



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Shipping, Clearing, Freight Logistics & Warehousing Workers  
Union v Vegpro Kenya Limited (Employment and Labour Relations Cause  
1415 of 2018) [2022] KEELRC 12886 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12886 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1415 OF 2018  
AN MWAURE, J  
OCTOBER 6, 2022**

**BETWEEN**

**KENYA SHIPPING, CLEARING, FREIGHT LOGISTICS & WAREHOUSING  
WORKERS UNION ..... CLAIMANT**

**AND**

**VEGPRO KENYA LIMITED ..... RESPONDENT**

**RULING**

1. This application is filed by the respondent and is dated November 12, 2018. The grounds raised therein are as follows and against the statement of claim dated October 1, 2018 and is as follows:
  - i. That this honorable court lacks jurisdiction to entertain this application and the claim under section 46 of the *Retirement Benefits Act*, no 3 of 1997.
  - ii. That the application and statement of claim are in breach of section 54(1), (2) & (3) of *Labour Relations Act*, 2007.
  - iii. That the application and statement of claim as drawn and filed are in contravention of section 57(1) and 59 of the *Labour Relations Act*, 2007
  - iv. That the application and statement of claim are in breach of section 31(2) of *Labour Relations Act*, 2007.
  - v. That the application and statement of claim is sub judice as the applicant/claimant has cause no 2018 of 2016 and cause no 963 of 2017, still pending before the honourable court raising similar issues.
  - vi. That the applicant is a union not known to the respondent in terms of the *Labour Relations Act*, 2007



## Respondent's written submissions

2. The Respondent in their submission states that as held in the case of *Mukhisa Biscuits Manufacturing Company Limited vs West End Distribution Limited [1969] EA 696* it was held that the soundness of a preliminary objection does not depend on the discretion of the court or production of evidence. It should raise a point of law that can be determined without making inquiry. They submit that as held in *John Mugo Gachuki vs new Nyamakima Co Ltd [2012] eKLR* a preliminary objection consists on a point of law which arises from pleadings and is capable of disposing of the suit. The same includes pleas on the jurisdiction of the court or a plea of limitation or where there is proviso to refer suit to arbitration proceedings.
3. The respondent in this preliminary objection leans on section 54 of *Labour Relations Act* 2007. Section 54 of the said Act provides an employer including an employer in the public sector shall recognize a trade union for purposes of collective bargain if that trade union represents the simple majority of unionisable employees.
4. The respondent further provide that section 87 of *Employment Act* 2007 clothe the court with jurisdiction to handle disputes between the employer and the employee. The Respondent relies on *Samwel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others [2012] eKLR* which provides that a jurisdiction of a court can only be provided by the *Constitution* or any other written law.
5. The respondent have also submitted that section 46 of the *Retirement Benefits Act* provide that if a person is dissatisfied with a decision of a manager, administrator, custodian or trustee of a scheme he may request in writing such decision be reviewed by the chief executive officer. If there is an appeal of the decision of the chief executive officer it will be to the tribunal.
6. The respondent averment is that the court lacks jurisdiction to determine this suit by tenets of article 162(2) of the *Constitution* and section 46 of *Labour Relations Act*.
7. The respondent goes further to submit that the applicant lacks locus standi to represent the grievants. The person who purports to represent another must not be a crank or a mischief maker. They rely on section 54 (1) (2) of the *Labour Relations Act* 2007. Respondents avers the applicant lacks locus standi to institute a suit against the grievants as it lacks a recognition agreement as provided in section 54(3) of Labor Relations Act 2007. They refer to the case of *Kenya Union of Employees of Voluntary and Charitable Organizations vs Board of Governors & Maina Wanjigi Secondary School [2014] eKLR* where it was held that 'sufficiency would take the form of recognition of a trade union by the employer so that the trade union may be able to represent the employees that form part of the union should any dispute arise.
8. The respondent further says this case is sub judice as there were two other cases Cause No 2018 of 2016 and 983 of 2017 which had tried similar issues and which have since been finalized. He says the cases have therefore been duplicated.
9. The respondent's submissions are that the present case is frivolous and vexatious and so urges the court to uphold its preliminary objection dated November 12, 2018 with costs to the respondent

## Claimant's submissions

10. The claimant avers in its submissions that it represents respondents unionisable employees and even though it has recruited majority of respondents unionisable members the respondent has not signed the recognition agreement. It says they got the labour officer to write to the respondent to sign the collective bargaining agreement but with no success.



