



**Mbatha & another v Jambojet Limited (Cause E711 of 2021)
[2022] KEELRC 12719 (KLR) (6 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12719 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E711 OF 2021**

M MBARÚ, J

JUNE 6, 2022

BETWEEN

BETTERY MUNANIE MBATHA 1ST CLAIMANT

KENYA AIRLINE PILOTS ASSOCIATION 2ND CLAIMANT

AND

JAMBOJET LIMITED RESPONDENT

RULING

1. The respondent filed application dated February 11, 2022 on the provisions of section 54 of the *Labour Relations Act* (LRA), section 12 of the *Employment and Labour Relations Court Act*, rule 14(5) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and seeking for orders that the court be pleased to dismiss the claim by the 2nd claimant against the respondent and to strike out the 2nd claimant as a party in these proceedings.
2. The application is made on the grounds that the claimant is seeking compensation for alleged unlawful and unfair termination of the 1st claimant's employment on account of redundancy and the is no employer and trade union relationship between the respondent and the 2nd claimant. The respondent as not entered a recognition agreement with the 2nd claimant and then lacks *locus standi* to represent the 1st claimant and to be party herein is in abuse of court process. The application has no supporting affidavit.
3. In reply, the claimant filed the replying affidavit of Captain Murithi Nyagah the General Secretary of the 2nd respondent and the application by the respondent is scandalous and in abuse of court process.
4. The 2nd claimant is a registered trade union with capacity in its own name to sue and be sued in any proceedings before court. The claimant is a duly paid up member of the 2nd respondent.



5. The Constitution, 2010 enlarged the scope of *locus standi* under article 22 and 258 of the Constitution to have every person, whether corporate or non-governmental to move the court contesting any contravention of the Bill of Rights. Any association acting in the interest of one or more person of its members may institute proceedings where the Constitution is contravened.
6. Captain Nyagah also avers that pursuant to articles 22 and 258 of the Constitution, the 2nd claimant does not lose its standing before court even in the absence of a recognition agreement with the respondent. Section 54 of the Labour Relations Act, 2007 (LRA) creates no nexus between recognition between a trade union and an employer and the legal representation of employees in court by a trade union is lawful. The 2nd claimant has proper standing in these proceedings.

Both parties attended and made oral submissions.

Determination

7. The application by the respondent is premised on the provisions of section 54 of the LRA, section 12 of the Employment and Labour Relations Court Act, and Rule 14(5) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (the Court Rules)
8. Section 54 of the LRA provides for the threshold for recognition of a trade union upon recruitment of a simple majority of members in the employment of the subject employer and taking into account the sector in which the employer operates.
9. In the case of Kenya Petroleum Oil Workers Union v Kenol Mahavir Service Station & Another [2017] eKLR, the court held that upon recognition, a trade union then gets the legal mandate of negotiating a Collective Agreement (CBA) on term and conditions of employment for unionisable employees with the subject employer, group of employers or an association or federation of employers. That is the sole purpose of recognition. See Kenya Union of Commercial, Food and Allied Workers v House Mart Limited [2021] eKLR.
10. Rule 14 of the Court Rules on the other hand regulates pleadings generally and more specifically, rule 14(5) regulates the nature of pleadings filed and where a party may raise objection(s) to a pleading(s) stating the grounds thereof;
 - (5) A party may, by notice, object to a pleading stating grounds of objection except that no objection may be raised to any pleading on the ground of any want of form.
11. The respondent opted to file a notice of motion and not a notice of objection. A notice of motion is regulated under rule 17 (8) and (9) which requires that such a motion must state the grounds thereto and an affidavit in support thereto. On the facts outlined, a respondent is directed to respond through a replying affidavit.
 - (8) A notice of motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the notice of motion and a copy of the affidavit shall be served on the other party.
 - (9) A party may respond to an application by filing grounds of opposition verified by an affidavit.
12. The motion filed does not conform to the Rules save the reliance on rule 14(5) and the gist of it, such is not fatal.



13. The 2nd claimant brings out the matter of application of article 22 and 258(1) of the [Constitution, 2010](#) as the main reason for joinder in these pleadings. Whereas a party is well allowed to commence proceedings in court for the protection of the Bill of Rights, article 22 and 258 may be invoked by the aggrieved party on its own interest, by a person acting on behalf of another person, on behalf of a class of people, in public interest or by an association acting on behalf of its member or members. The elements of acting on behalf of another person who cannot act in their own name must exist or that such party is a member or as a member of, or that the suit is filed in the interest of a group or class of persons, or in the public interest.
14. These parameters assist the court in sifting the so called busy bodies from litigants who have valid concerns and which ought to be heard on the merits as held in [Leonard Getboi Kamweti v Law Society of Kenya Disciplinary Tribunal & another \[2014\] eKLR](#), that;

"... It is for this reason that I think courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest. ..."
15. The Court of Appeal in [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others \(2013\) eKLR](#) in addressing the question of standing and who can file a suit held that;

"...this court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. ..."
16. Today, by dint of articles 22 and 258 of the [Constitution](#), any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. ... *any person other than a person whose right or fundamental freedom under the [Constitution](#) is allegedly denied, violated in infringed or threatened has a right of standing and can institute proceedings as envisaged under Article 22(2) and 258 of the [Constitution](#)...*
17. The motions and benefits of article 22 and 258(1) of the [Constitution, 2010](#) are therefore available to a party who acts on behalf of another person who cannot act in their own name, or as a member of, or in the interests of a group or class of persons or in the public interest.
18. In the memorandum of claim herein, the orders sought are a declaration that the termination of the 1st claimant's employment on account of purported redundancy is unfair, that termination of the 2nd claimant's members on account of redundancy was unfair and unlawful, the respondent violated the claimants' rights to fair labour practices and fair administrative action in terms of article 41 and 47 of the [Constitution](#), compensation of the 1st claimant at 12 months and payment of terminal dues.
19. The nexus between the 1st and 2nd claimants is that the 1st claimant is a paid up member of the 2nd claimant and the 2nd claimant represents the sector within which the respondent operates as a trade union.



20. Typically then, the 2nd claimant ought and should have filed the instant claim on its own name for and on behalf of its member(s) with the 1st claimant being the grievant. Whereas paragraph 9 of the memorandum of claim outline the measure taken or failed to be taken by the respondent during the challenged redundancy, matters would have been crystal clear with the 2nd claimant being the party urging the instant claim for and on behalf of its members and the 1st claimant as its member.
21. The want of form is however not fatal. A claimant under the *Employment and Labour Relations Court Act*, 2011 and the *Court Rules* is one who has filed a claim with the court with an outline of the issue(s) in dispute and the respondent is then served for a response and upon which the court must hear the matter on the merits.
22. The joinder of the 2nd claimant in these proceedings is proper.
23. There are specific prayers/orders the 2nd claimant is seeking for and on behalf of the members it represents and the non-recognition by the respondent cannot deny the 2nd claimant members the right to join and be associated with the 2nd claimant.
24. Accordingly, application dated February 11, 2022 and the objection to pleadings addressed is found without merit and is hereby dismissed. Parties shall close pleadings within the next 30 days and secure a hearing date at the registry. Costs shall abide the outcome of the case.

DELIVERED IN COURT AT NAIROBI THIS 6TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

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