



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.82 OF 2018

[formerly Cause No.310 of 2018 Nairobi]

KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT

VERSUS

NAKURU COUNTY GOVERNMENT.....1ST RESPONDENT

NAKURU COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

RULING

1. The ruling herein relates to Notice of Preliminary Objection filed by the respondents and dated 24th April, 2018 and on the grounds that;
 - a) *The instant suit is irregularly before the court as the claimant does not have a Recognition Agreement with the 1st respondent and as such there is no privity of contract between the respondents and the claimant which is a mandatory requirement of section 54 of the Labour Relations Act.*
 - b) *The Court's Jurisdiction has been wrongly and improperly invoked and the instant suit is premature and offends the provisions of section 62 of the Labour Relations Act as the claimant has not exhausted the conciliatory avenue provided therein.*
 - c) *The 2nd respondent is improperly joined in these proceedings and the claimant does not disclose any reasonable cause of action against the 2nd respondent.*
 - d) *The 2nd respondent is established under section 57 of the County government Act, 2012 and its powers and functions are clearly defined in the Act.*
 - e) *From the foregoing, the case against the respondent ought to and should be struck out.*
2. Both parties filed written submissions.
3. The respondents submits that the basis of objections filed are the principles set out under the case of **Mukhisa Biscuit Manufacturers Co. Ltd versus West End Distributors Co. Ltd [1969] E.A** and as espoused in the case of **Kenya Council of Employment Migration Agencies versus Nyamira county Government & 10 others [2015] eKLR** and that any objections made based on the law must be addressed first.
4. The respondents also submits that the suit by the claimant is irregularly before the court as there is no Recognition agreement between the parties and the claimant lacks *locus standi* in terms of section 54 of the Labour Relations Act, 2007. Section 2 of the Labour Relations Act, 2007 defines a recognition agreement as an agreement which regulates relations between a trade union and employer the trade union being the representative of the interests of unionisable employees employed by the employer. A collective agreement is also defined as one consisting of terms and conditions of employment negotiated between the trade union and employer. That section 54 of the Labour Relations Act, 2007 thus requires a trade union be recognised by the employer as a basis of formal engagement. The claimant has not demonstrated the existence of a recognition agreement and thus the collective agreement of 12th October, 2012 between the claimant and the defunct Association of Local Government Employers was a consequence of an existing recognition agreement as that time. The CBA lapsed in 2014 and the claimant cannot rely on it since there is no other CBA between the parties since. There is no basis upon which the claimant can approach the respondents after the constitution created new entities of County governments different and separate from local authorities with the former being a creature of the constitution and the latter being formed under the repealed Local Government Act, Cap 265 as held in **Nairobi Metropolitan PSV Sacco's Union Limited & 25 others versus County of Nairobi Government & 3 Others [2013] eKLR.**

5. The respondent also submits that for the parties herein to be engaged in a CBA pursuant to the provisions of section 59 of the Labour Relations Act, 2007 there must be a recognition agreement as a prerequisite. In **Communications Workers' Union versus Safaricom Ltd [2014] eKLR** the court held that there must be a recognition agreement for a trade union to engage an employer. The claimant in this case has no capacity to enter into CBA negotiations with the respondents without recognition. Recognition must be with individual counties as held in Kenya Government Workers Union [previously the Kenya Local government Workers Union] Uasin Gishu Branch & another versus Eldoret Water and Sanitation [2015] eKLR.

6. Out of the respondents' total workforce of 5000 employees, less than 1500 were inherited from the defunct local authorities and therefore presumed to be members of the claimant. The respondents are therefore precluded by operation of section 54(1) of the Labour Relations Act, 2007 from entering into a recognition agreement with the claimant. Recognition of a trade union is where such union enjoys a simple majority membership of the unionisable employee which the claimant has not met as held in **Rift Valley Railways Workers Union versus Building and Construction workers Union & 3 others [2016] eKLR**.

