and.....**

**(4) If the issue in dispute concerns the redundancy of one or more employees, a trade union may report a trade dispute to the Minister at any stage after the employer has given notice of its intention to terminate the employment of any employee on grounds of redundancy.**

21. The provision of this Section as submitted by Counsel for the Claimant, is not a mandatory requirement prior to instituting suit before court. The provision cited does not render a suit incompetent for reason only, that the dispute was not conciliated.

22. The other provisions subject of the preliminary Objection are sections 74, 54, and 69. Section 74 of the Labour Relations Act, 2007. They provide as follows:

**“Section 74**

A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns—

(a) the recognition of a trade union in accordance with section 62; or (b) a redundancy where—

(i) the trade union has already referred the dispute for conciliation under section 62(4); or

(ii) the employer

Section 54:

**“(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.,,,”**

Section 69

**“A trade dispute is deemed to be unresolved after conciliation if the—**

**(a) conciliator issues a certificate that the dispute has not been resolved by conciliation; or**

**(b) thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires.”**

23. None of these provisions in my view support the position taken by the Counsel for the 1<sup>st</sup> Respondent. The issues raised are all issues of fact which do not meet the threshold set in the case of *Mukisa Biscuit Manufacturing Co. Ltd –vs West End Distributors Ltd (1969) EA 696* to justify the striking out of this suit.

24. The upshot is that the Notice of Preliminary Objection dated 15<sup>th</sup> November, 2021, is without merit and is hereby dismissed.

25. The costs of the application shall be in the cause.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 31<sup>ST</sup>**

**DAY OF JANUARY, 2022**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Makali Present for the Claimant

N/A for the 1<sup>st</sup> Respondent

Mr. Abande present for the 2<sup>nd</sup> Respondent

Ms. Christine Omollo-C/A