



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION 158 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 4th September, 2019)

KENYA NATIONAL UNION OF TEACHERSPETITIONER

VERSUS

TEACHERS SERVICE COMMISSIONRESPONDENT

RULING

1. The Preliminary Objection before the Court has been raised by the Respondent where they state that there is a duly registered CBA with the Court as RCA No. 282 of 2016. That in the said CBA at Clause 17, all disputes between parties must first be subjected to bipartite negotiations for settlement before seeking redress from Courts as provided by law.
2. That although Article 22(1) of the Constitution of Kenya vests in everyone the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, infringed or violated, the right to so institute Court proceedings is not absolute but is subject to limitations by law.
3. Further, that in regard to Court proceedings between the Petitioner and the Respondent, Section 73(1) of the Labour Relations Act, 2007, limits the right enshrined under Article 22(1) of the Constitution.
4. That vide a letter Ref: KNUT/TSC/60/58/2019 dated 4/7/2019, the Petitioner/Applicant wrote to the Respondent to complain of an “attack” on its Membership Register pursuant to the Respondent’s Circular Ref: No. TSC/IPPD/UN/20/Vol.III/47 copied to the Cabinet Secretary for Labour.
5. That by a letter Ref MLSP/LD/IR/5/18 dated 26/8/19, the Principal Secretary, Ministry of Labour & Social Protection has written to the Respondent to declare a trade dispute. The Respondent avers that the Petitioner has failed to invoke the provisions of Clause 17 of the CBA between the parties, without subjecting the same to the dispute resolution mechanism as required under Part VIII of the Labour Relations Act, 2007, and contrary to Section 73(1) in a bid to resolving the dispute.
6. That the commencement of the current proceedings is premature and robs the Honourable Court Jurisdiction to entertain the same. That the proceedings herein are an abuse of the judicial process and are tantamount to wasting the Court’s time and hence ought not to be entertained.
7. The Respondent rely on the case of **Fatemi Investments Limited Vs Bayusuf (1990) eKLR** where it was stated that where a right is given by statute and the means to enforce the or redress are given by statute, one must use these means to get the relief one seeks.
8. The Respondent submit that it is good industrial practice that this dispute be subjected to tripartite negotiations and for the Courts to enforce agreements of the parties entered into voluntarily.
9. In opposing, the Preliminary Objection the Petitioner/Respondent submits that the jurisdiction of the Court is provided for under Article 162(2) of the Constitution and all other laws must be read subject to this provision.
10. That the genesis of the dispute arises out of a judgment by Ongaya J, which the Petitioner alleges, was misinterpreted by the Respondent. That interpretation of a Court’s judgment does not fall within the procedures of a conciliation. Prior to that, the parties had submitted to conciliation a dispute but did not agree on all the issues.
11. The Petitioner submits that the position being suggested by the Respondent is to take the parties back to square one. In the Petitioner’s

view, there is no actual dispute to be referred to conciliation.

12. That before the Court is a Constitutional Petition showing an assault on Article 41 where eminent obligations of employers are openly flouted and it is only this Court, which has the power to grant the reliefs sought.

13. The Petitioner contends that Section 74 of the Labour Relations Act allows filing of disputes before Court where the matter is urgent as was in the instant case.

14. Furthermore, that the Respondent has not disclosed to Court that there was a validation exercise which the Respondent wrote to the Petitioner stating the same was subject to Court proceedings. That by virtue of this letter, the Respondent submitted to the jurisdiction of the Court and is now estopped from denying the same.

15. That the parties have already exhausted ADR and that is the reason the matter is before the Court. It is also contended that the Respondent will not suffer any prejudice should the matter proceed. That the union is paralysed and thus the need to move fast as the Petitioner cannot withstand the timelines of Alternative Dispute Resolution. That the case of **Fatemi Investments (supra)** is a 1990 authority which does not hold water under the new constitutional dispensation.

16. In a rejoinder to the Petitioner's submissions the Respondent submits that it is the Respondent's position that a party cannot come to Court for interpretation of a judgment through a Petition. That the Petitioner is raising new grounds not in the Judgment of Ongaya J and as such, the parties ought to have proceeded through ADR first before coming to Court.

17. That the issues before the Court are not urgent and as such the provisions of Section 74 do not apply. They urge the Court to dismiss the Petition as the Law and the Respondent are bound to be prejudiced if the Preliminary Objection is not allowed.

18. I have considered the averments of the Parties herein. I note that the issues before Court as per the supporting affidavit of Wilson Sossion deponed to on 16/8/2019 at paragraph 21 show that a judgement was delivered in Petition 152 of 2019 before this Court (Judge Ongaya).

19. Immediately after the judgement, the Petitioner wrote to the Respondent on 15/7/2019 requesting for a meeting to discuss the implementation of the Court orders and ensuring compliance of the Collective Bargaining Agreement (CBA). The Respondent apparently did not reply but instead sought stay orders, which the Court declined to issue.

20. That in July 2019, the Respondent now acted arbitrarily and declined to deduct and remit union dues. No explanation was given.

21. Given that the action being complained of against the Respondent are borne out of a previous judgement of this Court which judgement followed previous Alternative Dispute Resolution (ADR) attempts, to insist that this matter goes back to negotiation will not be in the Parties interest and this Court will be running away from its obligations to ensure justice is done to all.

22. I do not find the Preliminary Objection thus merited and I dismiss it and allow the Parties to proceed with this application on its own merit.

Dated and delivered in open Court this **4th day of September, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mbaluto for Petitioner

Oyucho and Anyuor for Respondent