7. The respondents also submits that the jurisdiction of the court is wrongly invoked as the suit is premature and section 62 of the Labour Relations Act, 2007 has not been complied with. Under section 62 of the Act and rule 5 of the court Rules a trade dispute may be reported to the Minister and the rules requires that upon conciliation, the certificate be filed with the court as held in **Bakery, Confectionary, Food Manufacturing & Allied Workers Union (Kenya) versus Medina Bakery Ltd [2016] eKLR**. in this case the claimant has not attached the requisite records while filing this suit.

8. The 2nd respondent is improperly enjoined herein as there is no cause of action disclosed against the 2nd respondent or remedy sought herein and thus offends Order 1 Rule 3 of the Civil Procedure Rules, 2010. Article 235 of the constitution, 2010 provides that a county government is responsible for establishing and abolishing offices and making appointments and exercising disciplinary control of staff under its service. the 2nd respondent is established under the County Government Act, 2012 with functions on behalf of the county government. the employer of the county public service is the county government while the county public service board only operates at the behest of the county government. The inclusion of the 2nd respondent in this case is not necessary.

9. In response, the claimant submits that preliminary objections should be purely on points of law and where addressed on the assumption that all facts pleaded are correct the same can deal the suit as filed. Objection should not require the call of evidence to ascertain facts. In **Kenya Union of Commercial Food & Allied Workers versus Water Resources Management Authority 7 Another [2015] eKLR** the court addressed the ingredients of a preliminary objection which must relate to the court jurisdiction; pure point of law; and must be pleaded and where addressed may dispose of the suit.

10. The joinder of the 2nd respondent is proper in this case on the grounds that there exists labour relations between the claimant and the respondents and which requires an interrogation by the court. in **Kenya Commercial Food and Allied Workers Union versus Botanical Extracts (EPZ) Ltd , Cause No.2118 of 2012** the court held that a party who is represented by a trade union has a right to file a claim. The union does not require having recognition to be represented by their union.

11. The jurisdiction of the court is properly invoked as the court under the constitution, 2010 is mandated to hear employment and labour relations matters. Under section 73 of the Labour Relations Act, 2007 any claims arising out of employment and between an employer and trade union, the forum for litigation is the court.

12. The claimant also submits that the objections filed should be dismissed with costs to the claimant.

The objections by the respondents address the following issues;

Whether the non-recognition of the claimant is fatal to the suit;

Whether the claimant should have invoked the provisions of section 62 of the Labour Relations Act, 2007 before moving the court;

Whether the 2nd respondent is properly joined herein.

13. The principles governing preliminary objections are well reiterated in the case of **Kenya Union of Commercial Food & Allied Workers versus Water Resources Management Authority & Another [2015] eKLR** and where the court revisited the **Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Company Limited** case and in that vein, all objections relating to points of law and where once argued have potential of disposing the suit ought to be addressed and raised instantly.

14. In this case the respondent has addressed matters relating to the standing of the claimant in filing this suit on the grounds that there is no recognition and therefore no standing for the claimant to file suit and that the court lacks jurisdiction to here this matter equally the respondents have invoked the provisions of section 62 of the Labour Relations Act, 2007 on the grounds that the claimant ought to have filed a dispute with the Minister and engage in conciliation.

15. The above matters of law put into account, the objections must be addressed on their merits based on the applicable law and are therefore made at the right time and moment before the court can delve into matters presented by the claimant.

16. What is the purpose of a Recognition Agreement?

17. Section 54 of the Labour Relations Act, 2007 provides that;

54. Recognition of trade union by employer

(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.

(2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

18. The primary purpose of the Recognition Agreement is for the employer to recognise the trade union for the purpose of collective bargaining and where the trade union represents the simple majority of unionisable employees. So there are two levels to the Recognition Agreement. On the one part how a trade union is to attain recognition and on the other part once recognition is attained, the same is with the purpose of collective bargaining. See **Transport Workers Union versus Saudi Arabia Airlines [2016] eKLR**.

