

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 329 OF 2017

KUDHEIHA WORKERS.....CLAIMANT

VERSUS

BOM MBWINJERU PRIMARY SCHOOL.....RESPONDENT

RULING

1. The Respondent filed a preliminary objection to the suit by the Claimant on the grounds that the Claimant is non-suited against the Respondent. In the preliminary objection filed on 27th November 2017, it was stated that the claim offends the provisions of Article 186(1) as read with Part 2(9) of the Fourth Schedule of the Constitution of Kenya 2010 and that the Claimant thus has no *locus standi* to file the suit as the grievant membership with the union is disputed. The respondent thus sought the Claimant be struck off from the suit. In submissions filed in support of the preliminary objection, the Respondent asserts that under article 186(1) of the Constitution, the functions and powers of the National and County Governments are provided and this is under the Fourth Schedule. It was submitted that the grievant was employed in 1976 as a nursery school teacher and that the Respondent being a national primary school is governed by the Basic Education Act 2013. It was submitted that the Claimant had sued the wrong party and that there can be no cause of action against the Respondent. The Respondent thus urged that it ought to be struck out from this suit. The Respondent further submitted that the Claimant has no *locus standi* to institute the suit for the grievant and that for the test of *locus standi* to be met, a party must have a sufficiency of interest to sustain its standing to sue in a court of law. It was stated in this case, such sufficiency will take the form of recognition of the trade union by the employer so that the trade union may be able to represent those employees that form part of an union should any dispute arise. The Respondents cited the case of **Law Society of Kenya v Commissioner Lands & 2 Others [2001] eKLR** to support the arguments on standing. The Respondent further the cited provisions of the Labour Relations Act as to the absence of a recognition between the parties. It was stated that even if the trade union is duly registered, it cannot be a party to the suit as there is no recognition agreement in place. It was submitted that there was no basis for the Claimant to institute the suit and the same should be struck out with costs to the Respondent.

2. The preliminary objection was opposed and the Claimant filed submissions on 16 March 2018. It was submitted that the Claimant sued the Respondent for failure to pay the Grievant her retirement benefits as provided for under clause 31 of the collective bargaining agreement (CBA) between the Claimant and the Ministry of Education Science and Technology. It was submitted that the Claimant has *locus standi* to institute the claim for and on behalf of the Grievant as a member of the Claimant. It was submitted the preliminary objection should therefore be struck out and the hearing of the suit be allowed to proceed.

3. The *locus classicus* on preliminary objections is the oft cited case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] EA 696**. In that case, Law J.A. stated a preliminary objection to be thus:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” (Underline mine)

4. In the objection taken, it is asserted that the Claimant lacks the legal capacity to sue the Respondent on behalf of the Grievant and that the Respondent is improperly enjoined. The objection taken is that the Claimant cannot represent the grievant as it lacks standing. As held in the **Law Society of Kenya v Commissioner of Lands** above, standing is critical in any given suit where a party seeks to articulate a case on behalf of another and more so where the putative Claimant such as the one herein sues under the auspices of membership of the Claimant. In the suit before me there is no basis laid by any of the pleadings or the documents that are attached to the claim to suggest that the Claimant has capacity to sue on behalf of the grievant, Joyce Kathambi. The Respondent’s objection is therefore well founded, granted the Claimant has not demonstrated that it has sufficiency of interest to prosecute the claim on behalf of the grievant one Joyce Kathambi. This dispute was referred by the conciliator at the Labour Officer Meru to this court for determination on account of the non-payment of dues to the grievant by the Mbuinjuru Primary School, Nkubu. I therefore accede to the preliminary objection and strike out the name of the Claimant and substitute it with the name of the grievant Joyce Kathambi henceforth to be referred to as Claimant in the suit. As the preliminary objection did not succeed in having the suit determined *in limine* I shall make no orders on costs.

It is so ordered.

Dated and delivered at Meru this 7th day of May 2018

Nzioki wa Makau

JUDGE