



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
PETITION NUMBER 6 OF 2015

BETWEEN

DOCK WORKERS UNIONPETITIONER

AND

MESSINA KENYA LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Leonard Rufus Ochieng' Executive Officer, for the Petitioner

Otieno Asewe & Company Advocates for the Respondent

JUDGMENT

1. This Petition was filed by the Petitioner/Trade Union. There are 2 issues stated by the Petitioner to be in dispute: one, the Petitioner states 3 former Employees, who are its Members - Messrs. Joseph Mudira, George Olaka, and Daniel Melle [Grievants] – were unlawfully dismissed by the Respondent; and two, the Respondent has failed to deduct and remit trade union dues and has harassed Respondent's Unionisable Employees, on account of their association with the Petitioner.
2. Several orders are sought. They include a declaration that the Respondent has violated the Petitioner's right to organize; a declaration that the Petitioner has violated Grievant's freedom of association by terminating their contracts of employment; a declaration that exercise of Grievants' fundamental rights under the Constitution of Kenya, is not subject to the approval of the Respondent; the Respondent is compelled to deduct and remit to the Petitioner trade union dues; the Respondent pays to the Grievants terminal dues, damages and compensation for unfair termination; and other companies associated with the Respondent, not Parties to the Petition, pay the Grievants for extra services. The Petitioner prays for costs and any other relief.
3. The Petition is answered through a Statement of Response, filed on 3rd December 2015. The Respondent concedes the Grievants were its Employees. They were fairly dismissed for acts of gross misconduct. They were paid terminal benefits upon dismissal. They were heard.
4. The Respondent also relies on the Affidavit of its Financial Controller Deepesh Modi, sworn on 20th

November 2015. He explains that the Grievants were in managerial and/or confidential positions, and ineligible to join the Union. The Respondent has never been served with check off lists. Modi reiterates that the Grievants were heard and fairly dismissed. Lastly, Modi states that the Grievants' contracts contained an arbitration clause.

5. Parties agreed on 6th December 2016, to have the Petition considered and determined, on the strength of the record. They confirmed the filing of Closing Submissions at the last mention in Court, on 13th July 2017.

The Court Finds:-

6. This Petition shares certain facts with ***E&LRC Cause Number 259 of 2014 between Paul Chemunda Nalyanya v. 1.Messina Kenya Limited.*** The Petition and the Cause are both against the same Employer.

7. In both instances, Employees' contracts of employment concluded with their common Employer, the Respondent herein, contained an arbitration clause.

8. In the Cause, this Court found that Parties were bound by the arbitration clause, and the Court had no jurisdiction to hear and determine the dispute.

9. The arbitration clause in all the contracts is in the same language. The Petitioner named some of the Employees who were adversely mentioned in an Audit Forensic Report, leading to disciplinary action. Among the Employees mentioned were Paul Nalyanya and Josiah Mudira. The former initiated the Cause, while the latter is one of the Grievants herein There are shared facts and history between the Cause and the Petition.

10. The Court dismissed Cause Number 259 of 2014, based on among other reasons, the following:-

- The contract of employment concluded by the Parties positively rejected the jurisdiction of the Court.
- Parties had not repudiated the arbitration agreement.
- Arbitration agreement was unambiguous; suffered no defects; was not pathological; and left no doubt on the proper forum for dispute resolution.
- It divested the Court jurisdiction to hear and determine the dispute, and created a contractual obligation on the Parties to have their dispute submitted to arbitration.
- The E&LRC is not an arbitral institution of any shade, but a Court established under Section 4 of the Employment and Labour Relations Court Act pursuant to Article 162 [2] [a] of the Constitution, to adjudicate, not arbitrate employment and labour disputes.

11. The Court concluded in the case of ***Paul Nalyanya***, that the dispute was improperly before the Court. The Court can only be asked to intervene by the Parties in aiding the process of arbitration; in enforcement of the arbitral award; or in the rarest of cases, in setting aside such an arbitral award.

12. The Petitioner submits that Ms. Beatrice Opolo, Legal Officer of the Federation of Kenya Employers, was involved in the disciplinary hearing which culminated in the dismissal of the Grievants. The arbitration clause stipulates that if Parties were not able to agree on appointment of a single arbitrator, appointment would be through the CEO of the Federation of Kenya Employers. Ms. Opolo appeared in the disciplinary proceedings as an agent of the Federation's CEO. The CEO has therefore already taken a position in the dispute, and is not impartial. The Court retains original and appellate jurisdiction and the Petition is properly in Court.

13. This submission does not persuade the Court. Ms. Opolo appears to have been involved with the disciplinary process, as an Advocate representing the Employer. She as submitted by the Petitioner, is an Employee of the Federation. The Employer is a Member of the Federation. The arbitration agreement preceded the disciplinary hearing.

