



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 77 OF 2018

DORCAH NYAMBEKI NYAKUNDI.....CLAIMANT

VS

YUSUF ALI.....RESPONDENT

RULING

1. The Claimant, Dorcah Nyambeki Nyakundi is a member of the Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers. On 16th February 2018, she filed a Memorandum of Claim seeking compensation for unlawful termination of employment plus terminal dues.
2. Subsequent to its Response to Claim filed on 15th May 2018, the Respondent filed a notice of Preliminary Objection on 26th March 2018.
3. The Respondent's Preliminary Objection is based on the following grounds:
 - a) The Claim as filed and canvassed in the Claimant's Memorandum of Claim dated 14th February 2018 is fatally defective in law and as such cannot stand or be ventilated before the Court;
 - b) The Respondent is vested with the capacity to raise the Preliminary Objection as provided for under Rule 14(5) of the Employment and Labour Relations Court Rules;
 - c) Mr. Hezron Onwong'a is not an Advocate as defined by Section 9 of the Advocates Act and his representation of the Claimant as her Advocate offends this provision;
 - d) Mr. Hezron Onwong'a is an unqualified person to act as the Claimant's Advocate within the meaning of Sections 9 and 31(1) of the Advocates Act;
 - e) Mr. Hezron Onwong'a is barred by Section 31 of the Advocates Act from acting as an Advocate, issuing summons, instituting and carrying on proceedings on behalf of the Claimant before this Court;
 - f) Mr. Hezron Onwong'a's actions in drafting and launching legal proceedings against the Respondent as the Claimant's representative offend the provisions of Section 34 (1)(f) of the Advocates Act;
 - g) Mr. Hezron Onwong'a's action of signing the Claimant's pleadings offends the provisions of Order 2 Rule 16 of the Civil Procedure Rules, 2010;
 - h) Mr. Hezron Onwong'a is not an Advocate of the High Court of Kenya and his representation and pleadings do not conform to the provisions of Order 9 Rule 2 of the Civil Procedure Rules, 2010;
 - i) The Claimant's pleadings offend the provisions of Rule 6 of the Employment and Labour Relations Court Rules;
 - j) Further, the Claimant's pleadings are defective as they do not include a list of witnesses or statements of witnesses contrary to Rule 14(8) of the Employment and Labour Relations Court Rules;
 - k) Mr. Hezron Onwong'a's continued representation prejudices the rights of the Respondent under Rule 20(1) of the Employment and Labour Relations Court Rules, being a key witness to meetings between the Claimant and the Respondent;

l) Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers does not have a Recognition Agreement with the Respondent in accordance with Section 54(3) of the Labour Relations Act;

m) The Court is vested with jurisdiction by virtue of Section 12(3)(viii) of the Employment and Labour Relations Court Act to issue any relief that the Court may deem just and fit to grant, including striking out this suit.

4. The Claimant's response to the Respondent's Preliminary Objection is by way of a replying affidavit sworn by Hezron Onwong'a on 14th October 2020.

5. Onwong'a depones that he is an employee of Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers, holding the position of Industrial Relations Officer, appointed under Section 2(e) of the Labour Relations Act.

6. Onwong'a further depones that the Claimant is a *bona fide* member of Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers.

7. He points out that the Claimant's claim is brought under Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

8. Onwong'a states that the claim does not offend Section 12 of the Employment and Labour Relations Court Act.

9. Further, Onwong'a points out that Article 22(2)(d) of the Constitution of Kenya, 2010 gives power to an association to act in the interest of one or more of its members.

10. Onwong'a draws attention to Article 159(2)(d) of the Constitution and Rule 25(4) of the Employment and Labour Relations Court (Procedure) Rules which provide that justice shall be administered without undue regard to procedural technicalities.

11. The gist of the Respondent's Preliminary Objection is that a union representative cannot represent a union member in court proceedings.

12. The Respondent submits that Mr. Hezron Onwong'a is unqualified to draw and file pleadings on behalf of the Claimant because he is not an Advocate of the High Court of Kenya.

13. The Respondent further submits that it has no Recognition Agreement with Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers, the trade union Onwong'a represents. The Respondent argues that the trade union is a foreign third party without privity of contract as to the affairs between the Claimant and the Respondent.

14. That Hezron Onwong'a is not an Advocate of the High Court of Kenya, as defined in Section 2 of the Advocates Act, is an uncontested fact. Indeed, Onwong'a does not assign himself this title.

15. The issue before the Court is therefore not whether Hezron Onwong'a is a qualified person to practice as an Advocate; the issue is whether, as a union representative, he can represent a member of the union in court.

16. The power of trade unions to represent their members' interests is well secured under the Labour Relations Act.

17. This right is further recognised under Section 22 of the Employment and Labour Relations Court Act which provides the following:

22. In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee specially authorised for that purpose.

18. It is for this reason that there is a specific rule (Rule 5) in the Employment and Labour Relations Court (Procedure) Rules, setting out the procedure for handling of disputes referred to the Court under the Labour Relations Act.

19. In *Kenya Shoe & Leather Workers Union v Falcon Tanners Ltd (Cause No 826 of 2012)* Rika J stated the following:

"There is no legal obscurity on the right to representation of the Employees by the Trade Union. The law... extends the right to representation in Court, to the Trade Union, acting through its authorized Officers."

20. The correct legal position therefore, is that trade unions and their authorised officers have the *locus standi* to take out proceedings and appear in court on behalf of union members.

21. The other question raised in the Respondent's Preliminary Objection is whether a trade union has the capacity to take out proceedings against an employer with whom it has no Recognition Agreement.

22. This Court had the occasion to interrogate this question in *Kenya Shoe & Leather Workers Union v Modern Soap Factory [2018] eKLR* and returned as follows:

"...a trade union has many roles and although collective bargaining which is premised on recognition is a premiere one, the

other roles such as association generally and representation in particular, are equally important. What is clear is that Section 45(1) of the Labour Relations Act creates no necessary nexus between recognition and representation.”

23. The matter went on appeal to the Court of Appeal and in its decision in *Modern Soap Factory v Kenya Shoe and Leather Workers Union (Civil Appeal No 37 of 2019)* the appellate court rendered itself thus:

“Article 41 of the Constitution of Kenya on labour relations protects the right of every person to fair labour practices and the right, among others, to join a trade union, which in turn has the right to determine its activities. Article 258 of the Constitution on enforcement of the Constitution provides in Article 258(2)(d) that an association acting in the interest of one or more of its members may institute proceedings where the Constitution is contravened or threatened with contravention.....

We can see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact. Where there is a contest as to whether an employee is a member of a union, evidence would be required to settle that question. It is not a matter that is amenable for determination on the basis of a preliminary objection.....

A recognition agreement is defined under Section 2 of the Labour Relations Act as an agreement in writing made between a trade union and an employer, group of employers or employers’ organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers’ organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in court. As the learned Judge correctly stated, the two roles are distinct.”

24. With this clear jurisprudence in view, the only determination to make is that the Respondent’s preliminary Objection is without merit and is therefore overruled with costs to the Claimant.

25. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF FEBRUARY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Onwong’a for the Claimant

Mr. Wambua for the Respondent