



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1024 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th November, 2017)

**KENYA PLANTATION &
 AGRICULTURAL WORKERS UNION.....CLAIMANT**

VERSUS

ISSA WAFULA (GROUP HRM- ZENA ROSES KENYA).....1ST RESPONDENT
VITALIS OSODO (REGIONAL HRM-KONGONI RIVER FARM..2ND RESPONDENT
EVA OKALLO (GROUP HRM –VEGPRO GROUP).....3RD RESPONDENT
STEPHEN OWUOR (HRM-KONGONI RIVER FARM).....4TH RESPONDENT
ELIUD AONDA BVARASA (HRO-KONGONI RIVER FARM).....5TH RESPONDENT

(Jointly & severally with any other uncertified Human Resource

Practitioner in the Republic of Kenya)

FEDERATION OF KENYA EMPLOYERS.....6TH RESPONDENT
AGRICULTURAL EMPLOYERS ASSOCIATION.....7TH RESPONDENT
INSTITUTE OF HUMAN RESOURCE MANAGEMENT.....8TH RESPONDENT

RULING

1. The Applications before Court are Preliminary Objections filed in Court by the 1st to 5th Respondents, 6th Respondent and 7th Respondent respectively.
2. The 1st to 5th Respondents filed their Preliminary Objection on 19th June 2017 through the firm of Okweh Achiando & Company Advocates on the following grounds:-

1. That this Honourable Court lacks jurisdiction to entertain an application challenging the

professional registration of the 1st to 5th Respondents under the Human Resource Management Professionals Act No. 52 of 2012.

2. That the Applications does not satisfy the conditions set out under Section 12(1) and (2) of the Employment and Labour Relations Court Act and Section 2 of the Labour Relations Act, 2007 due to under noted grounds.

3. That No valid or competent application, claim or complaint lies before this Honourable Court.

3. The 6th Respondent filed Preliminary Objection on 19th June 2017 on the following grounds:-

1. Misjoinder of Parties

That the Federation of Kenya Employers has been wrongly joined in this cause for the following reasons:-

a) The Human Resource Management Professional Act No. 52 of 2012 has not endeavored the 6th Respondents by conferring duties of any legal/statutory responsibilities and obligations to advance the interests set out under Section 29 of the said Act. There is no provision constitutionally, statutory or otherwise requiring and enabling the 6th Respondents to carry out the mandate of the 8th Respondent herein.

b) The Federation of Kenya Employers has a specific mandate which does not extend to carrying out regulatory functions under the Human Resource Management Professionals Act 52 of 2012.

c) The Human Resource Management Professional Act (HRMP) No. 52 of 2012 has already provided a regulatory system for ensuring compliance and the said Act has not made any statutory provisions or requirements for employer on compliance.

2. Vexations and an abuse of Court process – The provisions of the Human Resource Management Professional Act No. 52 of 2012 are very specific on registration procedures of human resource professions, disciplinary actions and regulatory body tasked with ensuring compliance.

4. In view of the above submissions, they pray that the 6th Respondent be struck off from the record with costs.

5. The 7th Respondent on their part filed their Preliminary Objection on 6th July 2017, and they contend that the Application is hopelessly misconceived, frivolous, totally devoid of merit for the reasons that they are wrongly enjoined in these proceedings for the following reasons:

a) The Human Resource Management Professionals Act No. 52 of 2012 was enacted for purposes of establishment of the Institute of Human Resource Management and the Human Resource Management Professionals Board giving the Institute and the Board the mandate to provide for the examination, registration, regulation of standards of Practice of Human Resource Management Professionals.

b) The 7th Respondent has no mandate to issue Practicing Licenses to Members of the Institute as per Section 29 as alleged by the Claimant/Applicant herein.

c) The 7th Respondent is registered within the Provisions of the Labour Relations Act having no mandate in the area of Human Resource Management.

d) The Human Resource Management Professionals Act is applicable to Human Resource Management professionals which the 7th Respondent is not and as such the Act is not applicable to the 7th Respondent.

6. The 7th Respondent therefore pray that the suit against them be struck off with costs being borne by the Claimant.

7. In response to the Preliminary Objections filed, the Claimant filed various responses. In response to the 1st to 5th Respondents' Preliminary Objection, the Claimant filed an affidavit deposed to by one Thomas Kipkemboi deposed to on 11th July 2017. The deponent averred that he is the Deputy General Secretary of the Claimant herein.

8. He avers that Article 162(2) establishes the Employment and Labour Relations Court as a superior Court of record with its jurisdiction, also established like or in the instant case where the Claimant have filed an application challenging the professional registration of 1st, 2nd, 3rd and 4th Respondents under the Human Resource Management Professionals Act No. 52 of 2012.

