



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.E008 OF 2021

(Before D.K.N.Marete)

KENYA TERTIARY & SCHOOL WORKERS UNION

(KETASWU)CLAIMANT

VERSUS

KARATINA UNIVERSITY.....RESPONDENT

AND

KENYA UNION OF DOMESTIC WORKERS, EDUCATIONAL INSTITUTIONS AND

ALLIED WORKERS (KUDHEIHA).....PROPOSED 2ND RESPONDENT

RULING

By an application dated 10th March 2021, a 2nd Proposed Respondent/Applicant (KUDHEIHA) sought to be enjoined as a party to the application and suit as follows;

1. *THAT the Applicant/proposed 2nd Respondent, (KUDHEIHA) be granted leave to be joined to this suit as the 2nd respondent.*
2. *THAT the proposed 2nd respondent be allowed to file the necessary pleadings within 10 days or such reasonable time as this Honourable Court may direct, upon being properly served with the court proceedings already filed by the parties to this suit.*
3. *THAT costs be in the cause.*

It is grounded on the fact that the proposed 2nd respondent has had a standing collective bargaining agreement with the Respondent and has recruited the respondent’s workers as its members. It is therefore an interested party in the outcome of this litigation and therefore should be enjoined as such.

The proposed 2nd respondent further prays for leave to respond to the application in time and space.

The Claimant/Respondent in a Response to this application dated 22nd March, 2021 comes out as follows;

1. *THAT tenants on freedom of association is paramount right to all persons by self-choice as envisioned under the mandatory provisions of ILO Convention No.87, Article 36 & 41 of the Constitution of Kenya, 2010 and Section 4 (1) and 5 of the Labour Relation Act, No.14, Laws of Kenya.*
2. *THAT this right of freedom of association of persons by choice is also dully recognized by the Intended Party and/or purported proposed 2nd Respondent’s at Rule No.3 (V) of her Constitution inter alia:-*

“if a member is on check-off he shall give one calendar months’ notice in writing to his employer with copies to the secretary-General and his Branch Secretary notifying them that he will cease to be a member of the Union at the end of such notice and therefore no deduction will be made in the month following the expiry of the said notice. The member shall

continue to pay agency fees so long as he continues to enjoy the terms and conditions of existing collective Bargaining Agreement”.

3. *THAT therefore, the cited “UNKNOWN KUDEIHA 2” in the Claimant’s suit is “NOT” relatively the Kenya Union of Domestic Workers, Educational Institutions and Allied Workers (KUDHEIHA) to attract delayed justice.*

4. *THAT the Intended Interested Party and/ or purported proposed 2nd Respondent is not by any meaning of the law the principal/primary party in this suit by the Claimant union herein.*

5. *THAT it is trite law the opinion of the Intended Interested Party and/or purported proposed 2nd Respondent “CANNOT” change the pleadings of the Claimant’s suit herein.*

6. *THAT costs be provided for.*

She also raises the following as Grounds of Opposition to the application;

1. *THAT the Intended Interested Party as a dully registered trade union holds no “locus standi” as such to come and participate in this suit as the 2nd Respondent.*

2. *THAT, the cited “KUDHEIHA 2” herein is an “UNKNOWN ORGANISATION” and hence, is not registered as envision under the mandatory provision of the Labour Relations Act, 2007, Laws of Kenya.*

3. *THAT, therefore, in the circumstances the Honourable Court is implored to invoke the mandatory provisions of Part II, Rule 5 (d) of the Constitution of Kenya (Protections of Rights and Fundamental Freedoms) practice and Procedure Rules, 2013, to the later.*

4. *THAT, the Intended Interested Party purporting as the proposed 2nd Respondent has failed in total to disclose to the Honourable Court as to indeed it is registered and/ or Chartered University to canvas as a 2nd Respondent and/or trade union or also never the less the unknown “KUDHEIHA 2”.*

The Respondent in a Replying Affidavit sworn on 23rd February, 2021 also opposes the application.

It is her case that at all material times from 2017, Kudheihha has been the representative union negotiating the CBA for all grade 1-4 members of staff at both the national and local levels. She has negotiated CBA No.1 for 2017/2021 which was registered on 3rd July, 2020 and amended on 15th January, 2021.

Through the CBA above referenced all union dues and agency fees were paid to Kudheihha. This has continued with no complaints from any circles.

It is her further averment that the deductions remitted to Kudheihha in the month of January, 2021 were on account of agency fees and not union dues per section 49 (5) of the Labour Relations Act, 2007. This was in respect to members who had resigned from Kudheihha, the negotiator of CBA.

Further, the Respondent avers that not all employees who were subscribing to Kudheihha joined Ketaswu. A few remained. The payroll defines this as Kudheihha 1 while Kudheihha 2 is for those subjected to agency fees.

In the penultimate, the Respondent avers that the letter dated 4th November, 2020 was received and the university management advised that the claimant be invited for consultations but she opted for declaration of a trade dispute whereby the university board resolved to deduct and remit union dues as it awaited the conclusion of a recognition agreement.

The proposed 2nd Respondent/Applicant in her written submissions dated 20th May, 2021 submits a case of admission joinder as party. This is on ground of the various references to herself in the claim and also that she has quantifiable interest on the suit. She deems and submits that she is a necessary party to these proceedings.

It is her case that the goings on in this suit would not be disentangled without her involvement in the suit and therefore her quest for joinder

The Claimant/Respondent in her written submissions dated 21st May, 2021 submits that the proposed 2nd Respondent does not qualify to come on record as such in this suit. This is because the term “Respondent” as per the interpretation of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 means:-

“A person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringed a right or fundamental freedom”

In any event, if the proposed 2nd Respondent was indeed aggrieved and had good intention, it would have been applied to be enjoined as an Interested Party which it did not. The same rules define an interested party as;

“A person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to

the proceedings or may not be directly involved in the litigation”

The application should therefore fail for being a nullity.

The Claimant/Respondent further submits the entitlement of the Respondent’s employees to their due protection of rights and freedom by choice and without coercion by dint of the ILO Convention No.87 and Articles 36 and 41 of the Constitution of Kenya, 2010. This is besides section 4 of the Labour Relations Act, 2007 and Rule 3 (v) of the said Constitution.

This application has no place or basis and is malicious and baseless. It is aimed at embarrassing the claimant and the respondent who are the main parties in this business. They are at advanced stage signing a recognition agreement and should be left free to do the same, she further submits.

The Respondent did not file any written submission on the application.

This matter tilts in favour of the proposed 2nd Respondent. She has demonstrated an hefty case in favour of being awarded an opportunity to be enjoined and heard in the matter. This is because the right to be heard is basic and enshrined as a fundamental right and freedom in our constitution. It is undeniable.

The proposed 2nd Respondent’s stake in this action as brought out is eye catching. It cannot be diminished or extinguished. It is as clear as day light. It is indomitable. They would have to be involved in this suit with a view to establishing a lasting solution to the issues raised. This is essence of joinder of parties. Matters must be resolved and thrashed to portion, in the presence of all stakeholders, as applicable.

Having established a case of joinder, I award the same to the proposed 2nd Respondent, albeit in a varied form. I allow it to come in as an Interested Party to the suit.

I am therefore inclined to allow the application with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2021.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Jaoko instructed by the proposed 2nd Respondent Union-Applicant.
2. Mr.Japheth Angura for the Claimant/Respondent.
3. Miss Mumbi instructed by Anne C.Mumbi Advocate for the Respondent.