**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1422 OF 2018**

***(Before Hon. Lady Justice Maureen Onyango)***

**KENYA SHIPPING CLEARING FREIGHT LOGISTICS AND**

**WAREHOUSES WORKERS UNION.....CLAIMANT**

***VERSUS***

**VEGPRO (K) LIMITED (VP. GROUP).....RESPONDENT**

AND

**KENYA UNION OF COMMERCIAL FOOD AND**

**ALLIED WORKERS.....INTERESTED PARTY**

**RULING NO. 2**

There are two applications before me for determination. The first is filed by the claimant and is dated 4th October 2018. The applicant seeks the following orders –

1. Spent.

2. That the Court be pleased to direct and order the Respondent to sign Recognition Agreement with the Applicant /Claimant Union forthwith.

3. That the Court be pleased Direct and order the Respondent to deduct and remit the union dues the check offs form forwarded and annexed herein.

In the memorandum of claim filed with the application, the claimant seeks the following prayers –

1) The Respondent to accord the Applicant/Claimant union Recognition Agreement forthwith by signing it.

2) The Respondent to start deducting union dues basing on the forwarded checks off forms forwarded to the Respondent on the following dates 18/11/2016, 6/12/2016, 22/12/2016, 1/2/2017, 6/2/2017, 23/6/2017, 12/7/2017, 20/7/2017, 13/12/2017, 29/1/2018, 6/2/2018, 10/4/2018, 16/8/2018, 10/9/2018 and 24/9/2018.

3) The Respondent to pay the costs the suit.

In the grounds in support of the application and in the supporting affidavit sworn by JAMES O. TONGI, the General Secretary of the claimant/applicant, he states that the claimant union had originally recruited the employees of the respondent but the respondent sacked all the employees when the employees become unionised. That the respondent who was originally known as VEGPRO (K) LIMITED changed its name to VP Group with the intention of locking out the claimant union. That the claimant embarked on fresh recruitments but the respondent has refused to deduct union dues or sign recognition agreement.

That when the claimant reported a trade dispute to the Minister for Labour, the respondent failed to attend conciliation meetings.

The claimant avers that it has attained the requirements for recognition and has forwarded check off forms as proof of membership by employees of the respondent, hence the prayers in both the claim and the application herein.

There is no response to the application by the respondent. On 6th November 2018, Mr Okwe Achiando, Counsel for the respondent informed the court that he had not put in his response to the application or claim as he intended to file an application.

In the intervening period, the Interested Party, the Kenya Union of Commercial, Food and Allied Workers, applied to be enjoined to the suit. In a ruling delivered on 6th May 2019, this court allowed the application for joinder. In the ruling, the court observed that the (Proposed) Interested Party had proved that it had an existing Recognition agreement with the respondent and had several collective bargaining agreements (CBAs)signed between the Interested Party and the respondent.

**2nd Application**

The second application is the notice of preliminary objection (P.O) filed by the respondent on 30th January 2019. In the P.O dated 29th January 2019, the respondent seeks the dismissal and/or striking out of the claimant's suit herein on the following grounds:-

1. That the Application and the Statement of Claim are in breach of Section 54(1), (2) and (3) of the Labour Relations Act 2007 thus the Applicant lacks *locus standi*.

2. That further to the aforesaid in paragraph No. 2 the Application and the Claim should be struck out in *limine* for the simple reason that, without recognition by an employer, a trade union, even where it is registered to represent workers in a sector, remains a by-stander to the disputes between the workers and their employers. This was the determination of the court in **Kenya Shoe and Workers Union v Modern Soap Factory Ltd [2017] eKLR** and **Communication Workers' Union v Safaricom Limited [2014] eKLR**.

3. That the Application and Statement of Claim as drawn and filed are in contravention of Sections 57(1) and 59(1)(a), (b) and (c) of the Labour Relations Act 2007.

4. That the Application and the Statement of Claim are in breach of Section 31(2) of the Labour Relations Act, 2007.

5. The Application and the Statement of Claim is *sub judice* as the Applicant/Claimant has Cause No. 2018 of 2016 and Cause No. 963 of 2017 still pending before the Honourable Court raising similar issues.

6. That the Applicant is a Union not known to the Respondent in terms of the Labour Relations Act, 2007.

I will deal with the preliminary objection first, since if it succeeds, it would dispose of the entire claim and there would be no necessity to hear the application dated 4th October 2018.

In the locus classicus case of **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA 696**, Sir Charles Newbold P. defined a preliminary objection as "*…a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."*

The grounds of the preliminary objection are that the claimant has no *locus standi*, that there is no recognition agreement and that the suit is *sub judice*. The very subject matter of the dispute is recognition of the claimant. The claimant cannot be said to have no *locus standi* because it has no recognition agreement, when the prayers in the claim are for recognition agreement.

In any event, this is a matter for pleadings. The respondent has not filed a defence. It cannot allege want of locus by the claimant when it has not pleaded the facts that give rise to the conclusion that the claimant has no locus.

Further, Section 54(1), (2) and (3) of the Labour Relations Act which the respondent has relied upon in the P.O provide as follows –

**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) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.**

**(6) 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.**

**(7) 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.**

**(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.**

Section 54 does not preclude a trade union from representing employees in its membership. It is only a bar to collective bargaining. The union has not sought for collective bargaining. It has sought recognition so that after it is recognised, it can seek for collective bargaining. The evidence of membership, which gives the claimant locus to represent its embers, is in the schedule forms attached to the memorandum of claim.

This takes care of grounds 1 and 2 of the P.O Ground 3 thereof is ambiguous and would in any event not qualify as a P.O applying the test in Mukisa Biscuit Case.

Sections 57 and 59 relate to the process of collective bargaining and registration of collective bargaining agreements. Again, these are not subjects of the claim herein.

It is not clear how ground 4 which refers to Section 31(2) of the Labour Relations Act is relevant. The Section provides that no person shall be an official of more than one trade union or employee's organisation. There is no issue of officials of trade unions in the claim.

**Cause No. 2018 of 2016** and **963 of 2017** are not before the court and therefore the respondent has not demonstrated their relevance to this suit. Further, the issue of recognition agreement by a trade union which has not been recognised by an employer cannot be the subject of the plea of *res judicata* as the membership of a union is a fluid matter that can change drastically over a very short period of time by employees either leaving or joining membership of the union. The fact that a union did not have a simple majority at one particular time when it sought recognition does not mean that it cannot achieve simple majority within a few months, or even days, and apply again for recognition. That ground therefore also fails.

Grounds 6 is obviously a non-starter as far as a P.O is concerned.

For the foregoing reasons, the P.O must fail and is accordingly dismissed. Taking into account what I have observed above, the P.O amounts to an abuse of court process and I therefore condemn the respondent to pay costs of the same to the claimant which I will assess at Kshs.50,000. This is because the P.O was completely unwarranted and has only served to waste the court's precious time which would have been used to consider more serious issues. I have further taken into account that although this suit was filed on 4th October 2018 and the respondent filed a notice of appointment on 23rd October 2018, it has never filed a defence. The P.O was thus intended to delay the conclusion of this matter.

**Application dated 4th October 2018**

The application seeks similar orders as those on the face of the claim. The nature of the prayers sought is such as require evidence. This is more so as the Interested Party claims that the employees are its members and that it has a recognition agreement with the respondent with whom it alleges to have negotiated several CBAs.

For the foregoing reasons, the application is dismissed. The issues raised therein will be dealt with at the hearing of the claim. There shall be no orders for costs on the application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 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, the 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 the 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**