



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1647 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 17th September, 2019)

RIFT VALLEY RAILWAYS WORKERS UNION (K).....CLAIMANT

VERSUS

CHINA ROADS BRIDGES CORPORATION.....RESPONDENT

AND

MINISTRY OF LABOUR AND SOCIAL PROTECTION,

STATE DEPARTMENT OF LABOUR.....1ST INTERESTED PARTY

RAILWAYS AND ALLIED WORKERS UNION.....INTENDED 2ND INTERESTED PARTY

RULING

1. The Claimant, Rift Valley Railways Workers Union (K) filed a Preliminary Objection dated 19th March 2019 in response to the Notice of Motion Application dated 5th March 2019 filed by the Intended 2nd Interested Party, Railways and Allied Workers Union. The Claimant Union is objecting the enjoinder of the said Intended 2nd Interested Party on the basis that:-

1. The Intended 2nd Interested Party does not at all have the requisite Locus Standi to even purport to seek to be enjoined in the above matter, in seeking to represent the six grievants herein.

2. There is absolutely no nexus between a Recognition Agreement and the right of a worker to be represented by a Union of his/her choice as appears to be the narrative being advanced herein by the Intended 2nd Interested Party.

3. The Intended 2nd Interested Party herein is improperly before this Hon. Court so that the same ought of necessity to be asked to represent himself properly in Court. They cannot purport to seek to represent members of another union.

4. No prejudice shall, or is about to be suffered by the Intended 2nd Interested Party in the most likely event of the said Applicant being denied the joinder being sought, neither has the said

applicant demonstrated the said prejudice alleged to about be so suffered.

5. The said Application by the Intended 2nd Interested Party is a flagrant abuse of the due process, it is vexatious and a waste of the Court time and must therefore be dismissed and not without costs.

2. The Respondent, China Roads & Bridges Corporation while filing its Notice of Preliminary Objection to the entire claim, also filed its Grounds of Opposition to the Intended 2nd Interested Party's joinder application dated 27/03/2019 on the following grounds:-

1) That the Claimant has no locus standi to file a claim on behalf of the Respondent's former employees since it does not have a recognition agreement with the Respondent.

2) That by reason of 1 above, the entire claim is incompetent and fatally defective.

3) That it is legally untenable for the intended 2nd Interested Party to be enjoined in an incompetent and fatally defective claim.

3. When the matter came up before Court on 04/04/2019, the Intended 2nd Interested Party's advocate stated that they would not reply to the Preliminary Objections. On 02/05/2019, this Honourable Court directed the Respondent to file their reply to the Preliminary Objection within 14 days, which they did not and the Court further directed on 17th June 2019 that the Preliminary Objection would be dispensed by way of written Submissions.

Claimant's Submissions

4. The Claimant Union submits that a Recognition Agreement is only but for reasons of Collective Bargaining Agreement and is not at all a prerequisite for industrial relations and or representation as in this matter. That just because the intended Interested Party signed a recognition agreement with the Respondent does not preclude the Claimant Union from representing its members including the six grievants herein.

5. That further, the alleged Recognition Agreement was fraudulently signed without the requisite 50% plus one being obtained by the Intended Interested Party and that neither has the said Intended Interested Party presented check-off forms attesting to the said numbers. That even the purported 49% of the employees who may not be members of the Intended 2nd Interested Party have a right of representation invoked in **Articles 36 and 41 of the Constitution** to identify themselves with the activities of the Claimant.

6. That the position of the Labour Relations Act 2007 is that a minimum of 5 members who elect to join a specific union is the requisite number that a union ought to first have recruited for it to have the right to represent the said members in industrial relations issues, and not the 50% +1 or recognition as misrepresented by the Intended Interested Party.

7. That even though the tenets and/provisions of the alleged Recognition Agreement may have provided for "*full recognition*" of the union by the Respondent, the clause is unlawful for being inconsistent with the Constitution and Statutes thereon. That the law affirms the said workers' right to form, join or associate themselves with the activities of any union of their choice and so to the extent of the alleged recognition agreement's inconsistency, it must be declared null and void.

8. The Claimant submits that membership to a trade union is not by way of a recognition agreement but by way of signing check-off forms. That the Intended Interested Party should adduce evidence in Court by producing duly signed check-off forms to the effect that the said six grievants are its members and not the Claimant union's members. That the Intended Interested Party cannot expect the Court to rely on hearsay to make a determination as opposed to documented evidence.

