



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.164 OF 2017

ELIAS KIPLAGAT CHEMWENO & 77 OTHERS.....CLAIMANT

VERSUS

ZENA ROSES COMPANY LIMITED.....RESPONDENT

RULING

The ruling herein relates to Preliminary Objections by the respondent, Zena Roses Limited and set out under paragraph 12 of the Memorandum of Reply and on the grounds that;

*There are pending suits between the parties herein in Nakuru No.396 of 2014 Zena Roses Limited Versus Kenya Plantations and Agricultural Workers Union (formerly Nairobi ELRC No.1329 of 2014) and Nakuru ELRC No.448 of 2014 Kenya Plantations and Agricultural Workers Union versus Zena Roses (formerly Nairobi ELRC No.1428 of 2014) over the same subject matter herein.*

Both parties made their oral submissions and arguments with regard to the objections made.

The claimants submit that they have made efforts to have all the suits consolidated herein but the suit under **Cause No, 396 of 2014** and formerly **Nairobi Cause No, 1329 of 2016** relates to a strike notice where the respondent herein was asking for restraining orders against the trade union. In **Cause no.448 of 2014** and formerly **Nairobi Cause No.1428 of 2014** the claim relates to 47 shop stewards who had been transferred and the trade union was seeking the cancellation of such transfers and reinstatement. The claim herein relates to the claimants' unfair dismissal from employment by the respondent. The three (3) suits seek different orders and are not similar.

The claimants also submit that where the claimants ceased employment with the respondent, their membership with the trade union also ceased and have the right to file the current suit. Objections filed should be dismissed.

The respondent submits that there are two suits in **Cause No.448 of 2014** and **Cause No.396 of 2014** filed by the trade union on behalf of the claimants herein and this adds to three (3) on-going suits based on the same facts and cause of action. The trade union has the right to represent its members and file suits which was done in **Cause No.448 of 2014** and such suits are still pending. The submissions by the claimants that they have ceased membership with the trade union upon leaving the employment of the respondent have no basis in law or in fact.

The respondent also submit that where the 3 suits are allowed to proceed separately and before different court, such multiplication will cause injustice to the respondent as there are high chances of conflicting orders, multiple award over the same matters and or different directions taken in all the suits. This will cause prejudice to the respondent and amount to grave injustice. The cause of action is a strike that arose within the respondent employees and which led to the dismissal of the claimants and such matters are well addressed in Causes No.396 of 2014 and Cause No.448 of 2014 and are on-going.

It is not in dispute that there exists **Nakuru No.396 of 2014 Zena Roses Limited Versus Kenya Plantations and Agricultural Workers Union** (formerly Nairobi ELRC No.1329 of 2014) and **Nakuru ELRC No.448 of 2014 Kenya Plantations and Agricultural Workers Union versus Zena Roses** (formerly Nairobi ELRC No.1428 of 2014). The active suits are thus **Cause No's 396 of 2014** and **Cause No.448 of 2014** all at Nakuru, Employment and Labour Relations Court of Kenya. One is filed by the respondent herein, Zena Roses Limited while the other is filed by Kenya Plantations and Agricultural Workers Union respectively.

Unionisation of the claimants with Kenya Plantations and Agricultural Workers Union is not denied save that the claimants assertion is that such unionisation and membership ceased upon their termination of employment with the respondent. That they have filed the claim herein on their own right and following their unfair dismissal by the respondent.

When does union membership under Kenya Plantations and Agricultural Workers Union cease?

Employees unionise to form a collective and to build a mass to ensure recognition by the employer and to be able to negotiate terms and

conditions of employment by forming a trade union and which trade union is able to have such a mass to enter into a collective agreement. For the trade union to achieve such purpose, a constitution is required to regulate its operations and ensure democratisation and mandate of its members. Once such union is formed, the members are required to pay a due to facilitate operations. Such dues can be direct or by check off from the wages and salaries of the employees. Where a collective agreement is attained and some employees have not registered membership with the trade union, an agency fees is due.