11. The claimant says they made an application dated October 1, 2018 and a memorandum of claim and hence this preliminary objection was raised by the respondent. The respondent prays for striking out of claimant's prayers for lack of jurisdiction and the prayers by the claimants were as follows.
  - i. The respondent to pay redundancy to all employees in the current trade mark of about 100 employees.
  - ii. The respondent to pay sixty (60) employees the two days they worked on 25<sup>th</sup> and October 26, 2017 overtime.
  - iii. The respondent to refund the employee money they paid when they were taken to medical check up in 2017, Kshs 1000/- per employee.
  - iv. The employees to be allowed to elect their trustees to represent them in Kenindia Insurance Scheme.
  - v. The respondent to deposit five (5) million which is not reflecting in the current employee provident fund scheme, Kenindia Insurance.
  - vi. The Respondent to pay the costs of the suit.
12. The main issue for determination is whether there is a valid preliminary objection and whether this court lacks jurisdiction to entertain this application. Relying on the *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (supra) which provides that a preliminary objection must consist on a point of law the claimant avers the preliminary objection in this case is blurred with facts that require court to interrogate the same. They say the points raised are not pure points of law.
13. As for the issue of whether this court has jurisdiction to hear and determine this suit the claimant avers under article 162 of the Constitution of Kenya 2010 the matter in this issue is an employment and labour dispute affecting unionisable employees who are members of the claimant union. The claimant claims that this court has jurisdiction to hear and determine the suit and respondents have not provided how the following issues:
  - (1) Changing the trade mark from veproik to UP Group
  - (2) Whereabouts of Kshs 5 million from provident fund
  - (3) Nonpayment of public holidays 25h to October 26, 2017 will be handled if this court is stripped of its jurisdiction.
14. The claimant submissions is that section 54 of LRA 2007 is for negotiating a collective bargaining agreement but representative accrues by virtue of relationship between an employee and the union in terms of membership.
15. The claimants submissions is that union is registered to represent unionisable employees pursuant to provisions of Labour Relation Act. Article 22(2) (d) of the Constitution of Kenya 2010 gives power to an association to act in the interests of one or more of its members. Section 21(b) of LRA Act provide that a trade union shall be registered with a capacity in its own name to sue and be sued.
16. The case of *Kenya Shoe & Leather Workers Union vs Modern Soap Factory (2018) eKLR* the court held that a trade union has many roles and that section 45(i) of Labour Relations creates no nexus between recognition and representation. The claimant asserts that there is no requirement to a recognition of agreement in order for a union to represent its members. The claimant therefore asserts there is no reason to stop the union from representing its members.



17. The case of sub judice according to the claimant is overtaken by events since cause 2018/2016 has been withdrawn. The claimant says the respondent has referred to cases 983/2018 and 963/2017 and so is just mix up. The claimant says its statement of claim is not an abuse of court process and therefore the respondent's preliminary objection is incompetent and is the one which is an abuse of the court process.

## Decision

18. The respondent prayers are that claimant's application dated October 1, 2018 be struck off for lack of jurisdiction by this honourable court inter alia.
19. The court is reliant on the definition of a preliminary objection. The case of Mukhisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd (1969) E.A 696 a preliminary objection consist of law and such issue of law would dispose the suit. The issue raised by the respondent is that there is no recognition of the claimant's union by the respondent. The claimant says they have tried to get the respondent to sign the agreement an even the labour office has tried to intervene but to no avail. The court is of the view that there is no direct correlation in law between recognition of union and representation. The grievants as per the records in court are members of the union and contribute dues to the union. Article 162(2) of the constitution and section 12 of the Employment and Labour Relations Court Act donate clae jurisdiction to this court on employer and employee disputes and involve disputes involving trade unions. The case of Kenya Shoe & Leather Workers Union vs Modern Soap Factory (supra) make it clear section 45(1) of LR 2007 does not create nexus between recognition and representation. Section 21 of LRA 2007 provide that: A trade union employees organization or federation shall be registered as a body corporate with capacity in its own name to sue and be sued. It does not specify that it must be recognized by the employer in order to represent its members. In the above case of Kenya Shoe & leather Workers Union (supra) recognition is not the basis which the trade union represents its members in court.
20. As to whether the union has members employed by the respondent company the Court of Appeal in the case of Kenya union of Domestic Hotels & Educational Institutions and Hospital Workers vs Baibong Cheng (2021) eKLR held that this is an issue of fact to be determined at trial and not as a preliminary objection.
21. The court finds there is nothing that stops the union from representing its members in a court of law under the circumstances.
22. The court also finds according to section 54 of LRA 2007 representation accrues by virtue of a relationship between an employee and the union in terms of membership.
23. The respondent also provide that claim is filed in contravention of Retirement Benefits Act Section 46. The court finds no direct relationship of provident fund and accounting to the same and Retirement Benefits Act. The accounting of provident funds can be heard by this court as it refers to the rights of the employees and so is well suited under section 12 of Employment and Labour Relations Court Act.
24. All the other matters raised by the respondents as refers to the claim being filed under section 57 and 59 of Labour Relations Act does not strip the court of jurisdiction to hear this claim. Actually section 57 provides that a collective bargaining agreement with a recognized union sets out terms and conditions of service for unionisable employees covered by recognition agreement. Then section 59 of LRA provide terms of CBA and the parties but again does not preclude a union from representing its members.



25. Similarly the breach claimed under section 31(2) of LRA is also not a matter of law and can only be dealt with via presentation in court. All in all even the issues raised of the other referenced suits 2018/2016 and 963/2017 are not a matter of law because these suits should be presented in court and submissions presented to convince the court they handled similar issues as ones raised hereto and so render the matter sub judice.
26. All in all I find the preliminary objection raised by the respondent fails to prove point of law that justify the court to strike out the statement of claim which deals on matters of employment and not issue of collective bargaining agreement. I find the respondent has failed to prove the merits of its preliminary objection dated November 12, 2018 and so is dismissed with costs to the claimant.
27. Equally the preliminary objection raised by the interested party Kenya Union of Commercial Food and Allied Workers dated March 25, 2019 alleging claimant lacks locus standi and sufficient interest in this claim against the respondent for want of recognition and collective bargaining agreement will raise no new or different law or issues to justify the court to find otherwise. There is no point of wasting courts time and the parties as well by hearing the preliminary objection again and so the same is also dismissed for the same reasons given hereunder. In this application each party will bear its costs since no submissions were filed by either party.
28. The respondent is hence given 14 days to file a response to the main suit filed on October 1, 2018 and the court would order the case goes for the main hearing since a lot of time has been wasted for unexplainable reasons since 2018. The notice of motion dated October 1, 2018 to be abandoned as the said application raises similar issues to the issues raised in the main suit and the parties to proceed with the main suit and to take an early hearing date after the close of pleadings.
29. Costs to be in the cause.  
Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 6<sup>TH</sup> OCTOBER, 2022.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

ANNA NGIBUINI MWAURE

JUDGE

