



Kenya Union of Commercial, Food and Allied Workers v Worldwide Movers (K) Limited (Cause E539 of 2022) [2022] KEELRC 14668 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 14668 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E539 OF 2022
M MBARŪ, J
OCTOBER 6, 2022**

BETWEEN
**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**
AND
WORLDWIDE MOVERS (K) LIMITED RESPONDENT

RULING

1. The claimant filed application dated July 19, 2022 seeking for order that pending hearing of the suit the respondent be restrained from harassing, terminating or disciplining the claimant’s members whose names appear in the check off forms and that the respondent be directed to commence deduction and remittance of union dues and further that the respondent should be directed to recognise the claimant and to sign the Recognition Agreement.
2. The application is supported by the Affidavit of Mike O Oranga and on the grounds that the claimant has since recruited all unionisable employees of the respondent and attained 100% membership for such employee but despite being issued with a draft Recognition Agreement the respondent has refused and neglected to sign it with the purpose of denying the unionised employees the right to join a trade union of choice and in violation of Articles 37 and 41 of the Constitution of the right to associate and join a trade union of one’s choice.
3. The application is supported by the affidavit of Mike O Oranga.
4. In reply, the respondent filed Notice of Objection on the grounds that;
 1. The application and the entire claim is incompetent, bad in law and does not lie as the court lacks jurisdiction to hear and determine the same.



2. The application and Memorandum of Claim have been filed in total disregard of Section 62 of the [Labour Relations Act, 2007](#) and Rule 5(3) of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#).
5. Both parties attend and made oral submissions.
6. On the objections, the respondent submitted that Section 62 of the [Labour Relations Act, 2007](#) (LRA) the law requires that a dispute such as between the parties herein first be placed with the Minister for conciliation before the court's jurisdiction is invoked to hear and determine it. the dispute resolution mechanism with regard to recognition of a trade union by an employer is set in statute and Section 62 of the [LRA](#) is couched in mandatory terms. The claimant ought to have initiated conciliation before coming to court and the claim herein is premature and there is no Certificate of Conciliation or Certificate of no Conciliation and the claim should be dismissed.
7. The respondent relied on the case of JR application No 73 of 2018 – [James Mweu Maingi v Sports Registrar; Richard Njoka & 3 others \(Interested parties\)](#) [2019] eKLR and Petition No169 of 2020 – [Jeremiah Memba Ocharo v Evangeline Njoka & 3 others](#) [2022] eKLR.
8. In response, the claimant submitted that Section 62 of the [LRA](#) is not mandatory since a trade union may report a dispute to the Minister and Section 74 of the [LRA](#) allow a dispute on the question of recognition of a trade union by an employer to be filed in court under Certificate of Urgency and as such conciliation is ousted. A party cannot be compelled to go through conciliation and only the court can give protective orders as sought herein. The doctrine of exhaustion has its exceptions where there are inadequate reliefs which can be secured through an administrative action and under conciliation, the orders sought by the claimant herein cannot issue.
9. The claimant relied on the case of [Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union](#) [2018] eKLR; [Kenya Union of Printing Publishing paper Manufacturing Pulp & Packaging Industries v Ruffia Bags \(EA\) Limited](#) [2014] eKLR; [Kenya Union of Commercial Food and Allied Workers v Kenya Credit Traders Limited](#) [2019] eKLR; [Kenya National Union of Teachers \(KNUT\) v Nancy Njeri Macharia & another](#) [2020] eKLR.

Determination

10. The gist of the objections by the respondent is the application of Section 62(1) of the [LRA](#) which provides that;
 1. A trade dispute may be reported to the Minister in the prescribed form and manner—
 - a. by or on behalf of a trade union, employer or employers' organisation that is a party to the dispute; and
 - b. by the authorised representative of an employer, employers' organisation or trade union on whose behalf the trade dispute is reported.

A party is therefore not compelled to report a dispute to the Minister.

11. As correctly submitted by the claimant, under Section 74 of the [LRA](#) the law provides for specific dispute which can be filed directly to the court without first applying the provisions of Section 62 of the [LRA](#). Such must relate to recognition, redundancy and essential services.

"74. Urgent referrals to Industrial Court



A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns—

- a. the recognition of a trade union in accordance with section 62; or
- b. a redundancy where—
 - i. the trade union has already referred the dispute for conciliation under section 62(4); or
 - ii. the employer has retrenched employees without giving notice; or
- c. employers and employees engaged in an essential service."

12. In addressing a similar objection, the Court of Appeal in the case of *Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union* [2018] eKLR held that;

"We agree with the trial court that section 62 (1) is permissive and allows all trade disputes to be reported to the Minister by the parties listed thereunder in the manner prescribed. There is no compulsion for the referral, and it was certainly not the intention of Parliament to confine parties into a straight jacket, place them at the mercy of the Minister, or oust the jurisdiction of the court. At best, it was tailored to enhance good industrial relations between an employer and an employee and to achieve improved industrial relations between the employer and the trade union representing the employee, as partners in social dialogue."

13. Even though under Section 15 of the *Employment and Labour Relations Court Act, 2011* the law recognises alternative dispute resolution machinery and at Section 15(4) allow the court to refer any dispute for conciliation, the provisions under which the instant objection by the respondent are premised, that is Section 62 of the *LRA* conciliation is not mandatory. See *Kenya National Union of Teachers (Knut) v Nancy Njeri Macharia & another* [2020] eKLR.

14. The dispute herein between the parties is that of recognition of the claimant by the respondent. The claimant moved the court under Certificate of Urgency seeking various protective orders. Referral to the Minister is not mandatory.

15. Accordingly, objection by the respondent dated September 6, 2022 are found without merit and are hereby dismissed with costs to the claimant.

16. The respondent shall respond to the claim within 14 days and pleadings shall close within 21 days to allow parties take a hearing date at the registry.

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

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