19. In this case, where the claimant union enjoyed recognition with the defunct local authorities and has members now in the employment of the respondents, the court should address all factored and including the termination clauses of the Recognition Agreement existing between the claimant and the defunct entities and the operationalisation of the respondents in terms of transitional provisions before the court can with firmness set out whether recognition exists. Such are matters which require call of evidence and interrogation on the merits such are not matters that can be addressed in the context of the objections herein made even with the best application of section 54 of the Labour Relations Act, 2007.

20. The Court must also examine other factors, outside the four corners of the recognition agreement document, to assess whether the Agreement is still valid and binding. The main factor that the Court must look at is whether the claimant retains a simple majority of the Unionisable Employees of the respondents. The application of section 54 has to follow facts on the ground upon satisfaction that the claimant has recruited a simple majority of the Respondent's Unionisable Employees.

21. The rationale is as set out in the case of **Kenya Union Of Printing, Paper**

Manufacturers and Allied Workers versus Packaging Industries Limited & another [2014] eKLR, that;

Recognition is a right granted to the Trade Union to represent a defined collective bargaining unit. It is a right which rests on the strength of the collective bargaining unit. De-recognition of a Trade Union may therefore occur, if the membership had changed, and the Recognized Union no longer holds the simple majority.

22. The question of recognition of the claimant by the respondent is a matter which should be delved into in a trial and argued on its merits.

23. On whether the claimant should have invoked the provisions of section 62 of the Labour Relations Act, 2007 before filing the suit herein, I find the issue in dispute as set out in the Memorandum of claim is that the parties herein have a registered Collective Agreement registered under RCA No.21 of 2013 and covering unionisable employees of the respondents but the respondents have failed to deduct and or remit the trade union dues to the designated accounts and as required under section 48 of the Labour Relations Act, 2007 and therefore orders should issue directing the remission of the same together with taking accounts.

24. Section 62 of the Labour Relations Act, 2007 provides that;

62 Reporting of trade disputes to the Minister

(1) A trade dispute may be reported to the Minister in the prescribed form and manner—

25. The provisions are not mandatory. The reporting of the trade dispute to the Minister though not mandatory is a best practice in terms of addressing matters between employers and trade unions on the shop floor where the best evidence can be sourced.

26. Section 62 of the Act thus couched does not remove the original jurisdiction of the court from addressing any dispute filed by the parties and in this case a trade union with regards to matters set out in the Memorandum of Claim. The jurisdiction conferred upon the court under article 162(2) of the Constitution, 2010 does not abet even where parties file complaints with the Minister in terms of section 62 of the Labour Relations Act, 2007.

27. On the joinder of the 2nd respondent herein, the respondents in submissions acknowledge that the 2nd respondent, Nakuru County Public Service Board is established under section 57 of the County Government Act, 2012 and its functions outlined under section 59 of the Act. Such a body act and operates under the County Government and 1st respondent. The functions therefore stipulated in law for the performance by the 2nd respondent place them directly and contact with the claimant and its members in terms of their functions set out and including those under section

59 (1) (a) to (c) that;

(1) The functions of the County Public Service Board shall be, on behalf of the county government, to—

(a) establish and abolish offices in the county public service;

(b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

(c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;

28. To therefore remove the 2nd respondent from proceedings herein would be to remove a crucial and relevant party in view of the matters set out in the Memorandum of Claim. For the court to be able to effectively and effectually address all the matters in dispute, I find the 2nd respondent with the functions of establishing and abolishing offices in the county public service, with the function to appoint persons to hold office in the county and with the function of undertaking disciplinary control over such persons/officers, then they are a necessary party herein.

As set out above, the objection by the respondents are without merit and are herein dismissed. As the questions addressed by the respondents pose weighty matters of law and which both party should be aware of during trial, costs should be in the cause.

Delivered in open court at Nakuru this 14th day of June, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant:

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