



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 2527 OF 2016**

**KENYA NATIONAL PRIVATE SECURITY**

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

**VERSUS**

**ROVIO SECURITY LIMITED.....RESPONDENT**

**RULING**

1. For determination is a Preliminary Objection by the Respondent contending

1. **THAT** the Claimant is a stranger and lacks locus standi to bring this suit against the Respondent.
2. **THAT** the Claimant lacks locus standi to sue on behalf of the Grievant under section 54 of the Labour Relations Act.
3. **THAT** the suit is prematurely brought and offends sections 62, 67 and 69 of the Labour Relations Act.
4. **THAT** the suit is an abuse of the due process of Court.

2. Pursuant to Court directions issued on 3 June 2020, the Respondent filed its submissions on 18 June 2020 (should have been filed/served before 12 June 2020) while the Union's submissions were not on the record by the agreed date.

3. In urging the Objection that the Union had no *locus standi*, the Respondent asserted that although Article 41(2)(c) of the Constitution guarantees every worker the right to join a trade union, membership of a trade union was a prerequisite for the Union to sue on behalf of the member and that in the instant case, there was no evidence that the Grievant was a member of the Claimant Union.

4. To buttress the argument, the Respondent cited *David Benedict Omulama & Ors v Registrar of Trade Unions & Ar* (2014) eKLR; *Kenya National Union of Nurses v Attorney General & Ar* (2012) eKLR; *Kenya National Private Security Workers Union v Lavington Security Ltd* (2013) eKLR; Cause No. 745 of 2020, *Transport and Allied Workers Union v DHL Global Forwarding (K) Ltd* and *Transport Workers Union v Crown Bus Service Ltd* (2017) eKLR.

5. Taking the objection further and relying on *Kenya Shoe & Leather Workers Union v Modern Soap Factory Ltd* (2017) eKLR, the Respondent submitted that a *recognition agreement* and *collective agreement* between an employer and a trade union was also necessary before the Union could have the competence to sue on behalf of an employee.

6. On the question of prematurity, the Respondent contended that by dint of sections 62, 67 and 69 of the Labour Relations Act, the Union should have at the first instance reported a trade dispute to the Cabinet Secretary responsible for Labour.

7. In support of the contention, the Respondent drew the attention of the Court to *Inter-Public Universities Councils Consultative Forum of the Federation of Kenya Employers v Universities Academic Staff Union & Ors* (2018) eKLR and *Monicah Wanjiku Kanyigi v Our Lady of Mercy Secondary School* (2018) eKLR.

8. In this regard, the Respondent stated that there was no certificate of unresolved dispute exhibited as required by section 69(a) of the Labour Relations Act.

9. Concluding, the Respondent was of the view that the Union had abused the Court process by jumping the gun in moving the Court.

10. The Court has considered the Objection and submissions.

### **Locus standi**

11. It is within the knowledge of practitioners in this Court that judges of the Court have taken different jurisprudential positions on the question of the competence of a trade union to institute legal proceedings and/or agitate on behalf of its members where there is no *recognition agreement* with the employer.

12. However, at least for now, the Court of Appeal in Mombasa Civil Appeal No. 37 of 2019, *Modern Soap Factory v Kenya Shoe and Leather Workers Union* (unreported) have settled the question.

13. In the aforesaid authority, the Court of Appeal identified the only appeal Issue at paragraph 10 of its Judgment as

Whether a trade union has locus standi to represent its members in court in a dispute between an employee (who is member of the union) and an employer in the absence of a recognition agreement between the union and the employer.

14. In answering the question, the Court of Appeal stated

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. In the same spirit, Section 22 of the Employment and Labour Relations Act provides that:

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.

.....

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.

15. The Court of Appeal, therefore, distinguished a Union's right to represent its members, and the right to collective bargaining which is anchored on a *recognition agreement* and held that lack of a *recognition agreement* would not serve as a legal handicap to the competency or *locus standi* of a Union to institute legal proceedings on behalf of its members.

16. This Court endorses the binding authority from the Court of Appeal and adds that the question of whether the Grievant herein was a member of the Union must await proof during the hearing on the merits.

### **Prematurity**

17. Although the Respondent objected to the ripeness of the proceedings on the basis that the dispute resolution mechanisms under Part VIII of the Labour Relations Act were not complied with, the Court finds the objection not only frivolous but vexatious, for amongst the documents filed with the Memorandum of Claim were, a letter dated 21 April 2016 reporting a trade dispute to the Cabinet Secretary, Labour, letters dated 11 July 2016 and 29 July 2016 inviting the parties to a conciliation meeting and a *Certificate of Unresolved Dispute* dated 17 August 2016.

18. Further, the Respondent, in its Response acknowledged in paragraph 4 that it received a letter from the Sub-County Labour Office inviting it to attend a conciliation meeting.

19. In light of the foregoing, the Preliminary Objection is found without merit and is dismissed with costs to the Union.

20. In order to facilitate the hearing of the Cause, the parties are directed to file/exchange any further documents and witness statements on or before 16 October 2020 and thereafter a hearing date be taken in the registry on a priority basis.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 2<sup>nd</sup> day of October 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Ms. Onyancha, Legal Officer, Kenya National Private Security Workers Union

For Respondent Mr. Juma instructed by J.O. Juma & Co. Advocates

Court Assistant Judy Maina