9. It is submitted by the Claimant Union that the **International Labour Organisation Statutes and Conventions Number 87 and 98** prohibit the interference by an individual and/institutions or another union of the legal activities of a Trade Union.

Respondent's Submissions

10. The Respondent submits that the Claimant has not pleaded it has a recognition agreement with the Respondent and neither has it pleaded that the eight Respondent's former employees on whose behalf the claim is filed are their members.

11. That it is the Intended 2nd Interested Party that is entitled to file this claim on behalf of the grievants and that since these are not contested facts and discernable from the pleadings on record, they should not be determined by evidence adduced at trial.

12. That the Respondent's Notice of Preliminary Objection falls within the requirements of **Mukhisa Biscuit Manufacturers Ltd vs. West End Distributors Ltd [1969] E.A. 696** where the Court of Appeal held that a Preliminary Objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.

13. That in **Kenya Union of Employees of Voluntary & Charitable Organisations (KUEVACO) vs. Board of Governors & Maina Wanjigi Secondary School [2015] eKLR**, the Court held that the evidence of lack of a recognition agreement and Collective Bargaining Agreement meant the Claimants lacked standing before the Court.

14. The Respondent in this instant matter urges this Court to find that both the Claim and the Notice of Motion dated 28th December 2018 are incompetent and fatally defective for having been filed by a party who has no *locus standi*.

15. It is submitted by the Respondent that the Court in **Patrick Kiseki Mutisya (suing as the personal representative of the Estate of Nzomo Mutisya (Deceased) vs. K.B Shangani & Sons Limited & Others [2012] eKLR** upheld a Preliminary Objection on grounds that the suit had been filed by an incompetent party. The Court cited with approval the case of **Macfoy v United Africa Ltd [1961] 3 ALL ER 1169 at page 1172** in which Lord Denning rendered himself that:-

“If an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad...It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad...”

16. The Respondent prays that its Preliminary Objection and the Grounds of Objection be upheld.

Intended 2nd Interested Party's Submissions

17. The Intended Interested Party submits that the two Preliminary Objections raise factual issues, which need a call of evidence by this Honourable Court and evaluation of the said evidence in order to arrive at a logical just conclusion.

18. That it contests the facts raised in both Preliminary Objections and that the Preliminary Objections cannot stand as it is trite law that Preliminary Objections are founded on settled pure points of law. That in the case of **Equity Bank Limited –v- Bryan Yongo & Another [2014] eKLR**, the Court held that any true Preliminary Objection should not be entangled with factual issues.

19. It submits that the Respondent's prayer for the claim and the Claimant's application to be struck out with costs is draconian as it locks out a party from the seat of justice before advancing their case. That such action should only be resorted to in cases which cannot be cured through amendments and it cites

the case of **DT Dobie & Co. (K) Ltd vs. Joseph Mbaaria Muchina 7 Another (1980) eKLR** where the Court held that a suit after amendment ought to be allowed to go forward as Courts should not act in darkness without the full facts of a case before it. That the Respondent's Grounds of Objection are premature and misconceived since they do not address the issues raised in the Intended Interested Party's joinder application.

20. There are two applications before me. The first one relates to the 2nd Intended Interested Party's application for joinder which has not been opposed by the Claimant. The Respondent opposed this application. The main contention by the Respondent is that there is no suit in which the Intended Interested Party can join as there is no recognition agreement between the Claimant and Respondent and Intended Interested Party and that this claim is non-suited as Claimant lacks locus to bring this suit in Court.

21. The second application of the Preliminary Objection is the Preliminary Objection raised by the Respondent, which deals with the fact that the claim should be struck out as Claimant lacks locus to institute this claim as they have no recognition agreement with the Respondent.

22. The two applications are therefore based on the same issue.

23. Article 41 of Constitution provide that every employee has a right to join and participate in activities of a trade union of his choice. The right here belongs to the employee and the contract there is between the employee and the respective union. This implies that once an employee joins a union he or she acquires right given to a member of a union, which includes right to representation in Court. This right is not pegged on recognition between the union and any employer.

24. The contention there from the Respondent that the Claimant has no locus to represent the members due to lack of recognition is flawed.

25. In the circumstances, the Preliminary Objection raised fails. The 2nd Intended Interested is allowed to be enjoined in this claim.

26. Costs in the cause.

Dated and delivered in open Court this **17th day of September, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Owenga holding brief Ondego for Respondent – Present

Munai Isaac for Claimant – Present