14. The arbitration clause requires Parties to agree on the arbitrator. It was not shown that there was an attempt to appoint an arbitrator which failed, calling the intervention of the CEO of the Federation. It is only after failing to appoint an arbitrator that, Parties would seek the aid of the CEO.

15. The CEO would not be expected to have any arbitration role, other than in appointing the arbitrator. The concern should not be whether the appointing authority has taken a position; it should be whether the arbitrator so appointed, satisfies the law with regard to qualification and conduct as an arbitrator. The clause specifically states arbitration is subject to Arbitration Act 1995. If for any reason the Petitioner would find fault with the appointed arbitrator, challenge against the arbitrator can be made in Court.

16. Such challenge would be in the nature of the Court giving assistance to the arbitration process. It would not justify rejection of arbitration altogether. Parties are bound by the arbitration clause. They positively rejected the jurisdiction of the Court. The Court cannot ignore such rejection and assume jurisdiction, on the basis that Parties have experienced a hurdle in appointment of an arbitrator.

17. The arbitration clause as observed above, states proceedings would be governed by the Arbitration Act 1995, and other Acts or enactments for the time being in force in Kenya in relation to arbitration. Section 75 of the Labour Relations Act 2007 states that, the Arbitration Act shall not apply to proceedings before the Industrial Court.

18. The Petitioner submits arbitration mechanism became inapplicable immediately the Claim was filed in this Court, under Section 75 of the Labour Relations Act.

19. The Court disagrees with this interpretation. The first thing to note is that the Petitioner has not come to Court under the dispute resolution mechanisms contained in the Labour Relations Act. Secondly, by opting to go under the Arbitration Act, Parties rejected the dispute resolution mechanisms under any other law, save the laws contemplated by the arbitration clause. Thirdly, Section 75 of the Labour Relations Act makes it impossible for the Parties to invoke the jurisdiction of the Court under this Act. Assuming the Labour Relations Act is relevant on the subject, the Court does not think that this provision invalidated the arbitration clause, once Petitioner ignored arbitration and filed an action before the Court. Section 75, to the contrary, implies arbitration outside the confine of the Labour Relations Act, must be considered and determined outside this confine. The provision seeks to separate arbitration processes under the Labour Relations Act, from arbitration processes under the Arbitration Act. The Parties' arbitration clause on the other hand allows for the adoption of the Arbitration Act and other Acts relating to arbitration in dispute resolution. The Labour Relations Act cannot be one such other Act, considering its positive rejection of the Arbitration Act.

20. Relying on the decision of the Court in *Paul Nalyanya*, the Court is persuaded the Petition presented by the Petitioner Union on behalf of the Grievants, in pursuit of reliefs relating to the individual Grievants, is improperly before the Court, by virtue of the presence of a valid arbitration agreement. That agreement binds the Employer and its Employees, to present their dispute before an arbitrator appointed in the specified manner.

21. There are prayers on trade union dues, which relate to the Petitioner directly, as a beneficiary of these dues. But is this a constitutional issue? Is there no statutory mechanism for enforcing deduction and remittance of trade union dues?

22. It appears the Petitioner elevated a dispute based on contract and statute, capable of being resolved under contract and statute, to a dispute involving the Constitution of Kenya. Courts have uniformly rejected such elevation in a catena of Judgments. There is no need to invoke the Constitution in resolving everyday disputes, where there are statutory mechanisms, in resolving such disputes. The Labour Relations Act provides the Petitioner with a mechanism for pursuing payment of trade union dues. If the Act is deficient, and offers no, or inadequate remedy to the Petitioner, the Petitioner can always challenge the Act for being unconstitutional. There is no challenge made against the relevant Act. It must be

presumed the Act does not deny the Petitioner a remedy. Why does the Petitioner invoke the Constitution of Kenya? There is no justification in elevating the contractual and statutory differences between the Parties, to a constitutional dispute.

23. Companies associated with the Respondent are not Parties to the Petition. The Court cannot give orders with regard to non-Parties.

IT IS ORDERED:-

a) The Court has no jurisdiction to hear and determine the dispute relating to Grievants' terminal dues and compensation for unlawful termination, in light of the arbitration clauses in the Grievants' respective contracts of employment.

b) The Dispute with regard to trade union dues is not a constitutional dispute and may be pursued under the relevant statute.

c) The Petition is therefore struck out with no order on the costs.

d) The Petitioner is at liberty to pursue the grievance under the arbitration clause contained in Grievants' contracts of employment, and pursue other aspects of its own grievance under the relevant Act of Parliament.

Dated and delivered at Mombasa this 23rd day of October, 2017.

James Rika

Judge