



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2298 OF 2014

BANKING, INSURANCE & FINANCE UNION (KENYA) CLAIMANT

VERSUS

MAISHA BORA SACCO SOCIETY LIMITED RESPONDENT

RULING

1. The matter came up for hearing on 18th December 2015 and the Respondent noting the Memorandum of Defence filed on 25th November 2015 raised a preliminary objection moved the Court to argue the same. Paragraph 3 of the Defence sets out the following;

The response to the Claimant's claim in its entirety, the Respondent avers that there is no Recognition Agreement subsisting between itself and the Claimant herein as required under section 54(3) of the Labour Relations Act, 2007. Accordingly, the Respondent avers that the Claimant has no locus standi to commence or maintain this cause and shall at the earliest available opportunity apply to have the cause struck out in limine.

2. Both parties made their oral submissions.

The Respondent submitted that there is no recognition agreement between the parties herein for the Claimant to file suit against the Respondent pursuant to the provisions of section 54 of the Labour Relations Act. The Claimant lacks *locus standi*.

3. In the Amended Statement of Claim filed on 6th November 2015, the issue in dispute is the unprocedural, unjustified redundancy of 63 employees. The claim is on the basis that the 63 unionised employees represented by the Claimant were employed by the respondent. The question then does arise as to whether the contract of employment between the Respondent and the employees is subject to the intervention of the Claimant as the alleged termination of the 63 employees is termed as unprocedural by the claimant. That of the 63 employees there is no relation with the claimants so as to file the current claim and therefore lacks *locus standi*.

4. The Respondent also submitted that sufficient legal interest must be demonstrated so as to have standing to sue as held in **LSK versus Commissioner of Lands & Others, HCCC 464 of 2000 (Nakuru)**. That under section 4 of the Labour Relations Act, an employer is obligated to recognise a union to negotiate a CBA as a recognition agreement is defined under section of the Act. That only upon the signing of the recognition agreement can a trade union become a representative of unionised employees. The Claimant does not deny that they do not have a recognition agreement with the Respondent and that there is no CBA between the parties and in the absence of these agreements, the legal authority for the Claimant to represent staff/employees of the Respondent lacks basis so as to file the

current suit. In **CWU versus Safaricom Ltd, Cause No.31 of 2013** the Court held that a recognition agreement gives a union special status with an employer and has power to deal with wide range of issues and the basis to represent its members. Such recognition creates a lawful means to enjoy recognition. The Claimant lacks such recognition to file the current suit and should be dismissed.

5. The respondents also submitted that the relationship between the current and former employees of the Respondent is their contracts of employment. The question of privity of contract and for any union to get the *locus standi* to litigate for such former employees, a recognition agreement must exist. A recognition agreement must precede a collective agreement and none are in force herein. In this case the Claimant should have moved the Court seeking recognition first before filing the current suit, **Cause No.1776 of 2014, BIFU versus Maisha Bora Sacco Society Ltd.**

6. The Respondent also submitted that the Claimant has replied to the objections raised and has relied on article 3 of the Constitution on the basis that it confers *locus standi* to them to file suit as herein but these provisions do not apply. Equally article 20 of the Constitution only apply with regard to the application of the Bill of Rights and not on cases where third parties are involved. Article 22(2) of the Constitution relate to the enforcement of the Bill of Rights and thus *locus standi* to a person working in a representative capacity when the grievance in issue relates to application of Bill of Rights set out in a petition. The dispute herein relates to breach of contract and not Bill or Rights and this is not a Petition.

7. The Respondent also submitted that if this case is allowed to proceed, there will be a serious danger of anybody moving the Court and filing a claim. This will throw order into disarray. Individual employees have a right to file suit in their name but the Claimant cannot file as there is no recognition agreement or a CBA. Such a procedure should not be allowed where a trade union moves the Court against an employer with whom there is no recognition as such would be suit filed by a third party in a contract relationship. Affected employees can only sustain a suit in their own names.