With regard to collected dues by the trade union, Section 39 of the Labour Relations Act, 2007 requires that the same be applied for various purposes. In this case and of relevance is section 39 (c), (d) and (e) are relevant to quote as follows;

*39. Application of funds*

*Subject to its rules and the provisions of this Act, the funds of a trade union, employers' organisation or federation may be used only for the following purposes—*

*(a) ...*

*(b) ...*

*(c) the prosecution or defence of any legal proceedings to which the trade union, employers' organisation or federation or any member thereof is a party, when the prosecution or defence is undertaken for the purpose of securing or protecting its rights or the rights of any member in any matter concerning employment or the application of any employment law;*

*(d) The conduct of trade disputes on its behalf or on behalf of any member thereof;*

*(e) The compensation of members for loss arising out of trade disputes;*

The collected dues *may be sued* for the purpose of prosecution or defence of any legal proceedings in which the trade union is a party or has an interest so as to protect the rights of any member with regard to employment and labour relations. The trade union is also allowed to conduct trade dispute on behalf of its members and to compensate members who have lost employment following any trade dispute.

In the case of **Seth Panyako versus Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers [2013] eKLR** the court in addressing the question of the import and purpose of unionisation and membership therefrom held that;

*The law does not intend that Trade Unions recruit Members, collect subscription fees, and act below the best professional standards, when it comes to fair representation of their Members. Once a Trade Union is registered, it acquires among other capacities, the capacity to sue and be sued in its own name. It attains the status of a quasi- corporation, capable of suing for wrongs done to itself and being sued for breaches of the contract of Membership, subject to statutory limitations. The position that Trade Unions are associations of employees, and it would not be possible for employees to sue themselves as an association, no longer holds sway in modern trade union law. Members have contract or mandate with their Trade Unions, and Trade Unions can be held liable if they breach it. KUDHEIHA had an obligation under its constitution to act honestly and diligently in managing the Claimant's trade dispute. There is sufficient evidence that the Respondent committed breach of its mandate. When the Constitution of Kenya, the Labour Relations Act and the Internal Constitution of KUDHEIHA grant the mandate to recruit Members, there is a reciprocal obligation to act honestly and fairly, in representing recruited Members. When a Trade Union recruits Members and is granted organizational rights by the law, there is created a fiduciary duty to protect Members' rights, act diligently and in good faith. Trade Unions must learn that they are as much accountable to their Members who are paying them monthly subscription fees, in much the same way Lawyers who are paid legal fees to represent their Clients are accountable. Trade Union Dues and agency fees are not paid to merely increase the material wealth of Trade Union Nabobs; they are paid to ensure Members are effectively represented at the various Industrial Relations Platforms.*

The court in the case above also cited the case of South African case of **Food and Allied Workers' Union versus Ngcobo [353/ 12] 2013 [ZASCA] 45 [28<sup>th</sup> March 2013]**, and where the Court held that a trade union is liable for damages if it fails to perform the mandate which it accepted to represent its members.

With unionisation of the claimants addressed as being with Kenya Plantations and Agricultural Workers Union, such unionisation does not cease with termination of employment. The purpose of joining the trade union is to ensure all terms and conditions of employment are addressed and which include termination of employment. Where such termination is subject of litigation, section 39 of the Labour Relations Act, 2007 empowers the trade union to file a trade dispute or suit for and on behalf of the members so as to secure their interests and or rights arising therefrom.

However, where a member is keen to articulate their interests and rights alone and separately from their trade union section 20 read together with 22 of the Employment and Labour Relations Court Act, 2011 allows an employee on and of their own right to file suit. However such right should not be applied to conflate issues. Where the trade union acting for and on behalf of the employee(s) has commenced suit, good order and practice demands that there should be no multiplication of suits as such would not aid justice but lead to injustice.

Looking at both parties and their rights and to ensure no party is left out and unprotected in terms of addressing their cause, in a proper suit such as this where the claimants were unionised under Kenya Plantations and Agricultural Workers Union and the union has filed **Cause No.448 of 2014** against the employer and respondent herein, and on the other hand the employer has filed **Cause No,396 of 2014** following a strike, to avoid conflicting decisions with suit herein, a consolidation of all the files is imperative. Such will enable the court to be seized of all matters appurtenant to and between the parties and arrive at a determination giving context to all facts and the subject cause of action. To proceed singly and separately as herein initiated by the claimants would not aid justice and essentially would prejudice the respondents case

and also that of the trade union now pending and going back to 2014.

**Accordingly, the objections by the respondents are found with merit. The claim herein shall be consolidated under Cause No.448 of 2014 Kenya Plantations and Agricultural Workers Union versus Zena Roses, Nakuru ERLC Registry. Upon such consolidation and noting the number of claimants herein, the best registry, Nakuru or Eldoret can well be addressed.**

**Delivered in open court at Eldoret this 25<sup>th</sup> day of June, 2018.**

**M. MBARU JUDGE**

**In the presence of:**

Court Assistants:.....

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