



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 1 OF 2016

BETWEEN

KENYA SHIPPING, CLEARING, AND WAREHOUSES WORKERS UNION....CLAIMANT

VERSUS

AFRICAIR MANAGEMENT & LOGISTICS LIMITED.....RESPONDENT

RULING

1. The Claimant Union filed a Statement of Claim on behalf of its Member Gabriel Matheka Musembi, on the 4th January 2011. It is claimed the Member [Grievant] was an Employee of the Respondent Company, whose position was unfairly and unlawfully declared redundant by the Respondent. The Claimant seeks from the Respondent, on behalf of the Grievant, payment of redundancy dues and compensation for unfair termination.
2. The Respondent filed a Notice of Preliminary Objection on 15th February 2016, alleging the Claimant Union has not concluded any Recognition Agreement with the Respondent. The Claimant therefore has no *locus standi* to represent the Grievant. It is also in the Objection of the Respondent that the Claim ought to have been filed and tried at the Employment and Labour Relations Court in Nairobi.
3. It was agreed by the Parties that the Preliminary Objection is considered and determined on the strength of the Parties' written Submissions. These were confirmed to have been filed by the Parties, at the last mention in Court on the 29th June 2016, when the Ruling of the Court was reserved for 30th September 2016.
4. The Respondent submits that following the principle in *Nakuru High Court Civil Case Number 464 of 2000* and *Kenya Union of Employees of Voluntary and Charitable Organizations [KUEVACO] v. Board of Governors & Maina Wanjigi Secondary School [2015] e-KLR*, a Party must have sufficient interest to sustain its standing to sue in a Court of Law.
5. As concluded in Industrial Court's *Communication Workers Union v. Safaricom Limited [2014] e-KLR*, without Recognition by an Employer, a Trade Union, even though registered, cannot represent an Employee working for the particular Employer. Such a Trade Union is a bystander waiting by the roadside for instructions, similar to a well learned lawyer without a practice certificate, who though well versed in law, cannot represent a Client in a Court of Law.
6. The Claimant has not been accorded Recognition by the Respondent Employer. It therefore lacks the

capacity to represent the Grievant.

7. The second limb to the Objection is on the place of suing. The Respondent argues its only office is in Nairobi. The contract of employment was concluded, performed and terminated at Nairobi. The Grievant works and is resident in Nairobi. Conciliation meetings took place in Nairobi. Order 47[6] [1] of the Civil Procedure Rules dictate Nairobi should be the place of trial. The Respondent urges the Court to uphold the Objection on these two grounds.

8. The Claimant submits it is a registered Trade Union, representing Unionisable Employees in the shipping and allied industries. All such Employees working in these industries are eligible for membership. They enjoy the services of the Claimant in protection and promotion of their individual workers' rights and interests. The Claimant has the mandate in representing its Members in their grievances. This representation extends to the workplace, as well to the Courts. Recognition is not a prerequisite in such representation.

9. Recognition aims at enabling the Union to collectively negotiate and bargain terms and conditions of employment with the Employer. Section 54 of the Labour Relations Act 2007 is clear Recognition is granted to the Trade Union to enable it to bargain collectively. Representation in disputes and grievances, at the various dispute settlement platforms, including the Courts, is not based on the Recognition Agreement. The Parties went before conciliation before coming to Court. There was no objection about the Claimant's involvement at that forum.

10. On the place of suing, the Claimant submits the Respondent carries out its business throughout Kenya. The Claimant Union has its Head Office at Mombasa. Industrial Court Procedure Rules apply to this dispute, not the Civil Procedure Rules. The Grievant executed most of his duties in Mombasa.

The Court Finds:-

11. Section 54 of the Labour Relations Act 2007 answers the question why Trade Unions and Employers enter into Recognition Agreements. A Trade Union which recruits a simple majority of an Employer's Unionisable Employees, is required to be granted by that Employer, Recognition. Recognition allows such Trade Union and the Employer to enter into collective negotiations and bargaining, on the terms and conditions of service of the Unionisable Employees falling within that collective bargaining unit. The effect of Recognition is to grant the Trade Union the sole collective bargaining agency with regard to representation in collective bargaining.

12. Recognition has nothing to do with the Trade Union's *locus standi* in a Court of Law. It is not the event which confers the Trade Union with the authority to file Claims in Court on behalf its Members, and represent its Members in prosecuting those Claims.

13. Section 4 of the repealed Trade Disputes Act Cap 234 of the Laws of Kenya allowed Trade Unions to report disputes to the Minister for Labour for investigation and conciliation. Section 23 allowed Employees to be represented in the proceedings of the Industrial Court by an Advocate or by any Person, subject to the Rules of the Court. Section 23 of the Labour Institutions Act 2007 which replaced the representational provision under the Trade Disputes Act, allowed persons coming before the Industrial Court to act in Person; through a Legal Practitioner; an Office Bearer or Official of that Party's Trade Union or Employer's Organization; and if the Party is a juristic Person, by a Director or an Employee. This provision has been preserved under Section 22 of the Employment and Labour Relations Court Act.

14. A Trade Union is defined under Section 2 of the Labour Relations Act 2007 as an association of Employees whose principal purpose is to regulate relations between Employees and Employers. Once this association is registered, it attains under Section 21 of the Labour Relations Act the capacity to sue and be sued in its own name. A dispute which involves a Member is an associational issue which allows the Trade Union to take up the dispute in its own name.

