

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 61 OF 2018

KENYA ENGINEERING WORKERS' UNION.....CLAIMANT

- VERSUS -

AFRICA METAL WORKS LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd May, 2019)

RULING

The claimant filed the memorandum of claim dated 26.11.2018 alleging unfair and unlawful redundancy of the respondent's employees being the claimant's union members.

The respondent filed the reply to the memorandum of claim on 16.01.2019 through T.O. Kopere & Company Advocates. At paragraph 2 of the reply the respondent stated, "**2. The respondent shall at the hearing hereof raise a Preliminary Objection to the Memorandum of Claim dated 26.11.18 and filed in Court together with a Notice of Motion on 27.11.18 on the ground that the claimant has no *locus standi* to file any Claim in respect of any Past or Present Employees of the Respondent as there is No Recognition Agreement between the claimant and the Respondent under Section 54 of the Labour Relations Act, 2008 and consequently the Memorandum of Claim, Verifying Affidavit sworn by one Wycliffe Nyamwatta and all Documents filed herein should be struck out with costs to the Respondent in terms of the Notice of Preliminary Objection dated and filed in Court on 28.11.18 by the Respondent.**"

The claimant's case is that the respondent broke up from East Africa Works Limited after a disagreement amongst the directors and the respondent moved out with a portion of the employees who were already in membership of the claimant union. The employees in issue being members of the union were already subject to the recognition agreement and collective agreement binding upon the claimant and the East Africa Works Limited. In May 2018, 16 of the employees that were in the respondent's employment affirmed their union membership by signing the relevant check-off forms which were served upon the respondent as forwarded by the letter dated 15.10.2018.

The Court has considered the claimant's case and returns that in absence of any other material in that regard, as at filing of the suit on 27.11.2018, there were at least 16 employees of the respondent being the claimant's members. The preliminary objection before the Court is that despite such established union membership, the claimant trade union lacks standing to sue on behalf of its said members for want of a recognition agreement between the parties in the suit.

The claimant's case is that a recognition agreement under section 54 of the Labour Relations Act, 2007 is for purposes of paving way for collective agreement and is not meant for representation of employees that may have already joined the union like in the instant case. The claimant's further case is that the redundancy notices issued after the employees had joined the union so that the union was therefore entitled to sue on behalf of the employees.

The respondent relies on **Kenya Union of Employees of Voluntary & Charitable Organisations (KUEVACO) –Versus- Maina Wanjigi Secondary School [2015]eKLR**, where Mbaru J held that without a valid recognition agreement between a trade union and an employer, the trade union could not file a trade dispute under the Labour Relations Act, 2007.

The Court has considered the parties' respective positions. As at the time of the redundancy notices, the claimant had recruited the employees. Unlike in the case cited for the respondent, in the instant case there was no trade dispute as such. The claimant has moved the Court on the basis of the individual contracts of service and there was no trade dispute in that regard. Further, at full hearing it will be for parties to make a case for the terms and conditions of service applicable to those individual contracts of service in circumstances whereby the respondent had taken up employees previously subject to a recognition and collective agreement and whether the terms in the collective agreement were applicable or fresh terms had been concluded. The answer to such issues cannot be at the preliminary stage and the Court's opinion is that the claimant was entitled to move the Court towards resolution of such matters.

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.

Accordingly, the preliminary objection will fail.

In conclusion, the preliminary objection is dismissed with costs in the cause and parties are invited to take directions on further steps towards

the expeditious hearing and determination of the suit.

Signed, dated and delivered in court at Nairobi this Friday 3rd May, 2019.

BYRAM ONGAYA

JUDGE