



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1618 OF 2014

(Formerly Mombasa Cause 430 of 2014)

CONSOLIDATED WITH CAUSE NO. 148 OF 2013

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

CENTRAL ELECTRICAL INTERNATIONAL LIMITED.....RESPONDENT

RULING

1. The Respondent raised a Preliminary objection to the suit on the grounds that the Claimant lacked *locus standi* to bring the claim. It was submitted on 24th November 2014 that the Claimant union did not have capacity to bring the suit as there was no recognition with the Respondent. Further, the Respondent held that there should be sufficiency of interest as capacity of the union to sue under Section 22 of the Industrial Court Act was lacking. It was submitted that the persons the Claimant was purporting to represent are not members of the Union as no evidence had been led. It was submitted that the suit should be struck out without prejudicing the right of the employees to bring a suit. Reliance was placed on the decisions in **Communication Worker's Union v Safaricom Limited [2013] eKLR** and **Kenya Shipping Clearing & Warehouses Workers Union v Bobmill Industries Limited [2013] eKLR**.
2. The Claimant opposed the preliminary objection and filed a Reply to the Preliminary Objection on 20th November 2014. The so called reply to the preliminary objection is deemed as Grounds in Opposition as it sets out sequentially the points in opposition to the preliminary objection. The grounds were to the effect that the Industrial Court has to take into account Section 22 of the Industrial Court Act 2011 and Section 73(3) of the Labour Relations Act 2007. Reliance was placed on the case of **Kenya Hotels and Allied Workers v The Big Five Brewers Limited** Cause No. 391 of 2010 (unreported) for the proposition that evidence of the recognition was necessary for determination of the issue of *locus* raised and therefore the preliminary objection was not well founded.
3. In the submissions by the Representative of the Claimant Union, it was the Claimant's position that the issue of recognition was not raised at conciliation and the Claimant had attached a check off list in Cause 148 of 2013 a dispute on recognition. The Claimant urged the Court to uphold the position taken in **Kenya Hotels and Allied Workers v Big Five Brewers** above that documentary evidence cannot be used to deny workers representation before this Court.

4. In brief reply, the Respondent submitted that there was no evidence produced to show membership to the Union. It was submitted that the fact that the issue of representation was not raised at reconciliation does not preclude the Court from making determination. The case of **Communication Workers v Safaricom** was stated to have dealt in detail with the importance of recognition and right to represent workers.

5. From the arguments advanced by the parties it is important at the onset to determine whether what was raised was a preliminary objection. The *locus classicus* on this is the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** where Law J.A. stated a preliminary objection to be thus:-

“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 pleadings, and which if argued as a preliminary point 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.”

6. Sir Charles Newbold, President stated as follows in the same judgment:-

“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.”

7. The Respondent has raised the issue of representation and submits that the Claimant lacks capacity to represent the workers in the Respondent and thus this suit is brought by a party without the requisite *locus standi*. The Claimant on the other hand argues that the issue of locus was not raised at conciliation level and that on the strength of a decision made by Makau J. in **Kenya Hotels & Allied Workers v Big Five Brewers** documentary evidence ought not be used to deny workers representation.

8. A preliminary objection ought not be raised where facts are disputed. In this case the issue of representation has some central focus in this claim. Prior to the preliminary objection, there was a consolidation of two causes – Mombasa Industrial Cause number 148 of 2013 between the Claimant and the Respondent and an interested party Kenya Building Construction, Timber and Furniture Industries Employees Union. In the case which is consolidated with this present one, the issue at play is the recognition, or lack thereof, of the Claimant Union. In my view, the issue of recognition though pleaded requires an analysis of the evidence to ascertain the correct position regarding representation. That is not a matter the Court can determine *in limine*. The ‘preliminary objection’ raised does not fit in the confines of “pure point of law” espoused by Sir Charles Newbold President of the Court of Appeal in the case of **Mukisa Biscuits** above.

9. I did not need to delve into the richness of the decisions in the **Communication Workers v Safaricom** case or **Kenya Shipping Workers v Bobmill** case. I am persuaded that these are sound propositions of the law but do not apply to the circumstances in this case at the preliminary stage.

10. The upshot of the foregoing is that the preliminary objection thus fails and is dismissed with costs to the Claimant as the preliminary objection is not capable of disposing of the suit *in limine*.

Orders accordingly.

Dated and delivered at Nairobi this 5th day of February 2015

Nzioki wa Makau

JUDGE