9. The Applicants contend that the jurisdiction of the Employment and Labour Relations Court is to hear disputes relating to employment and labour relations and matters set out under Section 12 of the Employment and Labour Relations Court Act.

10. The Applicants contend that the jurisdiction of the Employment and Labour Relations Court as set out is to hear and determine all disputes referred to it in accordance with Article 162(2) of the Court and the provisions of the Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations and therefore the application or claim to be lodged with the Court only requires the same to be lodged by or against an employee, an employer, trade union, an employer organization, a federation, the Registrar or Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

11. They aver that in exercise of its jurisdiction, the Court has mandatory powers to make any of the orders prescribed in Section 12 (3) of the Act. They contend that the 1st Respondent is an employee of Zena Roses, the 2nd Respondent of Kongoni River Farm, the 3rd Respondent of Vegpro Group of Companies while the 4th and 5th Respondents are employees of Kongoni River Farm and all operate the Institute provisions of Cap 486 Companies Act, repealed Laws of Kenya and have the authority to hire and fire employees for and on behalf of their employing companies as demonstrated in Appendix TK6, TK 7, and TK8 of the Claimant's Application dated 2nd May 2017.

12. They further contend that the authority exercised by the 1st to 5th Respondents to execute decisions such as demonstrated in Appendix TK6, TK7 and TK8 of the Claimant's Appendix dated 2nd May 2017 is derived from statute and can only be defined by the Employment Act 2007, the Labour Relations Act 2007, the Labour Act 2007 and the Employment & Labour Relations Court Act 2014 (formerly Industrial Court Act, 2011) as that of an 'employer'.

13. That the person effected by the authoritative decision of the 1st to 5th Respondents are also 'employees'.

14. It therefore follows that the relationship between the 1st to 5th Respondents and the employees of their respective employing company and or members of the Claimant's herein as demonstrated in Appendix TK6, TK7 and TK8 is an employment and labour relations matter.

15. The Claimants submits that the 1st to 5th Respondents in their capacities as Human Resource Practitioners while acting for and on behalf of their respective employing company have executed decisions that are adverse to the Claimants yet are not authorized under Section 29(1) of the Human Resource Management Professional Act 2012 to carry out such decisions.

16. The Claimants therefore submit that it is this Court that has exclusive jurisdiction to hear and determine issues arising out of this matter. That the mandate is to ensure fairness and good governance in public bodies including the regulations of standards and practice of Human Resource Management in Kenya. They therefore want the Preliminary Objection dismissed with costs to the Claimants.

17. In respect to the Preliminary Objection filed by the 6th Respondent, the Claimants also filed a reply thereto on 17th July 2017. The reply was an affidavit sworn by one Thomas Kipkemboi the Claimants' Deputy General Secretary.

18. They deny that the 6th Respondent has not been conferred duty and or statutory obligation to carry out the mandate of the 8th Respondent herein. The Claimants submits that the 6th Respondent is properly enjoined in this case being the most representative employer organization in Kenya and under Section 18(2) of the Human Resource Management Professional Act 2012 consists of the registration committee that compromise the 8th Respondent herein.

19. That under Section 18(3) of Human Resource Management Professionals Act 2012, the 6th Respondent is charged with responsibilities, functions and or legal obligations set out therein.

20. They submit that amongst the functions set out in the Human Resource Management Professionals Act 2012 on which platform the 6th Respondent site is prescribed in provisions of Section 18(3) (b) (c) (d) and (e) of the Act.

21. That the 6th Respondent therefore is properly enjoined as a party to this suit as they are fully responsible by virtue of being part of and comprising the registration committee of Human Resource Practitioners to ensure members of the 8th Respondent such as the 2nd Respondent herein fully comply with the provisions of Section 29(1) of the Human Resource Management Professional Act 2012 and where necessary recommend that the conduct of such a member be referred for inquiry under Section 23 of the Act.

22. They submit that the presence of the 6th Respondent is necessary and or relevant for the determination of the real matter in dispute or to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit as far as the 6th Respondent is statutory obliged by the provisions of Section 18(2) (b) of the Human Resource Management Professionals Act 2012.

23. They urge the Court to find that the 6th Respondent has been joined in this suit under the facts set out in Order 1 Rule 7 of the Civil Procedure Rules which provides that:-

“Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties”.

24. They submit that should the Court be inclined to allow the Preliminary Objection filed herein to struck out the 6th Respondent from the present application, they without prejudice as to costs urge Court to be guided by Order 1 Rule 10 (2) of the Civil Procedure Rules which provides that:-

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

25. They urge the Court to dismiss the Preliminary Objection for lack of merit.

26. In relation to the 7th Respondent, the Claimant filed submissions indicating that the 7th Respondent has obligation to promote good labour relations among members, employees and the government through the process of negotiation, commutation and reconciliation.

