



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 1744 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 22nd February, 2017)

OLOOLAISER WATER.....CLAIMANT/APPLICANT

VERSUS

KENYA COUNTY GOVERNMENT WORKERS UNION.....RESPONDENT

RULING

1. Before the Court is Preliminary Objection dated 19th September 2016 by the Respondent on grounds:
 - 1) That this Honourable Court is not properly seized of jurisdiction to entertain the Claimant's Application and suit;***
 - 2) That the Claimant's Application and suit are premature as the dispute therein was referred to, and is pending before the Kajiado County Labour Officer for conciliation pursuant to Section 70(2) of the Labour Relation Act;***
 - 3) That the continued pendency of the Claimant's Application and claim is an abuse of process of the Honourable Court.***
2. The Respondents have filed submissions dated 24th October 2016.
3. The Respondents submit that on the 15th of August 2016 on behalf of its members who are in the employment of the Claimants, duly and pursuant to the law issued a 7 day strike notice. They submit that the said notice was due to the failure of the Claimant to implement a Collective Bargaining Agreement which was registered before Hon. Justice Abuodha on 15th June 2016.
4. Upon receipt of notice the Applicant Claimant wrote to the Labour Commissioner requesting for the appointment of a Conciliator for the purpose of helping parties arrive at an amicable settlement. The Conciliator was appointed and meetings set for 22nd and 24th August 2016. The conciliation commenced and the Respondents out of good faith reconsidered its Notice to Strike to give negotiations a chance.
5. The Respondent submits that the Claimant's Application and suit are premature as the dispute was referred to and is pending before the Kajiado County Labour Officer for conciliation in accordance with Section 70 (2) of the Labour Relations Act.

6. The said Section Provides that:

“The Minister may appoint a conciliator or conciliation under subsection (1):-

(a) in respect of a dispute that:-

(i) has not been referred to conciliation; or

(ii) is unresolved after conciliation;

(b) irrespective of whether:-

(i) a trade union is a party to the dispute or not; or

(ii) the dispute is in the public or private sector.

7. They therefore submit that this Court is not properly seized of jurisdiction to entertain the Claimant’s application and suit as the current dispute between the parties is yet to heard and determined by the Conciliator.

8. They cite the case of **Kenya Shoe & Leather Workers Union vs. Modern Soap Factory [2015] eKLR** the Court had this to say:

“if a dispute is not resolved after conciliation, a party to the dispute may refer it to the industrial Court in accordance with the rule of the Industrial Court.”

9. Further, they submit that the Court can only have proper jurisdiction to entertain such an application and suit after the trade dispute has not been resolved and subsequently referred to the Court as envisaged by Section 73 of the Labour Relations Act. The said Section states that:-

1) ”if a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.

2) Notwithstanding the provision of subsection (1) if a trade dispute-

(a) is one in respect of which a party may call a protected strike or lockout, the dispute may only be referred to the Industrial Court by an aggrieved party that has made a demand in respect to of an employment matter or the recognition of a trade union which has not been acceded to by the other party to the dispute: or

(b) is an essential service, the Minister may in addition, refer the dispute to the Industrial Court.

3) A trade dispute may only be referred to the Industrial Court by the authorised representative of an employer, group of employers or organisation or trade union.”

10. They restate that the Application and suit are premature.

11. As to costs, it is submitted that as the matter is premature, the Respondent has incurred huge and unnecessary costs in defending this Application and suit and humbly urge the court to award the Respondents costs.

12. The Claimant has filed written submissions dated 14th December 2016 where they submit that the application herein does not meet the threshold established in **Mukisa Biscuit Manufacturers LTD vs. Westend Distributors LTD [1969] EA 696:**

“...as the Preliminary Objection Consists of a pure point of law which has been pleaded, or

which arises by clear implication out of pleadings, and which if argued as a Preliminary Objection may dispose of the suit. ..”

13. They submit that since the Court must consider evidence to ascertain whether the suit is premature, the preliminary objection on that basis is not a pure point of law. Consequently, it fails to meet the legal objection of a preliminary objection and should be dismissed.

14. They submit that the court has jurisdiction to determine this suit as it is essentially an employer and trade union dispute and one envisaged in Section 12(1) of the Employment and Labour Relations Court Act.

15. Further Section 77(1) provides that:

“A party to a dispute that has received notice of a strike or lockout may apply to the Industrial Court to prohibit the strike or lockout as a matter of urgency. If (a) the strike or lockout is prohibited under this part; or (b) the party that issued the notice has failed to participate in conciliation in good faith with a view to resolving the dispute.”

16. Further Section 80 (3) gives the Court the power to determine whether any strike or lock out complies with the provision of the Act as follows:

“(3)Any issue concerning whether a strike or lock out or threatened strike or lock out complies with the provision of this Act may be referred to the Industrial Court”.

17. The Claimant submits that both Section 77 and 80 (3) of the Labour Relations Act allows an employer who has received a strike notice to file suit without first reporting a trade union dispute for conciliation.

18. As to prematurity of the suit, Section 70 (1) & (2) of the Labour Relations Act provide that:

“if the Minister is satisfied that it is in the public interest to prevent a dispute from arising or to resolve a dispute, the Minister may appoint a conciliator or conciliation committee to attempt to present a dispute or resolve the dispute. (2) The Minister may appoint a conciliator or conciliation committee under subsection (1) (a) in respect of a dispute that (i) has not been referred to conciliation; or(ii) is unresolved after conciliation. (b) irrespective of whether (i) trade union is a party to the dispute or not or (ii) the dispute is in the public or private sector.”

19. They submit that the provisions of Section 70 of the Labour Relations Act do not prohibit the Court from granting an injunction where there is an illegal strike notice. The Respondent issued their strike notice and went on strike without reporting any trade dispute or submitting to the conciliation process.

20.They deny that the Respondent rescinded the strike notice and participated in conciliation in good faith, they in fact proceeded on their illegal strike and only ceased upon being served with injunctive orders prohibiting the strike.

21. They also rely on Section 76 of the Labour Relations Act which provides as follows;

“A person may participate in a strike or lockout if (a) a trade dispute that forms the subject or lockout concerns terms and conditions of employment or the recognition of a trade union; (b) the trade dispute is unresolved after conciliation (i) under this act; or (ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and (c) seven days written notice of the strike or lock out has been given to the other parties and to the minister by the authorised representatives of (i) the trade union, in the case of a strike (ii) the employer, group of employer or employers organisation in the case of a clock out..”

22. They submit that the Court must consider whether the Respondent complied with Section 76 of the Labour Relations Act before going on strike.

23. They submit that the case relied on of Kenya Shoe & Leather Workers Union is distinguishable from the present suit as it relates to the deduction of union dues and not an illegal strike. The Court did not consider the provisions of Section 70 (2) of the Labour Relations Act, and only found that a trade dispute may be referred to the Court if it was not resolved through conciliation.

24. They conclude by submitting that the Court should dismiss the preliminary objection with costs to the Claimant.

25. Having considered the submissions of both parties, this Court find that indeed the conciliation process is still pending before the County Labour Officer Kajiado. That process has not been exhausted and it is premature for the parties to rush to Court or even issue a strike notice when the conciliation process is pending.

26. Both parties in my view acted in bad faith by the Respondents issuing a strike notice and Claimant rushing to Court. I will allow the conciliation process to proceed and stay these proceedings unless it is shown otherwise that negotiations have been exhausted.

Read in open Court this 22nd day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oyombe for Claimants- Present

Wabwoba for Respondents- Present