



Kenya Hotels and Allied Workers Union & 22 others v Kentmere (1986) Limited t/a The Kentmere Club (Cause 1588 of 2015) [2022] KEELRC 1092 (KLR) (6 May 2022) (Ruling)

Neutral citation: [2022] KEELRC 1092 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1588 OF 2015
MA ONYANGO, J
MAY 6, 2022**

BETWEEN

KENYA HOTELS AND ALLIED WORKERS UNION CLAIMANT

AND

GERALD NGIGE NG'ANG'A 1ST PROPOSED CLAIMANT
SARAH MUCHIRA 2ND PROPOSED CLAIMANT
SIMON NJEHU 3RD PROPOSED CLAIMANT
GRACE NJERI KIMANI 4TH PROPOSED CLAIMANT
JOHN MACHARIA 5TH PROPOSED CLAIMANT
WINNIE NJERI 6TH PROPOSED CLAIMANT
ISAAC HUSSEIN 7TH PROPOSED CLAIMANT
BONFACE KIOKO 8TH PROPOSED CLAIMANT
JULIUS DINO 9TH PROPOSED CLAIMANT
MICHAEL MBUGUA KARIUKI 10TH PROPOSED CLAIMANT
JOSEPH NGA'ANG'A 11TH PROPOSED CLAIMANT
AGNES MURINGO 12TH PROPOSED CLAIMANT
DAMARIS NDUATI 13TH PROPOSED CLAIMANT
SILVANUSAKENGA 14TH PROPOSED CLAIMANT
HARUN GODANA 15TH PROPOSED CLAIMANT
STANISLAUS NGATHIKE 16TH PROPOSED CLAIMANT
SAMUEL MWANGI KARIUKI 17TH PROPOSED CLAIMANT



GERALD WAWERU 18TH PROPOSED CLAIMANT
ROSE WAITHERA 19TH PROPOSED CLAIMANT
BENJAMIN MURIMA 20TH PROPOSED CLAIMANT
FRANCIS MUTHONDU 21ST PROPOSED CLAIMANT
KIMANZI NGULI 22ND PROPOSED CLAIMANT

AND

KENTMERE (1986) LIMITED T/A THE KENTMERE CLUB APPLICANT

RULING

1. The application before me for determination is dated 18th November 2021 and seeks the following orders:
 - i. Spent.
 - ii. The firm of Akolo Wanyanga & Company Advocates be allowed to come on record for the grievants.
 - iii. That the grievants be made parties to this Claim
 - iv. That the payment in regard to the mediation settlement herein be stayed pending the hearing and determination of this application.
 - v. That the amount agreed as per the Mediation Settlement be paid to the firm of Akolo Wanyanga & Company Advocates.
 - vi. That the costs of this application be provided.
2. The grounds on the face of the application in support thereof are that the “Claimants” (sic) would like to withdraw instructions given to the “Claimant” herein to represent them in this claim and that under Article 22(2) of *the Constitution* of Kenya every person has a right to choose the person to represent him in court at any point in the proceedings. Further, that the “Claimants” have lost confidence in the Claimant Union.
3. In the affidavit in support of the application sworn by Francis Muthondu he states that he is one of the Applicants and has been given authority by the other Applicant to swear the affidavit on their behalf in his capacity as Chairman of the Works Committee of the workers who used to work at Kentmere.
4. He states that they have lost confidence in the Claimant as there are reports that the Claimant does not pay grievants what the courts have awarded. That they are afraid that their money will not be safe in the hands of the Claimant Union herein.
5. The Claimant opposes the application through its written submissions.
6. The application was disposed of by way of written submissions. In the Applicants’ submissions the applicants submit that should the prayers sought in this application not be granted the fundamental rights of the Applicants under the Bill of Rights will be violated. The Applicants rely on Article 159(2) of *the Constitution* of Kenya which provides:



- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - a. Justice shall be done to all, irrespective of status;
 - b. Justice shall not be delayed;
 - c. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - d. Justice shall be administered without undue regard to procedural technicalities; and
 - e. The purpose and principles of this constitution shall be protected and promoted.
7. The Applicants further rely on Article 22(1) and (2) of *the Constitution* which provides:
 1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.
8. The Applicants further rely on Article 21 of *the Constitution* and submit that it is the duty of the court to protect the rights of the applicants to be enjoined as parties to this claim and have the Court direct where the funds already agreed upon shall be paid.
9. Citing Article 41 of *the Constitution* and Section 4 of the *Labour Relations Act* which provide for the right of an employee to join a trade union and participate in the activities of the trade union, the Applicants submit that the employees also have a right to exit the membership of a Union.
10. For the Claimant (Union) it is submitted that the Applicants have not come to court with clean hands and do not deserve the equitable orders sought. The Claimant relies on the decision of Mutende J. in *Francis Munyoki Kilonzo & Another v. Vincent Mutua Mutiso* [2013] eKLR where she stated:

“An applicant seeking such orders must come to court with clean hands. The maxim of equity on the principle of equity is expressed as follows-

"No one is entitled to the aid of a court of equity when that deed has become necessary through his or her own fault...a court of equity shall not assist a person in extricating himself or herself from extricating himself or herself from the circumstances that he or she has created..."
11. The Claimant refers to notices of appointment filed without instructions by the Claimant and an irregular and illegal consent entered into between the firm and one John Simiyu a former officer of the Claimant without authorisation.
12. The Claimant further submits that the said firm further wrote to the firm of Ruiru Njoroge & Associates on record for the Respondent asking to be paid the mediation settlement of Kshs.3 million,



having full knowledge that the Union has never made a resolution appointing the firm to represent it in this matter.

13. It is the submission of the Claimant that such order for joinder can only be made during the pendency of proceedings. That the instant application was made after the court became functus officio.
14. For emphasis the Claimant relies on the decision in *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR which case was cited by Achode J in the other case of *In Re Estate of Kinuthia Mabuti (Deceased)* [2018] eKLR where Githinji, Karanja & Kiage JJA observed as follows: - "...Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century..."
15. The Claimant further submits that on the 15th November, 2021, parties to this suit appeared before the Court and adopted the mediation agreement dated the 29th April, 2021 as an order of the Court as between the Claimant Union and the Respondent. That having adopted the said consent as an order of the Court, the Court thus became functus officio.
16. It is the Claimant's submission that the instant application is an attempt by the Proposed Claimants to have this Court sit on its own Judgment. That there must be finality in litigation. The Claimant submits that the principle of finality was addressed in the case of *Jersey Evening Post Limited v Al Thani* (2002) JLR 542 at 550 which case was cited with approval by the Supreme Court in *Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR where it was held: -

"...A court is functus officio when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available..."

17. The Claimant submits that one, John Simiyu, a former official of the Union who lost at the last Union elections held on 29th June 2021 and who was aggrieved by his loss, caused the filing of the instant application.
18. The Claimant submits that the order of joinder is untenable as judgment has already been entered in this suit. For emphasis the Claimant relies on the decision in *JMK v MWW & Another* [2015] eKLR where the Court held:

"Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the



suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties."

This Court adopted the same approach in *Central Kenya Ltd. v. Trust Bank & 4 Others*, CANo.222 of 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

"All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in *Tang Gas Distributors Ltd V. Said & Others* [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage."

