REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 755 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

KENYA NATIONAL UNION OF TEACHERS (KNUT)..................CLAIMANT

VERSUS

NANCY NJERI MACHARIA ....1ST RESPONDENT

TEACHERS SERVICE COMMISSION ....2ND RESPONDENT

RULING

The Claimant herein is a duly registered trade union representing all teachers in the employment of the 2nd Respondent. It enjoys recognition by the 2nd respondent as required by law vide a Recognition Agreement dated 15th May 1968.

Vide a letter Ref: CS/TSC/68/VOL.XI dated 4th November 2019, the 1st Respondent communicated to the Claimant a decision of the 2nd Respondent invoking Clause 2 of the Recognition Agreement and Section 54(1) of the Labour Relations Act, 2007 giving a two months' notice to the Claimant to terminate and/or revoke the Recognition Agreement dated 15th May 1968 on the ground that:

> *"The Kenya National Union of Teachers does not have the simple majority of unionisable employee under the employment of the Teachers Service Commission as at 4th November 2019."*

In the said letter, the 1st Respondent, on behalf of the 2nd Respondent, further informed the Claimant that it had simultaneously made requisite application to the National Labour Board pursuant to Section 54(5) of the Labour Relations Act, 2007.

Vide letter Ref: KNUT/TSC/60/77/2019 dated 5th November 2019, the Claimant rejected the 2nd Respondent's letter Ref: CS/TSC/68/VOL.XI dated 4th November 2019, which communicated the two months' notice to terminate and/or revoke the Recognition Agreement.

Aggrieved by the notice to terminate the Recognition Agreement the claimant union filed this suit on 7th November 2019 seeking the following orders –

> *1. That the Court be pleased to certify this application as urgent to be heard ex-parte in the first instance.*
>
> *2. That this Court be pleased to grant an ex-parte interim injunction restraining the Respondents by themselves and/or their authorized agents or servants from proceeding with the intended termination of the Recognition Agreement between the parties hereto as set out in the letter dated 4th November, 2019 or in any other way or manner intimidating, threatening and/or harassing the relationship with the Applicant in any other way whatsoever pending the hearing and determination of this application.*
>
> *3. That this Court be pleased to issue a permanent injunction restraining the Respondent by themselves, or their authorized agents, servants from proceeding with the intended termination of the Recognition Agreement between the parties hereto as set out in the letter dated 4th November, 2019 or in any other way or manner intimidating, threatening and/or harassing the Applicant in any other way whatsoever pending the hearing and determination of this application.*
>
> *4. That an order directed at the Respondents restraining them from interfering in any way with the Claimant's membership*

register.

5. That costs of this application be provided for.

Together with the claim, the claimant filed an application seeking orders to restrain the 2nd respondent from proceeding with the intended termination of the Recognition Agreement as set out in its letter dated 4th November 2019 or intimidating, threatening or harassing the relationship pending the hearing and determination of this suit.

On 12th November 2019, the respondents filed their Notice of Appointment of Advocates together with a Notice of Preliminary Objection citing the following grounds of objection –

1. That this Court lacks jurisdiction to entertain the suit herein on account that the suit has been instituted prematurely.

2. That the proceedings herein have been commenced contrary to the law.

In view of the preliminary issues raised in the preliminary objection, the court gave directions for deposal of the same. The preliminary objection was heard on 10th February 2020. Senior Counsel Ngatia appeared for the respondent, assisted by Mr. Anyuor while Ms. Guserwa appeared for the claimant.

Mr. Ngatia submitted that the recognition agreement signed by the parties provides at Clause 2 thereof that the agreement can be terminated by either party serving a two months' notice. That Clause 17 of the Recognition Agreement further provides that in the event agreement is not reached, the matter would be referred to conciliation.

Counsel submitted that by letter dated 4th November 2019, the employer (2nd respondent) invoked Section 54(1) of the Labour Relations Act, (the Act) by making an application to the National Labour Board as required under Section 54(5) of the Act. That in its response to the letter of termination of the recognition agreement, the union stated that it still had a simple majority and demanded the withdrawal of the termination notice within 7 days. That even before the 7 days were over the claimant filed the instant suit on 7th November 2019.

