



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT OF KENYA AT NAIROBI

CAUSE NO. 947 OF 2016

PERPETUA MPONJIWA, MARK SPINXS OTIENO,
FRANCIS OJALLA, ZIPPORAH MAINA AND ROB ABKULA
on behalf of members of AVIATION & AIRPORTS WORKERS
SERVICES UNION.....1ST CLAIMANT/APPLICANT
CABIN CREW BRANCH, AVIATION & AIRPORTS WORKERS
SERVICES UNION.....2ND CLAIMANT/APPLICANT
AIRLINES BRANCH, AVIATION & AIRPORTS WORKERS
SERVICES UNION.....3RD CLAIMANT/APPLICANT
VERSUS
AVIATION & AIRPORTS WORKERS
SERVICES UNION..... 1ST RESPONDENT
SECRETARY GENERAL AVIATION & AIRPORTS WORKERS
SERVICES UNION..... 2ND RESPONDENT
REGISTRAR OF TRADE UNIONS..... 3RD RESPONDENT

RULING

1. The 1st, 2nd and 3rd Claimants/Applicants moved the Court seeking injunctive orders against the 1st, 2nd and 3rd Respondents on account of elections held at the 2nd, 3rd Claimants and the 1st Respondent. The application under certificate of urgency was expressed to be brought under Section 12 of the Industrial Court Act 2011, Rules 16 & 27 of the Industrial Court (Procedure) Rules 2010, Section 4 & 34 of the Labour Relations Act, 2007 and other enabling provisions of

- the law. It sought various orders and in the main sought
1. orders to restrain the 3rd Respondent by way of injunction to stay Extract from Register of Trade Unions, Officers, Committee Members and Trustees purportedly elected on 23rd April 2016 and from recognising the said officials.
 2. an injunction to restrain the 3rd Respondent from effecting any changes in the Register of the 1st Respondents
 3. an order barring the taking over by the officials purportedly elected on 23rd April 2016.
 4. An order directing the 3rd Respondent to register the officials of the 2nd and 3rd Claimants Branch pursuant to elections held on 20th March 2016 pending the hearing and determination of the application.
 5. An order directing the 2nd Respondent to avail an updated register of all members eligible to vote and contest branch elections
 6. An order directing the 3rd Respondent to give directions to ensure that Branch/Chapter elections as regards voting process is transparent, fair, accurate and open to all members of the union.
2. The application was supported by the affidavit of Perpetua Mponjiwa and on the grounds on the face of the motion.
 3. Upon service of the application and the temporary order granted by the Court, the 1st and 2nd Respondent raised a preliminary objection to the application by the 1st, 2nd and 3rd Claimants/Applicants. The preliminary objection filed on 6th June 2016 was to the effect that the claim as drafted, pleaded and filed was incurably defective and can never be redeemed in any way. The objection was based on Sections 21, 35(5) and (6) of the Labour Relations Act 2007. Objection as taken as to the failure to effect service in terms of Rule 16 of the Industrial Court (Procedure) Rules 2010.
 4. The Claimants/Applicants filed submissions in reply to the preliminary objection on 13th June 2016.
 5. On 21st June 2016 parties appeared before me to urge and oppose the preliminary objection respectively. The objection was raised by Mr. Lichoro while Ms Mponjiwa responded for the Claimants/Applicants. Mr. Lichoro submitted that under Section 35 of the Labour Relations Act, no person can purport to act for a trade union if that person is not registered or is an official. He submitted that from the Extract none of the Claimants is an official. He stated that they ceased being officials and are barred from filing the suit on behalf of the 1st Respondent. He relied on the case of **Robert N. Lichoro & Another v Bonne Barasa & 2 Others Cause No. 1147 of 2012** (Unreported) where Nduma Nderi J. found that the Claimants in that case had no capacity to bring any suit on behalf of the Union as they were not officials. He submitted that Section 21 of the Labour Relations Act provides that only the 1st Respondent has been clothed with juristic personality to sue and be sued. He stated that Section 25 of the Labour Relations Act sets up branches but does not confer the branches with juristic persona to sue and be sued. He relied on the Ruling in the case of **Kenya Ferry Services Limited v Dock Workers Union (Ferry Branch) Cause No. 338 of 2014** where Radido J. held that the branches lack juristic personality to sue. He urged the Court to strike out the names of the 2nd and 3rd Claimants for lack of capacity. He submitted that the application was to be served on the Respondents by 23rd May 2016 but was not served until 31st May 2016. He submitted that it was improper to refrain from serving the orders and application and seek an extension.
 6. Ms. Mponjiwa responded to the objection by stating that upon filing the motion it was impossible to find the Union and that its offices were not located at Winstonia House along Embakasi – Old Airport Road which is the office indicated to the Registrar of Unions. She submitted that up to 23rd April 2016, she was the chairperson of the Union and that she is the branch secretary of the

Airlines Branch and therefore she has the capacity to come to Court. She stated that the Claimants had come to Court as the elections were conducted without following the Union constitution and that the law suit was filed by the correct parties. She submitted that the Court has the discretion under Order 1 Rule 10 and Order 8 Rule 3 & 4 which is in line with Article 159(2)(d) of the Constitution which requires the Courts to administer justice without undue regard to technicality. She stated that they do not show how they will suffer prejudice and relied on the case of **Kenya Ferry Services v Dockworkers Union (Ferry) Branch** (*supra*) and submitted that an irregularity which does not go to jurisdiction can be cured by amendment. She submitted that it was important the matter proceeds so that we can know what exactly happened in the elections. She stated that they had a right to participate in elections. She submitted that Mr. Lichoro was the national treasurer and that there was no letter of authority from the 2nd Respondent Bonne Nicholas Barasa.

