



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.E581 OF 2020

KENYA PRIVATE UNIVERSITIES WORKERS UNION.....CLAIMANT

VERSUS

CATHOLIC UNIVERSITY OF EASTERN AFRICARESPONDENT

RULING

The claimant union filed application dated 24th September, 2020 seeking urgent orders and in reply, the respondent filed Ground of Opposition and application dated 12th October, 2020 and seeking for orders that;

The Statement of Claim dated 24th September 2020 together with application vide Notice of Motion dated evenly and all attachments filed thereto by the claimant be and is hereby struck out.

The application is made on the grounds that the suit herein is *sub judice* and an abuse of court process. The application is a deliberate attempt at sowing discord with rulings and orders of the court on similar applications/suits before the court and specifically **Cause No.4 of 2019** as consolidated with **Cause No.239 of 2019** which is a matter between the same parties herein over the same subject matter.

The application is supported by the Supporting Affidavit of Lorine Atsieno Muchongori the legal officer of the respondent who avers that the claimant has no *locus standi* to file this action and the suit cannot be sustained as the claimant has never sustained simple majority of employees in the respondent university. The issue of recognition is a live issue in **Causes No.4 of 2019** consolidated with **Cause No.239 of 2019**.

The recognition agreement is null and void by operation of the law as the claimant has never attained simple majority of the 520 members of staff of the respondent contrary to section 60 and 65 of the Universities Act, 2012.

The issue of the respondent failing to deduct and remit union dues to the claimant is in issue in **Cause No.4 of 2019** and consolidated with **Cause No.237 of 2019** and the current suit is an attempt to re-litigate the same issues herein and hence *sub judice* and should be dismissed.

The claimant submitted that the cause of action herein is different from Cause No.4 of 2019 as consolidated with Cause No.237 of 2019 and the *sub judice* rule does not apply.

The parties filed written submissions.

Determination

The issue in dispute herein relates to alleged unlawful and unauthorised non-payment of employees' wages sent on unpaid leave due to COVID-19 on the facts that the pursuant to section 54 and 57 of the Labour Relations Act the claimant has a recognition agreement and Collective Agreement with the respondent but following circulars dated 29th and 31st July, 2020 to members of the claimant the respondent took a unilateral decision to retain employees on 30% pay cut of the gross salary and sent other employees on unpaid leave with no salary due to COVID-19 from 1st August, 2020 is unacceptable. That the claimant was not involved in the issuance of these circulars and cut in remuneration.

The claim challenges these circulars.

Cause No.4 of 2019 is filed by the respondent herein, Catholic University of Eastern Africa as the claimant and the issue in dispute is that the alleged recognition agreement dated 30th November, 2017 was obtained illegally as the respondent union has not met the threshold for recognition as required under the Labour Relations Act and that the strike called by the union through media on 5th January, 2019 is intended to paralyse activities within the claimant institution and is illegal and malicious. The claimant is seeking for a declaration that the recognition agreement be found illegal, null and void and the strike be declared illegal, null and void.

Cause No.239 of 2019 is filed by the claimant union and the issue in dispute is the alleged refusal to deduct union dues from union members and withholding the same. The claimant is seeking various remedies and declaration that they are entitled to trade union dues and these should be deducted and remitted to them by the respondent university.

Both suits have since been consolidated under Cause No.4 of 2019.

Is the instant suit *sub judice*?

Does the claimant have *locus standi* to initiate these proceedings?

The *sub judice* rule is defined in the case of **Republic versus Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR** that;

... for the doctrine of sub judice to apply the following principles ought to be present:- (a) There must exist two or more suits filed consecutively; (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. The mere fact that the applicant in the earlier suit is a Branch of the Law Society of Kenya, while the applicant in the instant suit is the main body does not change the situation. The Branch is suing on behalf of its members. As stated earlier, should the court determine the earlier suit either way, it will render the issues in the instant suit res judicata. Put differently, the outcome of the earlier suit will apply to the entire membership of the Law Society.

From the analysis above, the claim herein relates to facts and a cause of action arising out of circulars dated 29th and 31st July, 2020 with regards to payment of wages at 30% and or unpaid leave to the respondent employees.

The claimant is filed by the claimant on the grounds that there is a recognition agreement between the parties herein and giving the claimant the right to file suit for and on behalf of its aggrieved members and employees of the respondent.

The court reading of the claim herein and claims made under Cause No.4 of 2019 consolidated with Cause No.239 of 2019, the causes of action are different and even where such relates to the same parties, and the cause of action is different. Such cannot find justification that the instant suit is *sub judice*.

In this regard, does the claimant have *locus standi* to file the instant suit?

The claimant is defined as a registered trade union representing employees in the sector of employees both in academic and non-academic in all private universities. It is not in dispute that the claimant union has members from the employees of the respondent.

Pursuant to section 62 of the Labour Relations Act, 2007 a trade union is allowed to report a trade dispute to the Minister. A recognition agreement or collective agreement between the union and the employer of the members of the union is not a bar to reporting such a dispute.

Equally, pursuant to the provisions of section 73 the Labour Relations Act, 2007 where the dispute reported to the Minister is not resolved, the trade union is allowed to file the same with the court pursuant to Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

Further to the above section 22 of the Employment and Labour Relations Court Act, 2011 allow a trade union to represent its members before the court. such does not require a recognition agreement of a collective agreement. is entitled to represent its members before the court just like advocates would represent litigants in court. In the present case the union is the claimant as a party and not a representative of its members being the respondent's employees.

A recognition agreement is only necessary for purposes of section 54 of the Labour Relations Act, 2007 with regard to negotiations for a collective agreement.

In this regard, the issue in dispute being clear, the claimant is at liberty to represent its members in the employment of the respondent pursuant to sections 62 and 73 of the Labour Relations Act, 2007 read together with section 22 of the Employment and Labour Relations Court Act, 2011 and Rule 5 of the Court Rules.

The claimant has proper standing in these proceedings.

Accordingly, application and objections dated 12th October, 2020 by the respondent is found without merit and is hereby dismissed. the claim is not *sub judice* and the claimant has the requisite *locus standi* to file suit herein.

The court shall give directions with regard to application dated 24th September, 2020.

Costs in the cause.

Delivered at Nairobi this 22nd day of December, 2020.

M. MBARU

JUDGE