In the preliminary objection, the 2nd respondent is challenging none compliance with the provisions of the Act by the claimant regarding conciliation, and challenging the jurisdiction of this court to assume jurisdiction. Counsel submitted that statutory redress must predate commencement of a valid suit in this court.

Counsel referred the court to the decision in the case of **Kenya Union of Entertainment and Music Industry Employee v Bomas of Kenya Limited (2016) eKLR** where at paragraph 14 thereof the court decided that –

> *14. It is obvious from the facts of this suit and the conciliation proceedings lodged by the Claimant to the Labour Cabinet Secretary on 9.10.2014 that the dispute was not about refusal to recognise the Claimant or cancellation of the recognition agreement. The said conciliation proceedings were limited to refusal by the respondent to review the 2012-2014 Collective Bargaining Agreement which had expired on 30.6.2014. In view of the said express provisions of Section 54(6) and (7) of Labour Relation Act, it is clear that this suit was filed prematurely before first referring the recognition or cancellation of recognition for conciliation in accordance with Part VIII of the Labour Relation Act. The first Port of Call for a trade union to challenge cancellation of recognition under the said subsection (6) is the Conciliator and not this court. Consequently, I find that this suit is incompetent. In **Speaker of National Assembly v James Njenga Karume [1992] eKLR**, the Court of Appeal held that:-*
>
> *"In our view, there is merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."*

Counsel submitted that the instant suit is incompetent because the first port of call is the statutory conciliation machinery.

Counsel further referred to the decision in **Geoffrey Muhinja and Another v Samuel Muguna Henry & 1756 Others (2015) eKLR** where the court commenting on the doctrine of exhausting statutory redress mechanism stated –

> *"... It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.*
>
> *We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs' disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely."*

Counsel submitted that this statutory defence mechanism finds statutory underpinning in Article 159.

Finally, Counsel referred the court to the case of **Mary Wambui Munene v Peter Gichuki Kingara and 2 Others (2014) eKLR** where the Supreme Court stated that jurisdiction is a pure question of law to be determined on priority basis.

With reference to the claimant's submissions on the preliminary objection, Counsel submitted that the case of **Micato Safaris v Kenya Game Hunting and Safaris Union Workers Union (2017) eKLR** supports the respondents' preliminary objection to the effect that Section 54(7) provides that if a dispute is not settled during conciliation it would be referred to the Industrial Court. Further, that at paragraph 22 of the judgment the court stated that the correct procedure is to apply to the National Labour Board, which was not done in this case as the Board was not given an opportunity to either accede or reject the application by the respondent. That the union jumped the gun and moved to court.

With respect to the second case cited by the claimant union, that is the case of **Aviation and Allied Workers Union v Air Kenya Express Limited and Another**, Counsel observed that the court confirmed that conciliation predates adjudication, that it is only if conciliation does not resolve the dispute that the parties would seek adjudication of this court.

Counsel submitted that the simple arithmetical issue of whether or not the claimant has a simple majority has not been resolved by conciliation. That this court cannot assume powers of conciliation as it is only empowered to adjudicate.

Counsel urged the court to reject the suit as any party dissatisfied with conciliation will have automatic right to adjudication.

For the claimant Ms. Guserwa submitted that when the claimant filed this matter it was seeking protection under Section 74 of the Labour Relations Act which gives this court jurisdiction to hear matters on recognition and strikes. That the union is aware of the requirement to proceed to conciliation. That whereas that could have taken place, the union's relationship with the employer was exposed. That the Ministry has no power to stop the process that had been initiated. That time started running on the respondent's notice of termination as soon as the notice was issued. She queried why the respondent did not seek permission to terminate the recognition agreement from the National Labour Board before issuing the notice. She submitted it was the duty of the employer, not the union, to request the Board to consider the matter.

That it is only after the union declined that the respondent wrote to the Board, but did not indicate to the Board that they will hold their horses.

Ms. Guserwa submitted that the rights of workers are now protected under the Constitution. That it is for this court to decide to send the parties to conciliation. That it would be draconian for the court to dismiss this matter. That the purpose of the claimant coming to this court was to enable it seek the machinery in the Act after securing the protection of this court.

