



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO E008 OF 2021**

**KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL INSTITUTIONS**

**AND HOSPITAL WORKERS.....CLAIMANT**

**VERSUS**

**B.O.M NYALI GOLF AND COUNTRY CLUB LIMITED.....RESPONDENT**

**RULING**

1. On 2<sup>nd</sup> February 2021, the Claimant filed a Memorandum of Claim against the Respondent, citing the following as issues in dispute:
  - a) Outsourcing of cleaning services in the kitchen and bar;
  - b) Unlawful pay cut affecting the Claimant's members;
  - c) Refusal to pay service gratuity to the Claimant's members.
2. At the time of filing its claim, the Claimant also filed a Notice of Motion dated 2<sup>nd</sup> February 2021. The Claimant amended its Motion on 10<sup>th</sup> February 2021. By the amended Motion the Claimant seeks the following reliefs:
  - a) An order restraining the Respondent from implementing letter dated 5<sup>th</sup> December 2020, issued to the Claimant pending the hearing and determination of the claim;
  - b) An order restraining the Respondent and/or its servants and/or agents from outsourcing the services and/or the positions held by the Claimant's members in the kitchen, pending the hearing and determination of the claim;
  - c) An order directing the Respondent to remove workers of Karma, serving with the Claimant's members in the kitchen, pending the hearing and determination of the claim;
  - d) An order restraining the Respondent from implementing letter dated 4<sup>th</sup> February 2021, pending the hearing and determination of the claim.
3. The Motion is supported by an affidavit sworn by Jairus Oloko Munala and is based on the following grounds:
  - a) That by letter dated 5<sup>th</sup> December 2020, the Respondent informed the Claimant that the Respondent intended to outsource services offered by the Claimant's members;
  - b) That the Respondent was in the process of outsourcing the said services;
  - c) That the Respondent has failed to comply with Clause 19 of the parties' Collective Bargaining Agreement, by not giving the Claimant at least one-month notice prior to an intended redundancy;
  - d) That the Claimant responded to the Respondent's letter on 18<sup>th</sup> December 2020;
  - e) That the Respondent will not be prejudiced if the orders sought are granted.

4. In response, the Respondent filed a Notice of Preliminary Objection dated 11<sup>th</sup> March 2021. The Objection is based on the following grounds:

- a) The cause has been instituted in breach of the mandatory provisions of Section 73(3) of the Labour Relations Act, 2007;
- b) Hezrone Onwong'a, the Industrial Relations Officer of the Claimant and Jairus Oloko Munala, the Shop steward of the Claimant are not authorised representatives within the meaning of Section 2(a) and (e) of the Labour Relations Act by virtue of the facts that:
  - i) Neither of the two are the Secretary General of the Claimant; and
  - ii) Neither of the two are authorised in writing by the Secretary General of the Claimant to institute the proceedings.
- c) The cause is therefore fatally and incurably defective and by effect so is the Notice of Motion, which is anchored on it and the Court cannot exercise jurisdiction over the same;
- d) The cause and the Motion ought to be struck out with costs to the Respondent.

5. The Respondent also filed Grounds of Opposition dated 11<sup>th</sup> March 2021 stating that:

- a) The Claimant is a non-existent entity, is non-suited and legally incapable of originating any action against the Respondent;
- b) The acts which the Claimant seeks to restrain have already taken place and the orders sought are therefore moot and/or overtaken by events;
- c) The Motion is otherwise an abuse of the court process because:
  - i) The Claimant became aware of the Respondent's intentions as far back as 5<sup>th</sup> December 2020 but waited until 2<sup>nd</sup> February 2021 to come to Court;
  - ii) Since filing of the cause, the Claimant has filed multiple applications, twisting and convoluting the orders sought as well as the grounds relied upon, yet failing to abide by the directions of the Court given on 9<sup>th</sup> February 2021, to amend its pleadings and effect service on the Respondent in good time so as to enable the Respondent to file its response;
  - iii) The filing of multiple applications and failure to serve the Respondent as directed, are a clear demonstration by the Claimant of possible forum shopping and a desperate attempt to obtain *ex parte* orders of injunction so as to steal a match from the Respondent;
  - iv) There is no nexus between the final prayers sought in the Memorandum of Claim dated 2<sup>nd</sup> February 2021 and the interim injunctions sought in the applications;
  - v) The Claimant's pleadings demonstrate that a termination on account of redundancy has occurred and what the Court will be called upon to determine, as per the prayers in the Memorandum of Claim, is whether the termination was unfair, whether there was an unlawful salary reduction, whether gratuity has been paid or whether it is payable and whether there should be an award for compensation;
  - vi) There is no permanent injunction being sought to restrain any of the matters sought to be restrained by the orders of injunction in the applications.
- d) The applications fail to demonstrate that there is a *prima facie* case with a probability of success against the Respondent because:
  - i) Redundancy is a legally recognised process for termination of employment as long as the employer follows the provisions of the Employment Act;
  - ii) The Claimant contradicts itself by stating on the one hand that no notice under Clause 19 of the Collective Bargaining Agreement was issued but consistently referring to notices which were to take effect on specific dates.
- e) The Claimant has failed to demonstrate that unless the orders of injunction are granted the Claimant's members shall suffer irreparable injury. This is because the prayers for compensation for unfair termination, payment of alleged withheld salaries and gratuity are in fact, an unequivocal admission that any injury suffered by the Claimant's members is fully reparable;
- f) In so far as the applications seek a mandatory injunction to remove a private service provider from the Respondent's premises, the Claimant has failed to demonstrate that this is a fit and proper case for grant of a mandatory injunction as:
  - i) This is not the clearest of cases given that there is an admission of termination of the Claimant's members' employment by way of redundancy and the mandatory injunction will likely serve to paralyse services at the Respondent's premises; and

