



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATION COURT OF KENYA

AT MOMBASA

CAUSE 576 OF 2014

JULIUS ORARE ISAAC CLAIMANT

VERSUS

BAKE 'N' BITE COMPANY LIMITED RESPONDENT

RULING

Introduction

1. On 12th November 2014, the Claimant brought this suit seeking damages for unlawful termination of his employment by the Respondent. In response the Respondent filed the Notice of Motion dated 16th December 2014 seeking to have the suit either struck out or stayed pending negotiations between the Respondent and the Claimant's union. The grounds for the motion include the fact that the Claimant's union and the Respondent have entered into a Collective Bargaining Agreement (CBA) which provides a dispute resolution mechanism which has not been exhausted. For that reason, the Respondent contends that this suit is prematurely filed and the court lacks jurisdiction to entertain the same. The motion is supported by the affidavit sworn by Mr. Seif Muhamed Seif on 16th December 2014.
2. The Claimant has opposed the motion vide his affidavit sworn on 23rd February 2015. The gist of the replying affidavit is that the Claimant has never been a member of the alleged union and his attempt to seek help from the Union Shop steward has been fruitless because the Claimant did not join the union. For the foregoing reason, the Claimant denies being bound by the alleged CBA between the union and the Respondent and as such prays for the motion to be dismissed with costs.
3. The motion was disposed of by written submissions.

Analysis and Determination

4. After carefully perusing and considering the pleadings, the Notice of Motion, Affidavits and the submissions filed, it is clear that the parties herein were engaged into an employment contract which ended in June 2014 through summary dismissal for gross misconduct. There is also no dispute that the Respondent has entered into a CBA which provides for a dispute resolution mechanism and between her and her employees who are union members.

The issues for determination are:

1. Whether the Claimant is bound by the CBA between the Respondent and the union.
2. Whether the court lacks jurisdiction to determine the suit for being prematurely filed.

3. Whether the orders sought by the motion herein should be granted.

Whether the CBA binds the Claimant

5. The Claimant's contention that he was never a member of the union was not contested and rebutted. The burden of proving that membership lies with the Respondent who is alleging that the Claimant is bound by the CBA. Without proof that the Claimant was a member of the union renders the motion herein unmeritorious. The reason for the foregoing finding is that the dispute is outside the provisions of the Labour Relations Act and therefore restricted to the provisions of the Employment Act. Consequently the court is of the view that the CBA between the Respondent and union binds only the members of the union and not non members including the Claimant.

Jurisdiction

6. In view of the finding above that the Claimant is not bound by the CBA between the union and the Respondent, the court finds that the suit herein is properly before the court and the court has jurisdiction to entertain the same under the provisions of the Employment Act.

Orders sought

7. In view of the finding that the suit is properly before the court and that the court has jurisdiction to entertain it, the court will not strike out the suit or stay it pending negotiations under the CBA. As much as Article 159 of our Constitution and the Industrial Court Act encourages the courts to encourage Alternative Dispute Resolutions (ADRs), the motion before the court is not in consonance with the said provisions of the Law. The applicant is however at liberty to negotiate settlement with the claimant, without involving the union, pending the hearing of the suit

Disposition

8. For the reasons aforesaid, the Respondent's motion dated 16th December 2014 is dismissed with costs.

Signed, dated and delivered in Mombasa this 27th day of April 2015

Onesmus Makau

Judge