Referring to the decision in **Aviation and Allied Workers Union v Air Kenya Express Limited and Another**, Ms. Guserwa submitted that the case herein is different as the employer is deciding which union the employees should go to.

On the submissions by the respondents that this court cannot interrogate simple majority, Counsel submitted that from its records, it has a 99% membership.

Counsel further submitted that failure to comply with procedure is not fatal. She urged the court to dismiss the preliminary objection.

In a rejoinder, Senior Counsel Ngatia posed the question whether this cause was filed as a temporary measure of protection. He observed that the orders sought in the claim are of a final nature, seeking to nullify the notice, quash it and give damages.

On whether there is urgency to warrant the reliance on the doctrine of necessity, Counsel submitted that there was no justification for filing this suit two days after the notice. He submitted that the notice having been for two calendar months, with an expiry date of 4th January 2020, there was no urgency. He submitted that the notice itself invokes Section 54(1) thus triggering a statutory mechanism. That until that process has been completed there is no threat.

He submitted that since the issue of simple majority is a matter for conciliation, the case is for dismissal. That there will be no prejudice to the claimant as the statute provides for redress. He submitted that the ex parte orders on record is obstructing the statutory process and ought to be lifted as it should not have been issued in the first place.

Determination

Having considered the written and oral submissions of parties on the preliminary objection filed by the respondents, the issue for determination is whether this suit was filed prematurely.

The doctrine of exhaustion of remedies is that if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which judicial relief is unnecessary

The rationale for this distinction is that until the administrative process is complete, it cannot be certain that the party will need judicial relief, but when the case becomes appropriate for judicial determination, he or she may choose whether to resort to the court for that relief.

In the preliminary objection the respondents have asked the court to dismiss this suit as it was filed prematurely by the claimant before exhausting the statutory machinery provided for in the Labour Relations Act. Section 54 of the Act provides that –

54. Recognition of trade union by employer

(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.

(2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

(3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.

(4) The Minister may, after consultation with the Board,

publish a model recognition agreement.

(5) <u>An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.</u>

(6) <u>If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.</u>

(7) <u>If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.</u>

(8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.

[Emphasis added]

Part VII of the Labour Relations Act referred to in Section 54(6) is the dispute resolution machinery under the Act. The part provides for reporting of trade disputes to the Minister responsible for labour matters who would then appoint a Conciliator. That in the event the dispute is not resolved by the conciliator, the conciliator would issue a certificate that the dispute has not been resolved which would then entitle the parties to move to this court as provided in Section 73 of the Labour Relations Act which provides as follows –

73. Referral of dispute to Industrial Court

(1) If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.

(2) Notwithstanding the provisions of subsection (1), if a trade dispute—

(a) is one in respect of which a party may call a protected strike or lockout, the dispute may only be referred to the Industrial Court by an aggrieved party that has made a demand in respect of an employment matter or the recognition of a trade union which has not been

acceded to by the other party to the dispute; or

(b) is in an essential service, the Minister may, in addition, refer the dispute to the Industrial Court.

Section 74 provides for urgent referrals to the Industrial Court. It provides that –

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.

Section 15 of the Employment and Labour Relations Court Act recognises alternative dispute resolution machinery and at Section 15(4) provides that –

> **(4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.**

It is in light of the above referenced legal regime that the court is called upon to consider the preliminary objection filed by the respondents herein.

In this case, the respondent issued a two months' notice to terminate and or revoke the recognition agreement. The notice is made pursuant to Clause 2 of the recognition agreement between the claimant and respondent. The grounds for the termination/revocation notice is stated to be –

> "*The Kenya National Union of Teachers does not have the simple majority of unionisable employees under the employment of the Teachers Service Commission."*

In its rejoinder of 5th November 2019, the claimant union rejected the notice. On 7th November 2019, the claimant filed the instant suit.

The determination of the preliminary objection turns on whether or not Section 54(5) as read with Section 74 of the Labour Relations Act, Section 15(4) of the Employment and Labour Relations Court Act and clause 2 of the Recognition Agreement preclude the claimant from coming directly to court without going through the process of conciliation as provided for in Part VIII of the Labour Relations Act.

