



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC CAUSE NO. 120 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 9th July, 2019)

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

GALOT ESTATE KIAMBU.....1ST RESPONDENT

LONDON DISTILLERS (K) LIMITED.....2ND RESPONDENT

MR. MOHAN GALOT.....3RD RESPONDENT

RULING

1. The Ruling herein is in respect of two Preliminary Objections to the Claimant's Notice of Motion filed 26th February 2019. The 2nd Respondent filed its Notice of Preliminary Objection on 13th March 2019 while the 1st and 3rd Respondents filed their Notice Preliminary Objection on 14th March 2019.

2. The 2nd Respondent's Notice of Preliminary Objection raises the following grounds:

1. The Memorandum of Claim and the Notice of Motion are incompetent for lack of locus by the Claimant to sue on behalf of the grievants under section 54 of the Labour Relations Act, 2007.

2. The Memorandum of claim is an abuse of the process of the Court and has been lodged in violation of the provisions of Sections 62, 67 and 69 of the Labour Relations Act, 2007.

3. The Affidavit of Simeon Kimeu is defective.

3. The 1st and 3rd Respondents' Notice of Preliminary Objection raises the following grounds:-

1. THAT the claimant has violated clear provisions of section 62 of the Labour relations Act.

2. THAT the Claimant lacks locus standi to bring the Claim on behalf of the grievants as it does not have a Recognition Agreement with the 3rd Respondent.

3. THAT the 1st respondent is wrongly suited as it does not have a legal capacity.

4. That the Claimant has acted in contravention of its Constitution. It does not have jurisdiction to act on behalf of the grievants.

5. THAT this claim is an abuse of the Court process.

6. THAT the entire Claim is dismissed with costs.

4. The Claimant in response to both Preliminary Objections filed a Replying Affidavit sworn by Simon Kimeu the Claimant's Assistant Director of Organisation. He avers that 9 employees serving at the 1st and 3rd Respondents were locked out on 13th February 2019 for refusing to sign a form issued to them on 7th February 2019 by the 3rd Respondent requiring them to amongst others pledge their loyalty to

the 1st and 3rd Respondents and to confirm that they were not members of a trade union.

5. He avers that the Respondents in locking out the employees failed to issue notice as required under Section 76 (c) of the Labour Relations Act and that the Respondents did not refer to any trade dispute which would result to lockout out.

6. He avers that the Claimant moved to Court to protect the employees against the unlawful actions of the Respondents. He avers that the Claimant referred the matter to the Ministry of Labour for conciliation under Section 62 of the labour Relations Act and that it did not violate the provisions of said section.

7. He avers that the issue of whether the employees serving at the 1st Respondent are covered by a Recognition and Collective Bargaining Agreement between the Claimant and the 2nd respondent was settled in Cause 1639 of 2016. Consequently, the question of locus and sufficient interest was determined and the same has not been challenged.

8. He avers that the 3rd Respondent purports to pay statutory deductions for employees while the 1st Respondent has an employment relationship with the grievants as it issues instructions to them.

9. He avers that there exists a recognition and Collective Bargaining Agreement between the Claimant and the 2nd Respondent which employees serving at the 1st and 3rd Respondents have enjoyed over the years. He avers that the Supporting Affidavit of Simon Kimeu is properly drawn without defect. Therefore, both the Preliminary Objections ought to be dismissed with costs.

10. Both preliminary objections were heard by way of written submissions with the parties filing their respective submissions.

2nd Respondent's submissions

11. The 2nd Respondent in its submissions argued that the Claimant has not shown that the grievants are its members and that any deductions were made in favour of the Claimants towards the grievants' unions dues, levies and or subscription as required under section 52 of the Labour Relations Act.

12. It submitted that Clause 5 of the Claimant's constitution expressly sets out the areas where it can recruit and represent members and expressly excludes a private residence as such one sector outside the ambit of its operations. In addition, that the Claimant has not demonstrated that it has changed its Constitution as required by section 27 of the Labour Relations Act. It relied on the decisions in **Kenya Shoe & Workers v Modern Soap Factory [2017] eKLR** and **Kenya Hotel and Allied Workers Union v Sovereign Limited [2018] eKLR**.

13. It submitted that the wordings of Section 62, 67 and 69 of the Labour Relations Act are mandatory in nature and a party is not authorised to move to Court before the determination of the conciliation process by the Ministry of Labour and Human Resource Development. It argued that the Claimant had confirmed in the Notice of Motion and Supporting Affidavit that it had reported to the Minister of Labour of the existence of the dispute and that the dispute had not been determined by the time the Claimant moved to Court on 26th February 2019.

14. It relied on the decision in **Kenya Union of Printing, Paper Manufacturing and Packaging Industries v MFI Solutions [2016] eKLR** where the Court held:-

“The Claimant side-stepped conciliation and approached the Court directly. The dispute was filed under certificate of urgency. The law requires urgent referrals should be preceded by the conciliation process under Section 62, as read together with Sections 54 [6], 54[7] and Section 74 [a] of the Labour Relations Act. It is the intention of the law that recognition disputes are taken through the conciliation process, before being filed in Court...”

