



**Workers Union & another v Sarova Hotels Limited (Cause E017 of 2020)
[2022] KEELRC 4167 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4167 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E017 OF 2020
HS WASILWA, J
SEPTEMBER 27, 2022**

BETWEEN

KENYA HOTELS & ALLIED WORKERS UNION CLAIMANT

AND

MICHAEL ARUM OWUOR PROPOSED CLAIMANT

AND

SAROVA HOTELS LIMITED RESPONDENT

RULING

1. Before this court for determination is the proposed claimant's application dated December 21, 2021, brought pursuant to rule 28(g) of the *Employment and Labour Relations Court (procedure) Rules*, section 4(1)(c) of the *Labour Relations Act*, article 22(3)(d), 41, 47(1) and 159(2)(d)(e) of the *Constitution* of Kenya and all other enabling provisions of the law seeking for orders that;
 - a. The firm of Akolo Wanyanga & Company advocates be allowed to come on record for the grievant in place of Kenya Hotel and Allied Workers Union.
 - b. That the grievant be made party to this claim and or the name of Kenya Hotel & Allied Workers Union be removed from the pleadings.
 - c. That the costs of this application be provided.
2. The application is supported by the ground on the face of the application and the supporting affidavit of Michael Arum Owuor, the grievant & the proposed claimant, which was sworn on the December 21, 2021.
3. The basis upon which the application is made is that the grievant is empowered under article 22(2) of the *Constitution* to choose any person to represent him in court at any time of the pleadings, as such



- that he has withdrawn instruction from his union and instead wishes the firm of Akolo Wanyanga to represent him in this case.
4. The application is opposed by the union, who filed a replying affidavit deposed upon on the June 22, 2022 by Sava Wycliffe Mundu, the Secretary General of the union.
 5. According to the respondent the application is frivolous, vexatious and an abuse of court process as it has not given any justifiable reasons for seeking the orders in the application.
 6. It is stated that the issues in this claim arose out of unfair termination of the applicant from the respondent's employment. Subsequently, they were given instruction by the grievant to refer the matter to the Ministry of Labour in accordance with section 62 of the [Labour Relations Act](#).
 7. He states that the issues were not amicably resolved leading to the filing of this suit in 2020, which case the union, through its secretary general has been in conduct of. He stated that the grievant has never approached the union seeking to withdraw instruction given to it and that they were surprised of the applicant's move as they learnt of it when they were served with hearing notice of the application herein.
 8. It is contended that the move by the applicant is ill advised as the same was instigated by John Simiyu, the former Deputy Secretary General of the claimant, who lost the position following the election carried out on the June 9, 2021.
 9. He states that, it is the said John Simiyu who has been handling the union file on this cause and upon losing the said seat moved with some of the files and unilaterally and illegally instructed the firm of Akolo Wanyanga and Company advocates to take over, though the move was guised as to originate from the applicant.
 10. The claimant took issue with the hearing notice served upon them, which indicated that was drawn by the said firm when no instructed had legally be granted to the firm of Akolo Wanyanga.
 11. He contends that the applicant, having been a unionisable employee under the claimant's union, does not have *locus standi* to bring the joinder application herein. He added that the applicant is bound by the provisions of section 59(2) of the [Labour Relations Act](#).
 12. It is the respondents' stand that if the applicant wished to bring this suit in his own name, then he should file a new suit and officially withdraw instruction given to the claimant and not seek to remove from the pleadings.
 13. The respondent states that it has incurred costs from taking instruction, taking it up with the conciliator and filling of this suit up to this stage as such prays for to be refunded the costs incurred.
 14. In response to the replying affidavit, the applicant filed a supplementary affidavit sworn on the July 12, 2022, indicating that he officially withdrew his instruction from the union by a letter dated June 20, 2022. He maintained that he cannot be forced to continue being represented by the union, when he no longer wants.
 15. The application was canvassed by way of written submissions with the applicant filing on the July 15, 2022 and the respondent on the July 20, 2022.

Applicant's Submissions.

16. The applicant submitted that his right to choose a representative of his choice to represent him in court is provided for under article 50(2)(g) of the [Constitution](#). On that basis, he argued that he withdrew his instruction from the union in December, 2021 and formally did a letter of withdrawing



his instruction from the union on June 20, 2022 and instructed the firm of Akolo Wanyanga and Company advocates to take over the matter. He argued that the same law that give the union power to represent employees, grants employees leeway to withdraw such instructions when their interests are not adequately represented.

17. On the implication of withdrawing the suit and filling a fresh suit, the applicant submitted that the move will lead to unnecessary costs that he will be forced to shoulder, when he has been out of employment since 2019. He prayed for the application to be allowed as prayed.

Respondent's Submissions.

18. The union submitted on one issue; whether the applicant is entitled to the orders sought. It was argued that the applicant had given them instruction to institute this suit, which they did in accordance to the law and the claimant was at all material time informed or was part of the case herein, infact that he is the sole witness in the case as such was able to follow up on his interest. Therefore, that the application seeking to bring a firm of advocate in their place is an afterthought.
19. It is the respondent's submissions that the applicant has approached this court with unclean hands by alleging that he had withdrawn instructions from the union, when the respondent learnt of the appointment of the firm of Akolo Wanyanga advocates in the hearing notice of this application. In support of their case they relied on the case of *Francis Munyoki Kilonzo and another V Vincent Mutua Mutiso* [2013] eklr.
20. The respondent submitted that it has incurred a lot of costs in taking the applicant's case before the conciliator and on instituting this suit and following it up till this level, which they have not been reimbursed by the applicant.
21. The respondent, in conclusion, urged this court to dismiss the application with costs for lacking merit.
22. I have examined all the averments and submissions of the parties herein. It is true that the grievant was a member of the claimant union and by evidence of his supplementary affidavit, he withdrew instructions from the union by a letter dated June 20, 2022.
23. Article 50 (2) (g) of the *Constitution* indicates as follows;-
(g) "to choose, and be represented by, an advocate, and to be informed of this right promptly;"
24. By virtue of this unalienable right, the grievant is enforced by law to choose who to represent him before court. This right cannot be denied to him.
25. The grievant having chosen to withdraw instructions from the Union, he cannot be compelled by this court to continue to be represented by the union.
26. It is therefore my finding that the application filed has merit and is therefore allowed.
27. The grievant is made party to this claim and or the name of Kenya Hotel & Allied Workers Union is removed from the pleadings.
28. The firm of Akolo Wanyanga & Company advocates is allowed to come on record for the grievant (now claimant) accordingly.
29. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA



JUDGE

In the presence of:-

Wanyanga holding brief for Arum for Applicant – present

Mwaura holding brief for Ombati for Respondent – present

Court Assistant – Fred