8. In reply, the Claimant submitted that they filed a reply to the objections raised on 17th December 2015. The Claimant is a registered trade union pursuant to the labour Relations Act and hence a legal entity in accordance with section 22 of the Act. There is a right to represent employees in the sector the Claimant serves. The Claimant has since recruited members and from 4th February 2014 check off forms were sent to the respondent. A conciliation process commenced when the Respondent refused to sign recognition agreement and on 5th August 2014 the Minister signed a Certificate of no Settlement as the Respondent refused to agree. As a result the Claimant filed **Cause No.1776 of 2013** which is pending in Court and due for hearing. In the interim, the Court has restrained the Respondent from terminating the Claimant members but this was not complied with. There are contempt proceedings but the Court redirected the parties to proceed with the main suit. The question of termination is therefore a subject and matter before the Court under **Cause No.1776 of 2013**. This suit was consolidated herein but the Court has since given directions to the parties to separate the suits and file separate documents.

9. The Claimant also submitted that all the replies made by the Respondent have not raised the issue of standing until now and the purpose is clear to scuttle the hearing process. Parties have attended conciliation without the question of standing arising. The Claimant applied on 21st July 2015 to do a substitution of parties so as the Claimant members could file suit as grievants and the Court directed that the Claimant had a right to proceed as herein done for its members. On this basis the Claimant has taken hearing dates.

10. The Claimant also submitted that the Respondent effected union dues for July 2014 pursuant to section 48 of the Labour Relations and once the employees joined the union, they have a right to representation by the clamant union. A recognition agreement and a CBA is not a pre-condition to such representation as upon being a member, such a right accrue. In this regard, the Claimant has filed suit against the Respondent for non-recognition which is pending determination. Membership is instant and not based on other processes that defeat such membership and right to associate and the refusal by the Respondent to sign the recognition agreement does not in itself bar Claimant members who are their employees from such membership.

11. Article 3 of the Constitution allow any juristic person to defend the Constitution and give unionised members right to fair labour relations is violated, they can file suit to protect the right. Article 22 of the Constitution does not bar the Claimant from representing its members. Cause no.218 of 2012 the Court held that recognition is for CBA negotiations and not for representation of a trade union members per se. in **Court of Appeal No. 290 of 2012 Mumo Matemu versus Trusted Society**, the question of standing was addressed and a legal entity such as the Claimant has the right to represent its members under article 22 and 258 of the Constitution so as to ensure substantive justice is achieved. In this case the Labour Relations Act defines a trade union as a representative of employees based on its Constitution and in this regard the Claimant has an interest in this matter as set out in its constitution. The suit is filed without malice and there has been full disclosure. The Respondent has admitted that the grievants can file suit in their own name as there exists a valid claim.

12. That the objections raised should be dismissed to allow the Claimant prosecute its case.

Determination

Whether a recognition Agreement is a prerequisite to a trade union representing its members with an employer

Whether the Claimant has locus standi to represent its members without a recognition agreement or a CBA with their employer

13. For a start, when this matter was filed On 29th December 2014, the Claimant moved the presiding judge to transfer the matter and have it placed together with Cause No. 1776 of 2014, **BIFU versus Maisha Bora Sacco Society Limited** but on 22nd January 2015 the files were separated for ease of proceedings noting the issues raised in each suit – one seeking for orders of recognition of the Claimant by the Respondent and this matter relating to the issues of unlawful declaration of redundancy. On 21st October 2015, the Claimant was allowed to amend the Memorandum of Claim and on this basis, the Respondent filed their Defence raising the current objection with regard to standing of the claimant.

14. The question of standing therefore becomes crucial and important to determine before moving forward as with it, the Claimant will be able to proceed or be stopped from moving forward. It therefore becomes critical that the principles set out in **Mukisa Biscuits Case** apply to ensure that whatever legal challenges are posed are first gone into to avoid proceeding in a manner that will raise serious legal technicalities in the ultimate.

15. In this regard, the challenge that there is no recognition agreement between the parties so enable the Claimant file this claim is admitted by both parties save that the Claimant contention is that there is another matter pending for determination, which matter in **Cause No.1776 of 2014** is with regard to their seeking recognition by the Respondent so as to proceed as herein.