1st and 3rd Respondents' submissions

15. The 1st and 3rd Respondents submitted that there is no recognition agreement between the Claimant and them thus the Claimant has no *locus standi* to file the present suit on behalf of the grievants. They submitted that a recognition agreement is the basis upon which the Union and an employer begin engagement and without such the union lacks backing to defend or agitate for employees' rights. They relied on the decision in **Communication Workers' Union v Safaricom Limited [2014] eKLR** where the Court held:-

“The question here with regard to locus standi is that the Claimant union has no recognition with the Respondent and even where such recognition is lacking; there is no CBA between the parties to regulate terms and conditions of work. Without recognition by an employer, a trade union, even where registered as such, becomes a by-stander waiting by the road side for instructions.”[Emphasis supplied]

16. They submitted that the Claimant has brought this suit prematurely as a conciliator was yet to be appointed to resolve the dispute lodged by the Claimant to the Ministry of Labour and that no certificate has been issued by the conciliator according to Section 69 of the Labour Relations Act.

17. They further submitted that the provisions of Part VIII of the Labour Relations Court Act (wherein Section 62 falls) are mandatory and that the Claimant has not complied with Section 62 therefore this Court cannot exercise jurisdiction before procedure under the said section are exhausted.

18. They averred that the 1st Respondent is wrongly sued since it is not a recognised legal person as evidenced by the outcome of a search at the Registrar of companies.

19. They therefore submitted that for reason that the 1st Respondent is not an existing legal entity it cannot be sued hence the suit against it is a nullity and ought to be dismissed. They relied on the decisions in **Eritrea Orthodox Church v Wariwax Generation Limited [2007] eKLR** and **Africa Orthodox Church of Kenya v Charles Omuroka & another [2014] eKLR**.

20. They averred that the Claimant's constitution at rule 5 sets out the sectors within which the Union can recruit and represent members, which is industrial group. Therefore, the employees at a private residence such as the 3rd Respondent do not fall within the purview of employees eligible to be union members. They therefore urged the Court to dismiss the suit as the union has acted ultra vires to its own constitution.

Claimant's submissions

21. The Claimant submitted that there is an existing recognition agreement between the 2nd Respondent and itself. Further, the employees working at the 1st Respondent are employed by the 2nd Respondent which issued appointment letters and staff identification cards to the employees. In this regard, it submitted that in Cause 1639 of 2016 the Court established that employees serving at the 1st Respondent are employees of the 2nd Respondent and that no appeal has been lodged against the decision.

22. It submitted that the 3rd Respondent is sued for the reason that he is the chairman of the 1st and 2nd Respondents and that he is properly sued though the Claimant did not have to record a recognition with him in order to sue him for contraventions of the law. It argued that Section 54 of the Labour Relations Act is for purposes of collective bargaining and not for union membership and protection.

23. The Claimant confirmed having referred the dispute to the Ministry of Labour vide its letter dated 14th February 2019 but argued that the circumstances of this dispute is such that if the Claimant did not move to Court under certificate of urgency all the grievants would be out of employment for joining and participating in trade union activities.

24. It submitted that the grievants are deployed at the 1st Respondent which is owned by the 3rd Respondent and that whether the 1st Respondent is incorporated or not is not a subject that can be addressed in this Court.

25. It averred that the employees have freedom to join a union of their choice. In addition, no union has been enjoined in the suit claiming that the Claimant acted ultra vires.

26. In respect to the 2nd Respondent's submissions, the Claimant averred that the issue on recognition and collective bargaining agreements have been addressed and that the core dispute is union membership and the freedom of association. In conclusion, it urged the Court to dismiss each of the Preliminary Objection.

27. I have examined all the averments of both parties. The Preliminary Objections raised by the 1st and 3rd Respondent concern Locus of the Claimant to file this Claim against the Respondents.

28. The main contention by the Applicants is that there is no recognition agreement between the 1st and 3rd Respondents and the Claimant to allow the Claimant file this claim.

29. The Claimants have submitted that they have a recognition agreement with 2nd Respondent who posts employees to serve the 1st Respondent. The 3rd Respondent is owner of Galot Estate Kiambu and he is said to be issuing directions to 1st Respondent.

30. I note that 3rd Respondent is sued as owner of 2nd Respondent which is a limited liability Company and which has its own legal standing as per the principal in **Salomon vs Salomon**. The 3rd Respondent is therefore wrongly enjoyed in this case and I struck him off these pleadings.

31. As for the issue of Locus of the Claimant this is not an issue I can resolve without hearing the Parties fully in view of the submissions by the Claimant that the employees of the 1st Respondent were send by 2nd Respondent who has a recognition agreement with the Claimant. This issue will therefore be resolved in the main claim.

32. Costs in the cause.

Dated and delivered in open Court this 9th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Chadianya for 1st and 3rd Respondents – Present

Miss Maumo for 2nd Respondent – Present