



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 45 OF 2016

KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT

VERSUS

COUNTY PUBLIC SERVICE BOARD OF KITUI.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 16th June, 2017)

RULING

The claimant union filed the memorandum of claim on 24.02.2016 alleging the unlawful termination of service of its member one Oscar Kiilu Nzilu, the grievant. It was alleged that he was terminated by the respondent's predecessor, the Municipal Council of Kitui.

The respondent appointed Obura Mbeche & Company Advocates to act in the suit as per the notice of appointment dated 04.10.2016. The case came up on 18.11.2016 and the claimant was absent but counsel for the respondent who was present informed the court that the grievant was deceased as he had died on 10.11.2016. The court then ordered thus, **“The response, respondent's documents and witness statements be filed and served by 09.12.2016. A reply to response and further documents may be filed and served by 16.12.2016. In view of the demise of grievant, parties are encouraged to reach a compromise and to record consent at next mention date. Mention on 03.03.2017 at 9.00am to record compromise or further directions on hearing.”**

The order of 18.11.2016 appears not to have been extracted. Nevertheless, the respondent has filed a notice of motion on 02.03.2017 and dated 01.03.2017 seeking to review the order of 18.11.2016. The application invokes section 16 of the Employment and Labour Relations Court Act, Cap.234B, Rule 32 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions of the law. The respondent prays for orders:

- a) That the honourable court be pleased to issue an order of review and set aside the orders of 18.11.2016 made by the court directing that the death of the grievant herein has no effect on the proceedings.
- b) That the court be pleased to issue an order that the suit be stayed pending the appointment of a legal representative of the deceased Oscar Kiili Nzilu and the substitution of the deceased rights in the suit with those of the legal representative as required by law.
- c) That cost of the application be in the cause.

The application was supported with the affidavit of Geoffrey Orao Obura, Advocate. It is urged that the directions of 18.11.2016 violated the express provisions of section 82 of the Law of Succession Act,

Cap.160 which grants only a personal representative the power to enforce causes of action which by virtue of any law, survive a deceased. Thus, the claimant union lacks standing to enforce proceedings on behalf of deceased persons under the laws of Kenya. Further, the legal representative has to be substituted prior to the claimant union proceeding to prosecute the suit filed on behalf of the departed member.

The claimant's case is that the deceased was only a witness and the suit should proceed as filed. The claimant states that there is no representative suit in the instant case. There being no response to the suit, the objection and prayer for stay of proceedings should not be allowed as the claimant would thereby be driven away from the seat of justice. The claimant urges that the trade unions will always be proper parties and will conclude prosecution of suits even where the deceased member or grievant is involved and in such cases the court has ordered that the fruits of the litigation due to the estate of such departed person be paid to the lawful administrator or executor of such estate. Further, the spouse of the deceased grievant herein should be permitted to collect Kshs.75,000.00 as per Clause 53 of the collective agreement which states thus, **"In the event of death of an officer in service a council shall pay to his/her family Kshs.75,000.00 to assist defray funeral expenses."**

To answer the **1st issue** for determination, the court returns that there is no dispute between the parties that one Oscar Kiili Nzilu died on 06.11.2016 as conveyed in the obituary published in the Daily Nation on Thursday 10.11.2016. There is no dispute between the parties in that regard.

The **2nd issue** for determination is whether, in a representative suit, if the person represented therein is deceased, the suit would be stayed pending substitution with the appropriate personal representative of the deceased. As submitted for the applicant, under section 82(a) of the Law of Succession Act, Cap. 160, a personal representative of a deceased person has the power to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his personal representative. Under the Act, personal representative means the executor or administrator of a deceased person. As further submitted for the applicant, in **Nick Odhiambo Oloo –Versus- Christopher Oyieyo Bati [2012]eKLR** the Court of Appeal held that under section 82(a) of the Law of Succession Act, Cap. 160, only a personal representative was a recognised person for purposes of claiming capacity to deal with the estate of the deceased person as the executor or the administrator. Thus, the court returns that suits for claims in or about the deceased's estate can only be commenced or continued by the legal or personal representative; whether the suit is in representative capacity or directly in the name of the deceased person .

The **3rd issue** for determination is whether the present suit is a representative suit or not. To answer the issue, the court has to carefully look at the memorandum of claim. The memorandum of claim is titled thus, **"KENYA COUNTY GOVERNMENT WORKERS' UNION –VERSUS- COUNTY PUBLIC SERVICE BOARD OF KITUI COUNTY, ISSUE IN DISPUTE – UNLAWFUL TERMINATION OF SERVICE OF OSCAR KIILI NZILU BY THE THEN KITUI MUNICIPAL COUNCIL"** At paragraph 1 (f) it is stated thus, **"(f). THAT, this application is before this Court due to the respondent's failure to cooperate by attending conciliation meeting despite having been invited severally by the conciliator at the pre Employment and Labour Relations Court level which is within section 159(2) (c) of the constitution of Kenya 2010."** At 1(g) of the memorandum of claim it is stated thus, **"(g). THAT, this employee is a member of this union pursuant to section 41 of the constitution of Kenya 2010 and section 4 and 52 of Labour Relations Act of 2007."** At paragraphs 20, 21, and 22 of the memorandum of claim it is stated that the union reported a trade dispute and the conciliator issued the certificate for referral of the dispute to the court. The certificate is dated 31.07.2015 and it states that the dispute is between Kenya County Workers Union –Versus- The County Secretary, Kitui County Government and it further states that the claimant is now authorised to refer the matter to the court for further necessary action in accordance with section 69 of Labour Relations Act, 2007. The conciliator's further letter of 31.07.2015 states that the issue in dispute is the **"Unlawful dismissal of Oscar Kiilu Nzilu"** and the union is advised to refer the dispute to the Court as per section 69 and 73 of the Labour Relations Act, 2007.