19. With reference to the allegations made in respect of the integrity of the Claimant, the Claimant submits that the allegations have not been proved. It is submitted that *Kenya Hotels and Allied Workers Union v Well-Come Inn Hotels T/A Malindi Investments Ltd & Another* [2015] eKLR has been fully settled while Case No. Kisumu ELRC 35 of 2019 *Kenya Hotels and Allied Workers Union & another v Mayfair Holdings Ltd (Imperial Hotel)* is pending before court and is subject to the principle of sub judice thus not subject to discussion herein.
20. The Claimant also takes issue with the affidavit of Francis Muthundu. It submits that Order 1 Rule 13 of the *Civil Procedure Act* provides for the manner in which one party may be authorised by others to act on their behalf. That Francis Muthundu makes reference to a letter of authority at paragraph 2 of the supporting affidavit which is irregular. For emphasis the Claimant cites the case of *Abdulla Absbir & 38 others v Yasmin Farah Mohamed* [2015] eKLR where the Court held:

"From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving the authority, must be filed in the proceeding."
21. The Claimant prays that the application be dismissed.



Analysis and Determination

22. Having considered the pleadings and submissions of the parties, the issues of determination are:
 - i. Whether the firm of Akolo Wanyanga & Co. Advocates should be granted leave to come on record for the Applicants; and
 - ii. Whether the Applicants' application for joinder is merited.
23. The suit herein was filed by the Claimant Union under authority of Section 62 of the [Labour Relations Act](#) which sets out the persons who are authorised to file suit on behalf of a trade union. The Act specifically provides that only authorised representatives of a trade union can file a dispute on its behalf. The instant dispute was reported to the Minister under Section 62 of the Act and was only filed in this Court after the parties failed to agree on the findings and recommendations of the conciliator appointed by the Minister.
24. The Claimant in this suit is therefore the Union.
25. The claim was prosecuted by Mr. John Simiyu in his capacity as the 2nd Deputy Secretary General of the Claimant Union. He filed together with the claim, an extract of the Register of Trade Unions verifying this fact. He further filed an extract of the union constitution setting out the duties of the 2nd Deputy Secretary General which include legal functions of the union. It is in this capacity that he prosecuted this claim on behalf of the Claimants.
26. For an advocate to come on record for the Claimant, the Advocate must be engaged by the Claimant before he can apply to court to come on record for the Claimant. Judgment in this suit having been entered for the Claimant by adoption of a mediation settlement on 15th November 2021 before the instant application was filed, no change of advocates can be effected without an order of Court.
27. The Claimant has through the replying affidavit informed the court that its board has not passed a resolution to engage the applicant law firm. In the application the counsel seeks leave to come on record for the Grievants. The Grievants are not parties to this suit. They are only beneficiaries of the judgment. A Claimant cannot be compelled to engage counsel without its consent.
28. Counsel cannot seek leave of the court to come on record for a person who is not a party to the suit.

Joinder of the Grievants as parties to the suit

29. The Applicants seek the joinder of the Grievants as parties to this suit.
30. Order 1 Rule 10(2) of the Civil Procedure Rules provides as follows:
 - (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
31. In the instant case judgment has been entered for the Claimant and what remains is the disbursement of the decretal sum by the Respondent for distribution to the grievants. For the Court to order joinder of the grievants, the Applicants ought to demonstrate that the joinder of the Grievants is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in this suit.



32. In *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR, in declining to enjoin a party the Supreme Court stated:
- “The applicant has not demonstrated how the ends of justice would better be served by enjoining it...”
33. In this case judgment has already been entered against the Respondent in favour of the Claimant for the benefit of the Grievants. All that remains is the release of the decretal sum.
34. The Applicants have not demonstrated how their joinder would change anything as the court has not been called upon to reopen the suit and make any further determination in respect of the decretal sum.
35. The Applicants have not demonstrated that the Claimant who is represented by counsel, will not be in a position to distribute the decretal sum to the Grievants.
36. A letter from an advocate alleging non-payment of monies received by the Claimant on behalf of Grievants in another suit is hardly evidence to prove that the Claimant did not pay the money without other substantive evidence such as an affidavit of one of the beneficiaries attesting to the truth of the allegations.
37. From the foregoing, I find that the Applicants have not persuaded the Court that they are entitled to any of the orders sought. The result is that the application dated 18th November 2021 fails and is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