15. The obligation of the Trade Union to represent its Members in and out of Court, and the right to the

Members to representation, in work related grievances and disputes, flows from the membership of the Employee to the Trade Union. These are obligations and rights created by membership. Recognition is between the Trade Union and the Employer. Membership creates a relationship between the Trade Union and its Members. The two relationships are not the same thing, and do not have the same legal effect. Trade Unions collect regular membership fees from Employees, and the Employees in return, enjoy the representation and protection of the Trade Union under the Union Constitution and the law. Membership allows the Employees to have the Trade Union's legal representation in Court, while Recognition allows the Union to collectively bargain with the Employers, for the benefit of Members, and all Unionisable Employees.

16. These concepts have gained anchorage in the Constitution of Kenya, under Article 36 and 41 on freedom of association, and in Particular Article 22 [2] [d] which allows Trade Unions to bring suits claiming a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. An association under the Constitution has the authority to bring such a suit in the interest of one or more of its Members. This Article has recognized the associational standing of Trade Unions before Courts. It has affirmed the legal provisions, and clauses within the Trade Unions' internal Constitutions, which mandate them to bring Claims before the Court on behalf of their Members. Although Article 22 [2][d] does not govern proceedings of all nature, in all Courts, its spirit must be read in all proceedings where such associational standing is expressed or implied by Legislation or internal Constitutions regulating Trade Unions. The test laid down in the *Law Society of Kenya* Decision cited by the Respondent above, on sufficiency of interest in sustaining the standing to sue in a Court of law, is easily met by Trade Unions, as they are associations of Employees, and disputes involving those Employees are matters of associational interest. Once it is shown the Employee is a Member of the particular Trade Union, the law assumes the Trade Union has an interest and a duty, in protecting the rights of the Employee. The Trade Union cannot be a bystander in a dispute involving the violation of its Members' employment protections and guarantees.

17. The Court accepts the Claimant's submission that it was seized of the dispute, under its own name, at conciliation. The Court has observed that under the Trade Disputes Act, Trade Unions reported the disputes to the Minister for investigation and conciliation, in their own names. If the disputes were not voluntarily settled, they were referred to the Court for adjudication by the Minister, in the name of the reporting Trade Union. The Trade Union would state who the Grievant was, in its pleadings and papers before Conciliator and the Court. This position has not changed fundamentally under the Labour Relations Act. Complaints by Employees on unfair dismissal may be presented to a Labour Officer under Section 47 [1] of the Employment Act 2007. Such a complaint is presented by the Employee in person, or by his representative, which would include his Trade Union. "Representative" would mean the persons identified under Section 22 of the Employment and Labour Relations Court Act. Section 2 of the Labour Relations Act defines "Authorized Trade Union Representative." Trade Unions are involved at the investigation and conciliation processes before disputes are escalated to Courts. They own these disputes, by virtue of their associational standing. In event the case is lost in Court in their names, they, and not their Members, risk bearing the costs of the litigation and all the risk emanating from failure to meet those costs. This is an important associational standing, which buffers Employees against the impediments that come with the costs of litigation. It becomes possible for needy Employees to access industrial justice.

18. The Court is persuaded the Claimant has the capacity to bring the Claim in its own name, on behalf of the Grievant, and to prosecute the Claim on behalf of the Grievant.

19. On the second limb, the Claimant did not show the Court adequate reason why Mombasa should be the place of trial. There is no Affidavit filed by, or on behalf, of the Grievant, disputing that he works in and is a resident of Nairobi. He has not disputed that he worked at Nairobi. His contract was made, performed and allegedly un-made in Nairobi. The Court has in the past stated it is not governed by the Civil Procedure Rules. To this extent the Claimant is correct in its submission that the Civil Procedure Rules relating to transfer of suits, have no application to the Employment and Labour Relations Court. In its past decisions on the subject, the Court has stated that primarily, its concern is that an Employee, who in most cases approaches the Court from position of financial difficulties that come with loss of a job, should be assisted in having easy access to the place of trial. The place of trial should not invariably be

where the contract was made, performed or un-made; it should be the place where the Employee, if the Employee remains un-employed, can have less financially prohibitive access to the Court. If an Employee, for instance, has been dismissed by his Employer based at Mombasa and retired to his rural home in Kisumu; if he remains unemployed and without a consistent source of income; he should be free to file his Claim against his former Employer at the Court in Kisumu rather than Mombasa. Requiring him to travel to Mombasa would in the respectful view of this Court, mean he is not able to file his Claim, or file his Claim in time. He certainly would find it hard to raise the resources needed in prosecuting his Claim to conclusion.

20. In the current dispute however, all processes preceding the filing of the Claim, took place in Nairobi. The Grievant is based at Nairobi. The Respondent's Office is in Nairobi. Witnesses for both Parties are likely to be at Nairobi. The only factor connecting the dispute to Mombasa is the Claimant Union, which has its Head Office in Mombasa. The place of business of a Trade Union is not a defining factor in determining the place of a trial involving that Trade Union's Member. The only reason why the Claim was filed here is that Mombasa is a convenient place of trial from the Claimant's viewpoint. The Claimant after all is a national Trade Union. It should aspire to have a nationwide reach. All the other connecting factors, including the place of residence of the Grievant, persuade the Court the dispute should be heard and disposed of at the Employment and Labour Relations Court at Nairobi.

IT IS ORDERED:-

- a) The Objection on the Claimant's legal capacity to initiate and prosecute the Claim is rejected.*
- b) The Objection on the place of trial is sustained.*
- c) The dispute is transferred to the Employment and Labour Relations Court at Nairobi for trial and disposal.*
- d) Costs in the Cause.*
- e) Dated and delivered at Mombasa this 29th day of September 2016

James Rika

Judge