



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 169 OF 2019

KENYA PRIVATE UNIVERSITIES WORKERS UNION.....CLAIMANT

VERSUS

AGA KHAN UNIVERSITY HOSPITAL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 31st May, 2019)

RULING

The claimant filed the memorandum of claim on 14.03.2019 alleging the unfair, unprocedural, unlawful and constructive termination of employment contract by the respondent as per the notice dated 22.06.2018 and affecting the employment of the claimant's member one Dianah Nyanga Owino, the grievant. The claimant reported a labour dispute to the minister responsible for labour and a conciliator was appointed in accordance with the Labour Relations Act, 2007. By the letter dated 19.10.2018 the conciliator conveyed to the parties that the respondent argued that it had not signed any recognition agreement with the claimant trade union and therefore the demand to represent the employee was misplaced. The conciliator gave the parties the liberty to refer the dispute to the Court.

The respondent filed the notice of preliminary objection on 22.03.2019 through O & M Law LLP upon the following grounds:

- 1) That the claimant lacks *locus standi* to sue on behalf of the grievant under section 54 of the Labour Relations Act, 2007.
- 2) The respondent and the claimant are strangers as they do not have a recognition agreement in place.
- 3) That accordingly the suit ought to be struck out with costs.

The claimant's case is that Article 41 (2) (c) of the Constitution and section 4 of the Labour Relations Act provide for the right of an employee to join membership of a trade union and to participate in activities of the trade union without reference to recognition agreement or collective bargaining agreement. The claimant submitted that the Court should follow its decision in **Kenya Private University Workers Union –Versus- Kenya Methodist University [2017]eKLR** thus, “The Court returns that the present suit is a referral, by the claimant, to the Court, of unresolved trade dispute as per section 73 of the Labour Relations Act, 2007 as read with rule 5 of the Employment and Labour Relations Court Rules, 2016. The claimant clearly has the necessary standing. It is clear that a certificate by the conciliator has been issued in accordance with the provisions of the Act and the claimant was entitled to file the referral by way of the present suit.”

It was submitted for the respondent that a recognition agreement under section 54 of the Act was necessary for the trade union to move and file suit as has been done in the instant case. The respondent relies on the decisions by the Court in **Transport Workers Union (K) – Versus- Ideal Logistics Limited [2012]eKLR**, (Radido J) and **Banking, Insurance & Finance Union (Kenya) –Versus- Maisha Bora Sacco Society Limited [2016]eKLR** and **Communication Workers' Union –Versus- Safaricom Limited [2014] eKLR** (Mbaru J), and **Kenya Shoe & Workers Union –Versus- Modern Soap Factory Limited [2017]eKLR**, (Makau J) that conclusion of a recognition agreement is a precondition for a trade union to initiate conciliation proceedings or a suit on behalf of its member and against that member's employer.

The claimant relies on **Kenya Shipping, Clearing and Warehousing Workers Union –Versus- Sunripe (1976) Limited [2018]eKLR** where the Court (Onyango J) held, “ The respondent had submitted that the claimant union lacks locus standi to file suit on grounds that it does not have a recognition agreement or collective bargaining agreement. A recognition agreement is signed by a union and employer where the union had recruited a simple majority. The recognition agreement gives the union the right to negotiate collective bargaining agreement. This is provided for under Section 54 (1) and (2) of the Labour Relations Act. Membership of a union by employees is however provided for under Section 48 (3) of the Labour Relations Act and is signified by an employee signing Form S set out in the Third Schedule in the Act. It is membership of trade union that gives an employee the right of representation

by the union irrespective of whether the union has achieved a simple majority to entitle it to recognition by the employer or not.

The submission by the respondent that the claimant has no locus standi is therefore a fallacy as recognition and collective agreement are not the determinants of locus standi. It is membership of a union that gives the union locus standi to represent an employee. The respondent has not denied that the claimant has recruited members from among its employees.

Article 41 (2) (c) of the Constitution and Section 4 of the Labour Relations Act provide for the right of an employee to join membership of a trade union and to participate in the activities of the trade union without reference to recognition agreement or collective bargaining agreement.”

In the recent ruling in Kenya Hotels and Allied Workers Union –Versus- Golden Jubilee Ltd T/A Crown Plaza Nairobi [2019]eKLR, this Court held, “The Court considers that the purpose of recognition under section 54 of the Labour relations Act, 2007 is to pave way for collective bargaining and not to pave way for representation or initiation of a trade dispute or suit like in the instant case. The Court holds that once a trade union has recruited members, it is entitled to represent such members or initiate trade dispute proceedings or a suit for the benefit of its members, even in absence of recognition.”

Again in Kenya Engineering Workers Union –Versus- Africa Metal Works Limited [2019]eKLR, this Court held, “In any event the Court considers that the issue in dispute is the lawfulness and fairness or otherwise, of the redundancy in issue. The applicable law is section 40 of the Employment Act, 2007. The section is clear that for members of a trade union the relevant redundancy notice shall be served upon their trade union and membership in a trade union or lack of it shall not be a basis for discrimination during redundancy. The section does not prescribe conclusion of a recognition agreement as a precondition to involving a trade union in the redundancy process. In the instant case the claimant has so far established that as at the time of the redundancy notices it had already recruited the employees and served or notified the respondent accordingly. Within the framework of section 40 of the Employment Act, 2007, the claimant has established a direct grievance as a trade union and the Court finds that the claimant had standing to move the Court on its own behalf and that of its affected members towards challenging the ensuing redundancy.”

The Court has considered the previous cases and the jurisprudence appears to tilt towards the position that recognition is a precondition for concluding a collective agreement whereas the precondition to an employees’ representation by a trade union is that employee’s membership in the trade union. The Court returns that the preliminary objection will fail.

In conclusion the notice of preliminary objection filed for the respondent herein is hereby dismissed with costs and parties are directed to take steps towards expeditious determination of the pending application and the main suit.

Signed, dated and delivered in court at Nairobi this Friday 31st May, 2019.

BYRAM ONGAYA

JUDGE