Section 73(1) of the Labour Relations Act, 2007 provides thus, **"73. (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.”

The suit was filed on 24.02.2016 and the prevailing rules of the court were the Industrial Court (Procedure) Rules, 2010. Rule 4 provided that a party who wished to refer a dispute to the court under any written law shall file a statement of claim (like the one filed by the claimant in the present case). Rule 6 then made specific provisions where a trade dispute is referred to the Court in accordance with the provisions of the Labour Relations Act, 2007 including that the statement of claim be signed by the authorised representative of the party referring the trade dispute to the Court and the exhibiting of the conciliation report and the certificate of conciliation under section 69 (a) of the Labour Relations Act, 2007. Rule 9 then dealt with institution of suits by several employees, essentially being a provision for a representative suit where one employee is instituting a claim against one employer in respect of breach of contract and in which event the court could grant leave for the suit to be instituted on behalf of all employees by the labour officer or by one of such employees. The court observes that the rules have been retained in the current Employment and Labour Relations Court (Procedure) Rules, 2016 and which came into operation on 05.08.2016.

The court returns that there was no representative suit before the court in the present proceedings. The court returns that the suit before the court is a referral of a trade dispute between the trade union and the employer, the respondent. It is a suit filed in accordance with section 73(1) of the Labour Relations Act, 2007 and Rules 4 and 6 of the Industrial Court (Procedure) Rules, 2010. In those proceedings the primary and only parties are the trade union and the employer (the parties to the trade dispute being referred to the court) and there are no secondary parties. The court finds that a suit for such referral of the trade dispute by the trade union which was a party during conciliation proceedings does not thereby amount to a representative suit. The court holds that where the trade union has sued an employer by way of referral of a trade dispute and any of the members of the union being the subject or desired beneficiary of the suit (and being the employee of such employer) become deceased prior to or after the institution of the suit, the suit does not thereby become incompetent by reason of such employee having become deceased. The court holds that in such circumstances, the employee and the evolving or revolving employment rights and obligations are a subject of the suit - constituting part of the issues in dispute that fall for determination; as opposed to being a party to the suit. The court further considers that in such circumstances, the matters in dispute may well constitute part of the yet to crystallise estate (liability or asset) of such deceased employee but whose pursuit is clearly vested in the trade union by reason of the Labour Relations Act, 2007. In the court's opinion the provisions of the Labour Relations Act, 2007 and section 82 of the Law of Succession Act would rank equal and neither of the provisions would override the other. Nevertheless, one thing is clear, the deceased employee not having been a party to the trade dispute and the Labour Relations Act, 2007 having conferred capacity to institute such trade dispute proceedings only as per section 62 of the Labour Relations Act, 2007, the personal representative of a deceased employee has no standing to initiate the trade dispute or be a party in the suit by way of a referral under section 73(1) of the Act – as a representative has no power to do that which he represents lacked power to do.

In the court's opinion, in event of such trade disputes and the employee being the subject of dispute or desired beneficiary becomes deceased during pendency of the trade dispute, the provisions of the Labour Relations Act, 2007 remain the only avenue of concluding the proceedings. Under section 62(1) of the Act, a trade dispute may be reported to the Minister in the prescribed form and manner – (a) by or on behalf of a trade union, employer or employers' organisation that is a party to the dispute; and (b) by the authorised representative of an employer, employers' organisation or trade union on whose behalf the trade dispute is reported. Thus, in absence of an interested party as provided in section 64 of the Act, individual employees would not be parties to the trade dispute resolution proceedings under the Act and consequently there would be no role of a personal representative as envisaged in section 82 of the Law of Succession Act; and the court holds that the position subsists and flows throughout the referral proceedings before the court in the suit filed for that purpose being a referral of the trade dispute between the parties as envisaged in the Labour Relations Act, 2007. Needless to state, if at the end of such proceedings the employee is awarded benefits but has since become deceased, the Law of Succession Act will immediately attach as applying to such benefits and the role of the personal representative will become eminent. That would be in line with section 24 of the Employment Act, 2007 which provides

that a legal representative or the labour officer be paid by the employer all dues for a deceased employee to be held in trust in that regard.

To answer the 3rd issue for determination the court returns that there was no representative suit in the present case and the present suit was a referral of a trade dispute in which the only parties were the claimant trade union and the respondent employer with the deceased employee being a subject in the dispute and not a party to the suit.

While making the findings, the court has distinguished **Tailors and Textile Workers Union –Versus- Kapric Apparels Garments (EPZ) Ltd [2014]eKLR** as in that case it is not clear whether the suit was representative or a trade dispute referred to the court like in the instant case. The court has also considered and found that the present suit was not by the deceased employee with the trade union being the representative as envisaged in section 22 of the Employment and Labour Relations Act, 2011 which provides that in any proceedings before the Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by director or an employee specially authorised for that purpose.

In conclusion, the application filed for the respondent on 02.03.2017 by way of the notice of motion dated 01.03.2017 is hereby dismissed with orders that the costs be in the cause and parties are invited to take directions on further steps in the suit.

Signed, dated and delivered in court at Nyeri this Friday, 16th June, 2017.

BYRAM ONGAYA

JUDGE