7. In his reply, Mr. Lichoro submitted that the only point of law in the submission by the Claimants is that the union does not have a physical office. He stated that if she was the chair, how does she not understand where the office of the union is? He submitted that Section 55 of the Labour Relations Act does not speak of representing a union in Court and only speaks of representing a member which is markedly different. He submitted that Section 30 of Labour Relations Act permits appeal against a decision of the Registrar and stated that he is not opposed to an appeal against the decision of the Registrar but was opposed to the manner the application was filed. He submitted that the law was clear and because he was a principal officer of the Union he could come to Court.
8. Preliminary objections are taken *in limine* where the matter is one where conditions exist for the raising of a preliminary objection. The *locus classicus* is the celebrated case of **Mukisa Biscuits Ltd v West End Distributors Ltd (1969) EA 696**. In the case of **Jotham Mulati Welamondi v The Chairman, Electoral Commission of Kenya [2002] eKLR Ringera J. had this to say**

*I am also of the opinion that the only objections which could not be so taken are those predicated on disputed facts or which called upon the court to exercise its discretion. In the latter regard I would invoke the authority of **Mukisa Biscuits Ltd v West End Distributors Ltd (1969)**. E.A on the scope and meaning of preliminary objections. At P 700 Law J.A laid down the law as follows:*

"So far as I am aware, a preliminary objection consists of a point of Law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

And Sir Charles Newbold in his characteristic forceful and forthright rendition of the law had this to say at P. 701

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and, on occasion, confuse the issues. This improper practice should stop."

9. I am similarly persuaded as Ringera J. was that the objections which cannot be taken are those predicated on disputed facts or which call upon the court to exercise its discretion. I too look to the case of **Mukisa Biscuits v West End** and hold that if I am to determine facts then the objection would not lie *in limine*. Mr. Lichoro raises the issue of representation. Under the Labour Relations Act Sections 21 and 35, there is provision on representation.

10. Section 21 provides as follows:-

21. A trade union, employers' organisation or federation shall be registered as a body corporate—

- a. with perpetual succession and a common seal;*
- b. with the capacity in its own name to—*
 - i. sue and be sued; and*
 - ii. enter into contracts; and*
- c. hold, purchase or otherwise acquire and dispose of movable and immovable property.*

11. The law also provides as follows in Section 34:-

34. (1) The election of officials of a trade union, employers' organisation or federation shall be conducted in accordance with their registered constitutions.

(2) The constitution of a trade union, employers' organisation or federation shall—

- a. not contain a provision that discriminates unfairly between incumbents and other candidates in elections; and*
- b. provide for the election, by secret ballot, of all officials of a trade union at least once every five years.*

(3) Notice of the election of officials under this section shall be given to the Registrar in the prescribed form within fourteen days of the completion of the election.

(4) Disputes arising from, or connected directly or indirectly to, elections held under this section may be referred to the Industrial Court.

(5) The Registrar may issue directions to a trade union, employers' organisation or federation to ensure that elections are conducted in accordance with this section and their respective constitutions.

12. The provisions of Section 35 of the Labour Relations Act are as follows:-

35. (1) A trade union, employers' organisation or federation shall exhibit prominently—

(a) in its registered office, a notice giving the names of all officials and their titles;

(b) in every branch office the notice specified in paragraph (a) and in addition, a notice giving the names and titles of the officials of the branch.

(2) Notice of any changes of officials or of the title of any officials shall be submitted to the Registrar in Form Q set out in the Second Schedule, within fourteen days after the change, together with the prescribed fee, and the Registrar shall register the change, subject to subsections (4) and (5).

(3) Before registering any change of officials or correcting any register, the Registrar may require the production of any relevant evidence of the change.

(4) If, after inquiry, the Registrar is not satisfied as to the validity of any appointment or the propriety of any proposed correction, the Registrar may refuse to register the change of officials or to correct the register.

(5) No change of officials shall have effect until it is registered by the Registrar.

(6) No person who is not registered by the Registrar in accordance with this section shall act or purport to act as an official of a trade union, employers' organisation, or federation or of any branch.

13. From the foregoing, it is clear that the law has specifics as to what Unions and the officials should do and what the effect of the Registrar is in all this. The office of the union must be known, the list of branches and the elected officials must be known and the Registrar has the duty to register the details in the register maintained for that purpose. Failure to do so would be an abridgement of the law.
14. In the unreported cases of **Kenya Ferry Services Limited v Dock Workers Union (Ferry) Branch** and **Robert Lichoro & Another v Bonne Barasa & Others**, my brothers Radido J. and Nduma Nderi J. held that unelected officials and branches do not have capacity to act for the Union. From the extract from the 3rd Respondent dated 11th May 2016, only Mr. Lichoro appears as an official. He can act for the 1st Respondent and any objection to him appearing would be misplaced and not in accord with the law. I am persuaded that on the authority of the case of **Kenya Ferry v Dock Workers** (*supra*), the 2nd and 3rd Claimants lack the legal persona to sue and be sued and the appropriate order is to strike out their names from the suit. The 1st Claimant sues on behalf of members of the 1st Respondent and from the reading of the sections reproduced above, nothing bars them for so doing. They however cannot sue for and on behalf of the 1st Respondent as they are admittedly not officials of the 1st Respondent. The 1st Claimant, being the only surviving Claimant can proceed with the suit.
15. The interim orders are vacated and in their place, granted that there is a registered list of union officials, the list will remain as it is shown on the extract of the Registrar of Trade Unions as of 11th May 2016 pending the hearing and resolution of the dispute.
16. The preliminary objection is partly successful but given the fact that the substantive issues in the claim remain for determination no order as to costs will be made. In any event only the union officials both present and former have appeared in the matter.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of June 2016

Nzioki wa Makau

JUDGE