

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

MISCELLANEOUS CAUSE NUMBER 48 OF 2018

BETWEEN

BAKERY, CONFECTIONERY, FOOD MANUFACTURING

& ALLIED WORKERS UNION [K].....APPLICANT

VERSUS

TSS GRAIN MILLERS LIMITED (UNDER ADMINISTRATION).....RESPONDENT

RULING

1. The Claimant Union filed this Miscellaneous Application principally under Section 560 [9] [d] of the Insolvency Act 2015, and Rule 17 of the Employment and Labour Relations Court [Procedure] Rules 2016. The main order sought, is for leave to institute legal proceedings against the Respondent, a Company which has been placed under administration. The Applicant is a Trade Union, seeking to pursue redundancy benefits against the Respondent, on behalf of former Employees of the Respondent, who are Members of the Claimant Union.
2. The Respondent filed a Replying Affidavit sworn by Administrator, Ponangipalli Venkata Rama Rao, on 7th March 2019. Also filed is a Notice of Preliminary Objection, filed on even date. The gist of the Reply and Objection is that an Application for Leave, under the Insolvency Act 2015, can only be made at the High Court. The E&LRC upheld this position in **Cause Number 833 of 2015 between Fredrick Okoth Owino v T.S.S. Grain Millers**. The Respondent urges the Court to strike out the Application with costs to the Respondent.
3. Encountered with this hurdle, the Applicant made an oral request to the Court to have the Application transferred to the High Court, Commercial Division, rather than being struck out as desired by the Respondent.
4. The Court has considered the conflicting positions of the Parties, and taken into account the relevant statutory and case law, cited by the Parties. There is before the High Court Mombasa, Insolvency Cause Number 1 of 2016, involving the administration of the Respondent Company. The E&LRC has ruled in its Cause Number 833 of 2015, involving the same wobbling business and a former Employee that an order for leave under the Insolvency Act, ought to be made at the High Court. Once leave is granted, the Applicant shall be at liberty to come back to the E&LRC.
5. The Court however, does not see why the Application should be struck out altogether, instead of being transferred to the right forum. Transfer would minimize costs to the Parties, and is the right thing to do, under the principle of judicial cooperation and comity. Section 3 of the Employment Act 2007 requires the Court to facilitate the just, expeditious and proportionate resolution of disputes governed by the Employment Act 2007.

IT IS ORDERED:-

a. The Application filed herein by the Applicant on 22nd November 2018, is transferred to the Commercial Division, High Court Mombasa.

Dated and delivered at Mombasa this 14th day of June 2019.

James Rika

Judge