



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1510 OF 2017**

**KENYA HOTELS & ALLIED WORKERS UNION...CLAIMANT**

**v**

**BIDWOOD SUITES HOTEL LIMITED.....RESPONDENT**

**RULING**

1. This Ruling is in respect of a *Preliminary Objection* dated 11 September 2017 and filed by Bidwood Suites Hotel Ltd (Respondent) on 13 September 2017.

2. The Objection was to the effect

**TAKE NOTICE** that, the Respondent, prior to the hearing of the main suit, shall raise a preliminary objection that there is no recognition agreement between itself and the Kenya Hotels & Allied Workers Union as required under section 54(3) of the Labour Relations Act, 2007. Accordingly, the Respondent avers that the Claimant has no *locus standi* to commence or maintain this Cause and the same be struck out.

3. Kenya Hotels & Allied Workers Union (the Union) filed a Response to the *Preliminary Objection* on 5 October 2017 contending that the *Objection* infringed on its right to file suit in a superior Court, representation and freedom of association.

4. The Court took oral submissions on 4 June 2019. The parties also cited authorities. The Court has considered all the material placed before it.

5. The jurisprudence of the Court on whether a Union which has not been granted recognition has the *locus standi* to institute and prosecute claims on behalf of its members has been shifting since the establishment of this Court in 2012.

6. Section 54(3) of the Labour Relations Act cited by the Respondent provides that

An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employer's organisation recognise a trade union.

7. Since the provision makes reference to section 54(2) of the Labour Relations Act, it is necessary to set out what the subsection provides. It provides that

A group of employers, or an employer's organisation, including an organisation of employers in the public sector, *shall recognise a trade union for the purposes of collective bargaining* (my emphasis) if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

8. It is apparent to the Court that the principal statutory reason for the grant of recognition to a trade union by an employer is to enable and facilitate collective bargaining.

9. However to put the *recognition proviso* into context, it is imperative to examine the wider question of *locus standi*, starting with the Constitutional norm.

10. Article 22 of the Constitution set out the supreme norm on *locus standi* in respect of proceedings alleging denial, violation or threatened violation of constitutional rights and freedoms.

11. Of particular interest in the present case is Article 22(2)(d) of the Constitution under which *locus standi* is given to an association acting in the interest of one or more of its members.

12. Before a trade union seeks recognition, it must get registration from the Registrar of Trade Unions. It must also recruit/demonstrate that it has recruited members.

13. When a worker joins a trade union, it is an exercise of the right to freedom of association guaranteed by the Constitution. As a member of such an association, the worker cannot be limited from enjoying other benefits which such association may bring forth.

14. Otherwise such membership of a statutorily registered association would become illusory.

15. Article 20(3)(b) of the Constitution enjoins the Court (as all other persons) in applying a provision of the Bill of Rights (in this case freedom of association and right to institute court proceedings/access justice) to adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

16. In the view of the Court, giving sections 54(2) & (3) of the Labour Relations Act a purposive and contextual meaning would therefore lead to the conclusion that a *recognition agreement* is not decisive in anchoring *locus standi* upon a trade union to institute legal proceedings on behalf of its members where there is no recognition.

17. Put differently, the Court, within the constitutional scheme finds nothing in section 54(2) & (3) of the Labour Relations Act which would serve to restrict or limit the *locus standi* allowed a trade union as an association from instituting or representing its members in legal proceedings where it can demonstrate that it is agitating on behalf of its member(s) even before recognition.

18. For the above reasons, the Court will not follow the earlier decisions on the question of *locus standi* as were set out in *Communication Workers Union v Safaricom Ltd* (2014) eKLR and *Kenya Shoe Workers Union v Modern Soap Factory Ltd* (2017) eKLR, which were relied on by the Respondent.

19. The preliminary objection is dismissed with no order as to costs.

**Delivered, dated and signed in Nairobi on this 19<sup>th</sup> day of July 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Mr. Simiyu, Deputy Secretary General

For Respondent Mr. Kazungu instructed by Ashitiva Advocates LLP

Court Assistant Lindsey