16. It is recognised that under section 22 of the Employment and Labour Relations Court Act, representation before this Court is set out as;

22. In any proceedings before the Court or a subordinate 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 a director or an employee specially authorized for that purpose.

17. Therefore a party acting on their own has the primary audience while a party being represented by an advocate, such an advocate is regulated by under the Advocates Act while a party represented by their trade union, such unionisation is regulated under the Labour Relations Act. It would therefore cause great administrative and procedural injustice if any advocate were to file proceedings without adherence to regulations in statute as under the Advocates Act as well as a trade union which files pleadings without compliance to set rules and regulations as under the Labour Relations Act. Such would lead to disorder in disputes actitation by the Court and contrary to the good norms and practice and rule of law. Reliance on

article 3, 22 and 159 of the Constitution is good but the context must be given to the violation of the Bill of Rights as against other matter regulated by statute such as Employment and labour relations particularly what is set out under the Labour Relations Act, the Employment Act and the jurisdiction of the Court under article 162 of the Constitution read together with the Employment and Labour Relations Court Act at section 12. such are to be seen in context without under regard to technicalities and in recognition that the violation of the Bill of rights is well set out in a Petition to enable the responding party and the Court presiding to Respondent effectively and award an appropriate remedy respectively.

18. Going back to the Labour Relations Act, in ensuring that a trade union is granted the requisite authority to represent its member, recognition by the employer is regulated in law. In this case, a recognition agreement is given a definition is important to make reference to thus;

“recognition agreement” means an agreement in writing made between a trade union and an employer, group of employers or employers’ organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers’ organization;

19. Therefore, for a trade union to have standing with the employer so as to act *as the representative of the interests of unionisable employees employed by the employer* ‘recognition’ is required. To be entitled to a recognition agreement, a union needs to establish that it has complied with section 54 of the Labour Relations Act, in that it represents more than a simple majority of the unionisable employees of the employer. This is a matter of fact that require the call of evidence to be determined after a trial.

20. In this case, the Claimant submitted that the Respondent deducted union dues for July 2014 but has since stopped the remittances. Where there is a deduction of trade union dues by an employer, such by implication is in compliance with the provisions of section 48 of the Labour Relations Act which in itself indicates the employer has acted pursuant to directions and procedures set out therein.

21. It is not lost to the Court that The Claimant has moved the Court in **Cause No.1776 of 2014** seeking the Respondent as the employer for their members be compelled to recognise the claimant. Such a matter was filed before this current suit, and while that was pending, issues are herein arose and a new claim arose where the Claimant filed the current cause and sought the same be consolidated with the first **suit under No.1776 of 2014**.

22. Therefore the question of standing, though raised herein as an objection and seeking to terminate the current proceedings on the grounds that the Claimant lacks the same to initiate this suit, such is a matter this Court is seized of, it cannot be ignored in the context raised herein as it has to be determined and with it, give guidance to the current proceedings. It is equally not lost to the Court the effort made by the Claimant to prosecute the matters herein – the application for consolidation of the files with **Cause No.1776 of 2014** and the effort to have the grievants proceed on own behalf – which have all been directed by the Court with regard to matters in **Cause No.1776 of 2014** being addressed to set in motion as to whether there should be recognition and without going into the merits therein, such a determination would impact on the proceedings herein. To therefore terminate the current suit would be to ignore such matters before the Court and defeat the course of justice for the Claimant and its members.

To avoid a conglomeration and multiplicity of suits; noting the orders and directions so far issued and given herein; and noting the current objections which have the impact of addressing the question of standing for the Claimant and noting this is a matter brought first in time in Cause No.1776 of 2014, proceedings herein shall stop pending the determination of Cause No.1776 of 2014 on priority basis. The Registrar of the Court to direct the Deputy Registrar Nairobi to allocate a hearing date in 14 days in Cause No.1776 of 2014 and this file be placed together with Cause No.1776 of 2014 for follow up with regard to the determination of the issue now herein pending – locus stadi of the claim.

Hearing put in abeyance herein.

Delivered in open court at Nairobi and dated this 20th day of January 2016.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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