ii) The application is certainly of not such a nature as to satisfy the Court that at the end of the trial, it would still issue the same orders it is being asked to grant at the interlocutory stage as in fact no such permanent orders have been sought in the Memorandum of Claim.

g) The applications reveal that the balance of convenience and the 'greater harm' principle lies on favour of the Respondent because:

i) If the orders sought are granted at this stage and the Claimant fails to succeed at the trial, the Claimant's members will have been reinstated back to employment, after having been lawfully terminated, while a private service provider already contracted by the Respondent will have been removed from the Respondent's premises, thereby exposing the Respondent to a potential claim for breach of contract;

ii) The Claimant will have had its members reinstated into employment pending the hearing of the cause, when no such order is being sought after trial and;

iii) If the orders sought are denied at this stage and the Claimant succeeds at the trial, the prayers it has sought in the Memorandum of Claim will be sufficient remedy for any breaches of the law allegedly carried out by the Respondent.

6. The Claimant responded to the Respondent's Preliminary Objection by way of a replying affidavit sworn by Hezrone Onwong'a on 15<sup>th</sup> May 2021.

7. Onwong'a depones that he is an employee of the Claimant Union, holding the position of Industrial Relations Officer, appointed under Section 2(e) of the Labour Relations Act.

8. Onwong'a further depones that the Claimant is a *bona fide* registered trade union, with a Recognition Agreement, upon which it has negotiated several Collective Bargaining Agreements with the Respondent.

9. Onwong'a adds that Jairus Oloko Munala is elected under the Labour Relations Act.

10. Onwong'a states that the present claim does not offend Section 73(3) of the Labour Relations Act because both Jairus Oloko Munala and himself are duly appointed under the Labour Relations Act.

11. Onwong'a points out that the claim is brought under Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

12. He further 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.

13. By its Preliminary Objection, the Respondent contests the sustainability of the Claimant's entire claim before the Court and because this sort of Objection has potential to dispense with the case, I am required to address it first.

14. The Respondent submits that Hezrone Onwong'a, who has signed the Memorandum of Claim on behalf of the Claimant and Jairus Oloko Munala, who has signed the verifying affidavit, are not authorised representatives of the Claimant within the meaning of Section 2(a) and (e) of the Labour Relations Act.

15. By his replying affidavit sworn on 15<sup>th</sup> March 2021, Hezrone Onwong'a filed letter dated 5<sup>th</sup> January 2021, addressed to the Registrar of the Employment and Labour Relations Court, confirming the appointment of Onwong'a, among others, as representatives of the Claimant's members in court proceedings. Significantly, the name of Jairus Oloko Munala is not on the list of authorised representatives.

16. Section 2 of the Labour Relations Act defines an authorised representative as:

**(a) The general secretary of a trade union;**

**(b) .....**

**(c) .....**

**(d) .....**

**(e) Any person appointed in writing by an authorised representative to perform the functions of the authorised representative.**

17. Regarding court proceedings, Section 73(3) of the Act provides as follows:

**(3) A trade dispute may only be referred to the Industrial Court by the authorised representative of an employer, group of employers, employer's organisation or trade union.**

18. The Court was referred to the decision in *Kenya National Union of Nurses v Kenya Medical Research Institute (KEMRI) and 2 others [ 2020] eKLR* where **O.N Makau J** held that failure to comply with Section 73(3) of the Labour Relations Act is not a matter of mere

procedural technicality but rather, goes to the jurisdiction of the Court to entertain the claim. This is the correct legal position as I understand it.

19. In the case now before me, the Memorandum of Claim was signed by an authorised representative but for some reason, that was not clear to the Court, the verifying affidavit was signed by an unauthorised representative.

20. According to Rule 4(2) of the Employment and Labour Relations Court (Procedure) Rules, the purpose of a verifying affidavit is to verify the facts relied on in the claim. It follows therefore that a verifying affidavit is an integral part of the claim and can only be signed by an authorised representative as defined in law.

21. Jairus Oloko Munala, was not such an authorised representative and his signing the verifying affidavit dealt a fatal blow to the Claimant's entire claim. As a result, the Memorandum of Claim and all interlocutory applications are incompetent in law and are hereby struck out.

22. Each party will bear its own costs.

23. Orders accordingly.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MAY 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 (Union Representative) for the Claimant

Mrs. Mohamed for the Respondent