Under Section 54(5) it is the employer to apply to the Board to terminate or revoke a recognition agreement. My understanding is that before the employer can give notice of termination, it would first have to apply to the Board and it is only after the Board has granted authority to terminate that it would give notice as provided under Clause 2 of the Recognition Agreement. This is because the Section does not make any reference to either party terminating the recognition agreement at their own level. Further Section 54 which provides for recognition of unions by employers must be read with Section 74 which provides for urgent referrals to court where a dispute concerns recognition. Section 74 is a departure from Section 73 which requires a dispute to be referred to conciliation and only to court if conciliation does not resolve the dispute.

Section 54(5) provides for the employer to apply to the Board to terminate or revoke the recognition agreement and Section 54(6) which follows therefore anticipates conciliation only if the procedure before the Board develops into a dispute.

It is therefore my view that the administrative machinery would commence with the employer issuing notice to the Board. That any notice sent under the recognition agreement prior to the authority of the National Labour Board is premature as the approval of the Board is a statutory precondition to the termination of the recognition agreement.

In this context, the respondent cannot accuse the claimant of coming to court prematurely where it is the one that has issued the notice prematurely. Section 54(5) does not provide for the union to apply to the Board and so the union cannot commence the machinery provided under Section 54(5) by going to the board.

It would therefore be logical for the union to come directly to court as the respondents have issued an irregular notice of termination without first complying with the requirements under Section 54(5) of the Act.

This would be sufficient reason to dismiss the preliminary objection. However, there is also the provisions of Section 74 of the Labour Relations Act which allows a trade union to approach this court as a matter of urgency where there is a dispute concerning the recognition agreement which is what the union did in the instant suit.

Further, Section 15(4) of the Employment and Labour Relations Court Act contemplates situations where parties come to this court before conciliation or mediation and gives the court powers to stay the proceedings and send the parties to conciliation or mediation if in the court's opinion such process should precede adjudication. Clearly, the Act gives the court powers to make such a determination. The jurisdiction of the court would thus not be ousted where a party files in a court a matter which ought to have been referred to conciliation as the respondents have urged the court to find in the preliminary objection.

Finally, a comment on the doctrine of exhaustion as it applies to the preliminary objection.

In the case of **Republic v Secretary of the Firearms Licencing Board and 2 Others Ex Parte: Senator Johnson Muthama (2018) eKLR**, a 5 Judge bench of the High Court remedied the jurisprudence on the doctrine as follows –

> *34. This Court therefore did allow the Applicant to by-pass the procedure set out in Section 23 of the Firearms Act in granting the said leave. In addition, a five-judge bench of this Court held as follows in* ***Mohammed Ali Baadi and Others v The Attorney General and 11 Others, (2018) eKLR*** *as to when an alternative dispute resolution mechanism may not be appropriate:*
>
> > "*94. While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See* ***The Speaker of National Assembly v James Njenga Karume 41****), the exhaustion*

doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of ***Dawda K. Jawara v Gambia42*** *it was held that:*

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available onlyif the applicant can make use of it in the circumstances of his case."

95. In the case of ***R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya43*** *after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the Court held:*

[46] What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the ***Shikara Limited Case****, the High Court may, in exceptional circumstances, find that exhaustion*

requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake."

In the present case, the respondent issued notice of two months. The option of conciliation under Section 62 to 69 would definitely take more than 2 months. This is because of the timelines under Section 63(1) of 14 days, a further 14 days under Section 64, 21 days under Section 65 and a minimum of 30 days under Section 67. By the time this process is exhausted the 2 months' notice would long have elapsed. There is no provision under the Act for the Minister to suspend the notice during conciliation. This means that the orders sought in the claim and the notice of motion filed therewith are not available under the machinery referred to by the respondent. It thus means that the doctrine of exhaustion is not applicable under the circumstances of this suit.

Conclusion

From the foregoing, I find no merit in the preliminary objection and dismiss it with costs.

The respondents are directed to file their reply to the application and defence to the claim within 30 days from the date of ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MAY 2020

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st 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 has 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.

MAUREEN ONYANGO

JUDGE