



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 8 OF 2016

(Before D. K. N. Marete)

KENYA UNION OF EMPLOYEES OF POLYTECHNICS, COLLEGES AND

ALLIED INSTITUTIONS (KUEPCAI).....CLAIMANTS

VERSUS

MOI TEACHING REFERRAL HOSPITAL.....RESPONDENT

RULING

This is a Preliminary Objection dated 25th May, 2016. It comes out as follows;

TAKE NOTICE that at the hearing of the Claimant claim dated 12th January, 2016, Counsel for the Respondent will contend as a preliminary point of law, that the claimants claim is hopelessly misconceived, frivolous, and totally devoid of merit for the reason that Moi teaching and referral hospital is neither a polytechnic nor a college and that the claimant is not the appropriate union for the respondents employees.

WHICH OBJECTION is grounded upon the Kenya Gazette Supplement no. 34 of 12th June, 1998 (legislative supplement no. 25) Legal notice no. 78. (The Moi/Teaching and Referral Hospital Board Order, 1998), and the Respondent's statement of response filed on 15th April, 2016.

The claimant in response to the preliminary objection seeks to rely on Article 36 (1) and (2) of the Constitution of Kenya, 2010 that provides for the right to association as hereunder;

“(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind. (3)”

This is coupled by Article 41 (1) and (2) of the Constitution of Kenya, 2010 as follows;

“Labour Relations.

41 (1) Every person has the right to fair labour practices

(2) Every worker has the right to

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike

It is the claimant's further submission that the respondent's powers and functions are provided for in legal Notice No. 78 – The Moi Teaching and Referral Hospital Order as follows;

9. That, powers and functions of the Board are explicitly enumerated at paragraph 5 (1) to (3) and which among others is to mitigate educational activities at the Moi Teaching and Referral Hospital that states *inter alia*:

“ (1) (2)

(3) (c) promote the general welfare of the patients, trainees and staff of the hospital

(d) Promote medical training and provide technical advice on health research, manning and development;

10. That, further it is important to be well informed of the functions of the institution at paragraph 6 (b) which provides for among others *inter alia*:

“(b) to provide facilities for medical education for Moi University and for research either directly or through other cooperating health institutions;

(c) to provide facilities for educations and training in nursing and other health and allied professions;”

The claimant therefore faults the preliminary objection for being mischievous and lacking in merit and prays that it be dismissed with costs.

The respondent/objector deems and submits that the claim is hopelessly misconceived, frivolous and devoid for the reason that the claimant is not the appropriate union for the respondent's employees. She further submits that the claimant is acting on the mistaken belief that by virtue of Article III (A) Section 1 (a) (i) of its Constitution the respondent's employees are potential members. This is not true as the claimant constitution defines its members to include;

(a) Staff of employees of tertiary (polytechnics and colleges), schools and educational centers.

(a) (i) Further defines polytechnics as including public, provisional, district, divisional, village, youth, teaching and referral training institutes, education and YMCA/YWCA centers.

This objection fails for lack of conformity with the principles laid out in the authority of **Mukhisa Biscuit Company Limited Verses Westend Distributors Limited (1969) EA 696** at page 701 on the sanctity of preliminary objections as follows;

“A preliminary objection is in the nature of what used to be a demure. It raises a pure point of law which if 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 occasion confuse the issues. This improper practice must stop.”

This would call for an interrogation of further data to bring out the actual status of the claimant as it relates to representation of the respondents employees. I am therefore inclined to dismiss the preliminary objection with costs to the claimant.

Delivered, dated and signed this 19th day of July 2016.

Appearances

D.K.Njagi Marete

JUDGE

1. Mr. Agura for the union.
2. Mr. Kirima for the respondent/objector.