

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO 163 OF 2016

JOSEPH MWANGI KIHARA & 85 OTHERS.....CLAIMANTS

VERSUS

KENYA UNION OF DOMESTIC EDUCATIONAL

INSTITUTIONS,HOSPITAL & ALLIED WORKERS.....RESPONDENT

JUDGMENT

1. The Claimants sued their Union, the Respondent for alleged failure to champion their rights against their employer. The Claimants averred that they were all employees of Kagumo Teachers College and members of the Respondent Trade Union and as such they have a right against the Respondent Union's failure to exercise its mandate towards them and more particularly advocating the Claimants' interests in their employment relationship with their employer, ensuring or championing for better pay for the Claimants, negotiate the Collective Bargaining Agreement as envisaged in Section 57(1) of the Labour Relation Act to improve terms and conditions of the Claimants and provision of legal assistance to the Claimants. The Claimants averred that they engaged the Respondent since the year 2006 to champion their rights against their employer which engagement culminated into a court order given on 4th December 2015 in this Court's Cause No. 9 of 2013. The Claimants averred that however, the Respondent has since failed in this mandate by withdrawing a case filed on behalf of the Claimants against their employer on flimsy grounds of lack of recognition of agreement, failure to enforce on behalf of the Claimants a collective bargaining agreement against the employer leading to issuance of a strike notice against which the Claimants' employer obtained a court order, and lastly failure to champion the Claimants rights with regard to schemes, common establishments and extraneous allowance. The Claimants averred that due to the foregoing abrogation of duty by the Respondent, including failure to implement the court order granted on 4th December 2015 to the benefit of the Claimants, have caused a great loss to the Claimants and they thus seek damages. The Claimants further prayed that a mandatory order of injunction do issue against the Respondent compelling it to instruct an advocate of the Claimant's choice at their cost to execute the order dated 4th December 2015 and costs of the suit.

2. In the defence filed by the Respondent, it averred that every trade union has the right to determine its own administration, programs and activities and that it has a zeal in fighting tirelessly for the protection and promotion of the Claimants rights. The Respondent averred that this claim was fuelled by high court judgment dated 25th March 2014 by Justice Abuodha which ordered that the Claimants are entitled to the same terms and conditions of service as those applicable to their counterpart public service and the issue on the availability was to be discussed by the Ministry of Education and Treasury. The Respondent averred that it and the Board of Management of the Claimants engaged in several meetings and the parties agreed that it will implement the said Directorate of Personnel Management circulars. The Respondent averred that the consent dated 4th December 2015 was filed at the Labour Relations Court at Nyeri and the Management complied with the consent and this cause must fail on that ground. The Respondent averred that the Claimants have therefore failed to demonstrate abrogation and neglect by the Union and the claim ought to fail on that ground and further the claim is also against the spirit of labour practices as it has been brought in bad faith and against the spirit of good industrial relations as the strike was called off by the Union on 25th July 2013 vide a return to work formula after receiving a letter from the Cabinet Secretary informing it that the strike was premature as negotiation was still an option. The Respondent averred that it has incurred hefty legal fees in furtherance of the Claimants' interests and for the Claimants to claim laxity on the part of the Respondent is being ungrateful. The Respondent thus prayed that the court finds this claim as frivolous, vexatious, misinformed, irregular, misconceived and failing to disclose a cause of action and dismiss it with costs.

3. The Claimant Joseph Mwangi Kihara testified on behalf of all other Claimants and stated that they paid dues to the Union every month but the Union failed to fight for their better pay. He stated that they sued the employer in 2006 for underpayment but the Union caused the collapse of the case. He testified that in 2011 they were given an order that the CBA and negotiation be undertaken but that was not done hence they do not have a recognition with Kagumo Teachers College. He stated that the Respondent has not made an effort to have the order complied with causing them to continue suffering. He testified that they have written the Respondent many letters with no response. In cross-examination he admitted to have come to an agreement and they were paid the allowances and the salary but maintained that the commuter allowance was paid at a lower rate as they were in a wrong job group. He testified that the Union should have dealt with the job group issue. The Respondent did not call any witness and its case was closed.

4. The Claimants submitted that the agreement reached before Abuodha J. was not honoured hence the approach to court. They cited Article 232(1) of the Constitution, Section 5(1), (2) and (3) of the Employment Act which outlaws discrimination against an employee and submitted that it is on this legal provision that the court by consent ordered on the 4th December 2015 that there shall be common establishment to provide for parity of job groups. However, despite the Claimants' qualification they have stalled in the same job groups since 2006 despite the DPM circulars of July 2012 and the various revised schemes of service of various carders to which the Claimants belong. The Claimants submitted that the lack of promotions and salary re-alignment was occasioned by the Respondent's failure to follow up the matter with their employer. The Claimant submitted that no evidence was adduced by the Respondent to show any attempt to make a follow up in accordance with the Claimants' various schemes of service despite the Claimants request to do so hence necessitating this claim. The Claimants submitted that the Respondent failed to prove that they have actively engaged the employer in ensuring that the consent order dated 4th December 2015 has been implemented, thus they had failed in protecting and promoting the Claimants' rights. The Claimants submitted that

they were also entitled to general damages as they have incurred huge losses in income as all allowances were paid in the wrong job groups as promotions have not been updated in accordance with the current revised schemes of services for the various cadres in which the Claimants individually belong. The Claimants submitted that due to the significant loss caused by the partial implementation of the consent, it is only mete and just that the honorable court allows the Claimants to appoint an advocate to execute the said consent order in a wholesome manner to ensure that they enjoy its full benefits. The Claimants thus submitted that they are therefore entitled to the reliefs sought in the memorandum of claim and prays that the court allows it as claimed. The Respondent did not file any submissions.

5. The suit was filed as a result of the alleged failure by the Union to take action in a matter that was concluded by the Court. Where a decision is rendered either on the merits or after a consent, the issue of execution of the suit cannot found a cause of action in another suit for enforcement of the judgment. As such, the suit before the court was misplaced since members of Trade Unions who are dissatisfied by their union have to seek redress by either vacating their membership or organizing themselves and seeking to register a trade union to articulate their needs better. As the suit was incompetent to that extent it is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 11th day of December 2019

Nzioki wa Makau

JUDGE