



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.E014 OF 2021

(Before D.K.N.Marete)

KENYA UNION PRE-PRIMARY EDUCATION TEACHERS.....CLAIMANT

VERSUS

SECRETARY, KIRINYAGA COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

CHIEF OFFICER, DEPARTMENT OF EDUCATION,

KIRINYAGA COUNTY GOVERNMENT.....2ND RESPONDENT

COUNTY SECRETARY, KIRINYAGA COUNTY GOVERNMENT.....3RD RESPONDENT

RULING

This is an application by way of Preliminary Objection dated 21st June, 2021. It comes out as follows;

- 1. The 3rd Respondent does not have any recognition agreement with the Claimant.*
- 2. The Claimant has not reported the instant dispute to the Cabinet Secretary in charge of Trade as required under Section 62 of the Labour Relations Act.*

The Respondents/Objectors in their written submissions dated 19th July, 2021 submit a case of lack of jurisdiction on this court to hear and determine this matter. This is on the ground that the claimant has a *locus standi* to deal on the subject for her members for lack of a Recognition Agreement with the Respondents.

The Respondents on this seek to rely on the provisions of Section 54 of the Labour Relations Act which provides 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.*

She further seeks to rely on the authorities of **Kenya Union of Employees of Voluntary and Charitable Organisations (KUEVACO) V Board of Governors & Maina Wanjigi Secondary School (2015) eKLR**, where it was held thus;

“Without Recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organisation, such a trade union without Recognition cannot file a trade dispute within the meaning of

the Labour Relations Act. The starting point would be to apply the provisions of sections 54 (3) and (6) for such a union to have the locus standi in dealing with trade disputes, Recognition agreements or any negotiations for and on behalf of members and their employers.”

Further, the Objector seeks to rely on the authority of **Communication workers’ Union versus Safaricom Limited (2014) eKLR**, where the court held thus;

“The question here with regard to locus standi is that the Claimant union has no recognition with the Respondent and wven where such recognition is lacking; there is no CBA between the parties to regulate terms and conditions of work. Without recognition by an employer, a trade union, even where registered as such, becomes a bystander waiting by the roadside for instructions. Similar to a lawyer, though having a first class honours lacks a certificate of practice as an advocate of the High Court of Kenya. Such a lawyer though well versed in law and well suited to give legal advice to various citizens lacks capacity to stand in court as an advocate representing a client.”

Again, in **Kenya Shoe & Workers Union vs Modern Soap Factory Ltd, Mombasa ELRC Cause No.241 of 2017**, where Makau J held as follows;

“I agree with Mbaru J’s opinion in the Communication Workers Union case, that without recognition by an employer, a trade union, even where it is registered to represent workers in a sector, remains a bystander to the disputes between the workers and their employers. However, if the workers are members of the union, the union can only assist them in disputes just as a lawyer does without substituting the litigants names from the pleadings.”

The Claimant/Respondent in written submission dated 8th July, 2021 submits on a case of conflicting decisions on the subject by this court.

In all, the Claimant/Respondent submits that the preliminary objection does not raise pure points of law and raises issue which would require evidence to establish and therefore fails.

Section 54(1) of the Labour Relations Act provides thus;

1. *“An employer, including an employee in the public sector, shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionizable employees.”*

Section 54 (2) provides;

2. *“A group of employers, or an employers’ organization, including an organisation 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 unionizable employees employed by the group of employers or the employers who are members of the employer’s organization within a sector.*

Further, she seeks to rely in the authority of **Modern Soap Factor vs Kenya Shoe and Leather workers union (Civil Appeal No.37 of 2019)**, where the court held thus;

17. *“We can see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact.....it is not a matter that is amenable for determination on the basis of a preliminary objection.”*

15. *“Based on the foregoing, there are conflicting positions taken by the ELRC on the question under consideration.”*

In our judgment, we can see no reason why a registered union, whose constitution so empowers, should not have standing to institute a claim on behalf of its members and to represent its members in court.

On the premises of the submission of the Court of Appeal decision on this subject, coupled with duplicity of the thinking of this court on the subject, I buy the claimants/Respondents case on the preliminary objection. It is sustainable, the quest for justice, and not the letter of the law suffices to cement a case against the preliminary objection.

This is not so. The submissions by the Claimant/Respondent do not hold. This is because a Recognition Agreement is primal in any relationship between an employer and a union. This is not the case here.

I am therefore inclined to allow the preliminary objection with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2022.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Samuel Opiyo for the Union/Respondent

2. Barasa instructed by V.A Nyamondi & Company Advocates for the Objector.