



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 369 OF 2015

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

v

CHIEF OFFICER PUBLIC SERVICE MANAGEMENT (MIRIAM KOSGEI)

COUNTY GOVERNMENT OF UASIN GISHU.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD, UASIN GISHU.....2ND RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU.....3RD RESPONDENT

PUBLIC SERVICE COMMISSION.....4TH RESPONDENT

RULING

1. The Kenya National Union of Nurses (Union) instituted legal proceedings against the Respondents on 9 October 2015 and the issue in dispute was stated as Unfair and Unlawful Dismissal of the Grievant contrary to Article 41 and 47 of the Constitution.
2. The Grievant was named as John Kipyego Biiy.
3. The Cause went through the usual processes and after close of hearing on 25 October 2016, the Court scheduled judgment for 3 March 2017.
4. On 3 February 2017, a week before the date scheduled for judgment, the firm of Eshiwani Ashubwe & Co. Advocates who have been on record for the Union filed a *Notice of Withdrawal* of suit which notice was stated to be predicated on Order 25, rule 1 of the Civil Procedure Rules, 2010.
5. When the Cause was called out on 3 March 2017, the Grievant who was in attendance, informed the Court that he had filed an a *Notice to Act in Person* and an application seeking
 - a)
 - b) THAT the Honourable Court be pleased to strike out the Notice of Withdrawal dated 2nd February, 2017 by Ms Eshibwani (*sic*) Ashubwe and Company Advocate
 - c) THAT the Honourable Court be pleased to order that this suit does proceeds to finalisation under prosecution of the grievant JOHN KIPYEGO BIIY.

d) THAT the Honourable Court be pleased to declare its judgment on all the issues arising in the suit.

e) THAT the costs of this Application be borne by the Kenya National Union of Nurses.

6. The Union filed Grounds of Opposition to the Motion on 16 March 2017 and arguments were taken on the same day.

7. All the Respondents opted to sit out the application as they indicated that the *Withdrawal of Cause* was a dispute concerning the Union and the Grievant.

8. The Union's Secretary General also informed the Court that the advocate on record had decided to opt out of the application.

Grievant's contentions

9. The Grievant's contentions in brief are that he is a member of the Union and also serves as the National Chairman; that the Secretary General of the Union in giving instructions to the advocate on record to withdraw the Cause acted without authority or sanction of the organs of the Union thus prejudicing him; that he (Grievant) was the primary aggrieved party and owns the Cause; that the reliefs sought relate to him and not the Union and that the Secretary General instructed the withdrawal of the Cause due personal differences.

Union's contentions

10. The Union through its Secretary General countered the Grievant's application by asserting that the Grievant had no *locus standi*/right of audience; that a suit can be withdrawn at any time before judgment; that Rule 4(1) of this Court's Rules permitted the withdrawal; that the Court was *functus officio*, the Cause having been withdrawn; that the Grievant was not a party to the Cause and is at liberty to file a fresh suit and that the application offended Sections 2 and 73 of the Labour Relations Act.

11. Both the Grievant and the Secretary General also made brief oral submissions and one decision, Nairobi Cause No. 866 of 2014, *Josephine Musindi & Ors, Kenya National Union of Nurses v Seth Panyako*.

Evaluation

12. The Court has given due consideration to the material and submissions presented to it. The application raises what may appear to be novel points of law in the practice and procedures of the Employment and Labour Relations Court.

13. The Court will first draw from comparative jurisdictions.

Doctrine of fair representation

14. In North America (United States and Canada), the Courts have developed the doctrine of fair representation.

15. Under the doctrine, a Union has a duty to offer fair representation to the member(s)/employee.

16. In that jurisdiction, to support a breach of the duty of fair representation claim, the plaintiff must prove that the employer's action violated the terms of the collective bargaining agreement and that the union breached its duty to act honestly and in good faith and to avoid arbitrary conduct (*see also Hines v. Anchor Motor Freight*, 424 U.S. 554, 564 (1976) (holding that union is always subject to complete good faith and honesty of purpose in exercise of discretion); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)).

17. A union is not liable for merely negligent conduct (see *U.S. Steelworkers of Am. v. Rawson*, 495 U.S. 362, 372-73 (1990); *Slevira v. Western Sugar Co.*, 200 F.3d 1218, 1221 (9th Cir.2000)).

18. Breach of the duty of fair representation occurs only when a union's conduct is arbitrary, discriminatory, or in bad faith. See *id.* For example, "[a] union breaches its [duty of fair representation] if it ignores a meritorious grievance or processes it in a perfunctory manner." *Conkle v. Jeong*, 73 F.3d 909, 916 (9th Cir.1995) (citing *Vaca*, 386 U.S. at 191).