27. The parties herein agreed to dispose of the Preliminary Objection through written submissions. I have looked at the submissions, which are a replica of the averments made in the application and affidavits filed for or against the Preliminary Objection.

28. I have considered the submissions herein and the issues for determination are as follows:-

1. ***Whether this Court has jurisdiction to entertain this application.***
2. ***Whether the 6th and 7th Respondents are properly enjoined in this matter.***

29. I will start by stating that jurisdiction is everting and without jurisdiction, this Court has no business hearing this application/cause. This is the principle established in the case of Lilian S and which has been expounded again by the SC in **Republic vs Karisa Chengo & 2 others (2017) EKLR** which held as follows:

“by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to cognizance of matters presented in a formal way for its decision. The limits of authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristicswhere a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”.

30. While bearing in mind the above principle, I note that I am being asked to adjudicate upon alleged failure by the 1st to 5th Respondents to comply with the provisions of the Human Resource Management Professionals Act 2012 more particularly their failure to have practicing certificates.

31. The Jurisdiction of this Court is well settled under Article 162(2) of the Constitution and Section 12 (3) of Employment and Labour Relations Court which states as follows:

3. ***“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:-***

- (i) interim preservation orders including injunctions in cases of urgency;***
- (ii) a prohibitory order;***
- (iii) an order for specific performance;***
- (iv) a declaratory order;***
- (v) an award of compensation in any circumstances contemplated under this Act or any written law;***
- (vi) an award of damages in any circumstances contemplated under this Act or any written law;***
- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under***

any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant”.

32. By virtue of statute and the constitution, this Court adjudicate disputes arising from or to an employer, employee, trade union, employer organization, trade union organization, Registrar of Trade Union, Cabinet Secretary etc. In principle issues of what I would call employment and labour relations. Employment Relation refers to issues that would emanate out of an employment contract.

33. I was referred to the Human Resource Management Professionals Act, which is “**An Act of Parliament to provide for the establishment of the Institute of Human Resource Management Professionals Board to provide for the examination, registration and regulation of the standards and practice of Human Resource Management Professionals and for connected purposes**”.

34. Section 18 of the said Act sets up a Committee for registration of Human Resource Management Professionals. While Section 19 sets out the qualification, criteria for eligibility for registration as a Human Resource Management Profession. The qualification, supervision and disciplining of Human Resource Management Practitioners are also provided for and regulated under the Act.

35. The Act provides for the Committee, which is to refer matters to the disciplinary committee if it has reason to believe that a registered person may have been guilty of professional misconduct.

36. What do Human Resource Management Professionals do?. Human Resource Management Professionals deal with employment and labour relations issues at their work place. They handle issues of recruitment to discipline of employees. This indeed is a duty which I can say puts them securely under the scrutiny of the entire employment relationship and they owe it to both the employer and employee to ensure a conducive working relationship for productivity to thrive and to have industrial peace.

37. Given the heavy role and mandate Human Resource Management Practitioners hold, their conduct, management, registration and practice would be of great interest to this Court, which deals with employer and employee relations. To state otherwise would be to miss the point

38. This Court indeed has jurisdiction to examine proper employment and labour relations and where there is any breach the Court can be called upon to adjudicate in any dispute. It is therefore my finding that this Court has jurisdiction to handle this application and claim and I hold so.

39. On issue of the parties before Court being improperly before Court, I would start from the premise that the application before me is a Preliminary Objection. A Preliminary Objection has been defined in the **Mukhisa Biscuit Manufacturing Company Limited v West End Distribution Case (1969) E A 696** case where the Court found that a Preliminary Objection has to be on points of law where evidence needs to be called for the Court to determine the issue then it ceases to be a Preliminary Objection.

40. In this instant case, the 6th and 7th Respondent have submitted that they are improperly enjoined in this case. For me to determine whether this is true or not true, I would need to get into factual issues to determine the role of each of them visa vis the matters complained of.

41. This is not a matter, which I can determine from a point of law view. In my view the issues of joinder or lack of it in this application can only be determined after proper analysis of the evidence which I am unable to do at this point. In that respect I find that, the application before me as concerns joinder is not a point of law and will be determined in the main application/claim.

42. On the issue raised by 1st to 5th Respondents on the matter being subjudice, the same has not been demonstrated before this Court.

43. I find after consideration of the averments and submissions before me that the Preliminary Objections raised all lack merit. The Preliminary Objections are therefore dismissed and I direct that the application

before Court shall proceed.

44. Costs in the cause.

Read in open Court this **20th day of November, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kanyiri for 6th Respondent – Present

Maondo holding brief Okweh for 1st to 5th Respondents – Present

No appearance for the Claimant