19. A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behaviour is so far outside a 'wide range of reasonableness' as to be 'irrational.'" *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991). See also *Conkle*, 73 F.3d at 915-16 (holding that union's decision is arbitrary if it lacks rational basis); *Johnson v. U.S. Postal Serv.*, 756 F.2d 1461, 1465 (9th Cir.1985) (holding that reckless disregard may constitute arbitrary conduct); *Tenorio v. NLRB*, 680 F.2d 598, 601 (9th Cir.1982) (defining arbitrary as "egregious disregard for the right of union members").

Doctrine of contract of mandate

20. In *FAWU v Ngcobo* (2013) ZACC 36, the South African Constitutional Court in addressing a case where a Union had failed to commence litigation on behalf of a member and purported to withdraw from acting on his behalf held that

Even if the Union could withdraw, it nonetheless had a duty to take that decision in good faith and to notify the employees promptly. These qualifications underlie the law of mandate: a mandatory must act in good faith, and may withdraw only if there is still time for the mandatory to fulfil the mandate.

Domestic jurisdiction

21. The statutory framework and the practices, procedures and traditions of this Court contemplate and allow Unions, as juristic persons, to commence legal proceedings on behalf of their members in different type of scenarios including on terms and conditions of employment, breach of contract and/or in cases of unfair termination of employment.

22. The statutory framework is anchored on provisions such as Sections 62, 73 and 74 of the Labour Relations Act and rules 2 and 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

23. In cases of unfair termination of employment, Unions in this country ordinarily commence the suit in their own name and not in the name of the member/employee.

24. In such a scenario, in my view, the Union is simply acting as the agent or mouth piece of the member/employee, more akin to the situation obtaining under the civil procedure framework where the advocate on record presents the case on behalf of either the Plaintiff or Defendant.

25. The right and/or interest presented or advanced by the Union, then cannot be its own right or interest, but that of the member/employee, such as the Grievant in the case at hand.

26. And just as an advocate cannot withdraw a Suit without the express instructions of the client, a Union cannot withdraw a Cause without the express instructions of the member/employee or Grievant, in this case.

Agency relationship

27. Closely relevant to the preceding discourse is the legal construct, that as between a member/employee and the Union, the Union is an agent of the member/employee. The Union therefore owes its members a duty similar to that owed by fiduciary to a beneficiary.

28. The Union acts as a statutory representative of the member in legal disputes and therefore it should act for and not against the interest of the member/employee.
29. In this respect it is trite principle of law that the agent acts on and with the instruction of the principal and not the other way round.
30. Although the facts presented before the South African Constitutional Court are not similar to the facts in the instant case, the legal principles arising from the doctrine of contract of mandate would apply where a Union wishes to withdraw a Cause it had commenced on behalf of its member.
31. Further, in my view the legal principles developed in North America on the duty of fair representation by a Union would be sound in law in our jurisdiction, with the consequence that an employee/member has a right to demand complete honesty and good faith from the Union when making decisions affecting the employee/member.
32. I would therefore reach a conclusion that even in our jurisdiction a Union owes its members individually and collectively a duty of fair representation. The duty requires that a trade union shall not act in a manner that is arbitrary, discriminatory or in bad faith in representing employees in dispute settlement.
33. A Union's decision should also not be motivated by bad faith or be based on personal hostility. Without going onto the merits, it is public knowledge that the Grievant has been having feuds with the Union's Secretary General which have split into the court system.
34. A Union cannot be allowed exclusive discretion to deprive a Grievant of an effective remedy once it has brought legal proceedings by purporting to withdraw a Cause for breach of contract.
35. The Union should therefore not handle a dispute superficially, capriciously, indifferently or in reckless disregard to the employee's interests.
36. The Union in the case at hand did not present any evidence that the Grievant gave it express instructions to withdraw the Cause, it was acting with impunity and in that respect, it breached the duty of fair representation owed to the Grievant and the Court therefore holds that the purported *Notice of Withdrawal* was fatally defective and incapable of withdrawing the Cause.
37. May be the Union should have applied and/or opted out of the Cause much in the same way advocates seek leave to cease from acting.

Conclusion and Orders

38. The Court would therefore hold and order that:

- (a) The *Notice of Withdrawal* dated 2 February 2017 be struck out.
- (b) The *Notice of Intention to Act* in person dated 2 March 2017 be allowed.
- (c) The judgment initially scheduled for 3 March 2017 be delivered immediately hereinafter.

39. There will be no order as to costs.

Delivered, dated and signed in Nakuru on this 28th day of April 2017.

Radido Stephen

Judge

