REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.744 OF 2013

KENYA UNION OF EMPLOYEES OF VOLUNTARY AND

CHARITABLE ORGANISATIONS [KUEVACO]..CLAIMANT

VERSUS

BOARD OF GOVERNORS MAINA WANJIGI SECONDARY SCHOOL...........RESPONDENT

RULING

Odin Otieno appearing to KUEVACO the Claimant

Waweru Gatonye & Co. Advocates for the Respondent

1. On 17th December 2014, the respondent, Board of Governors, Maina Wanjiigi Secondary School filed Notice of Preliminary Objections to the suit as filed seeking for its dismissal on the grounds that;

1. *The Claimant and the alleged employees are strangers and have no locus to file this suit as the Grievant membership with the union is disputed. All workers employed by the school are registered members of the Kenya Union of Domestic, Hotels, Educational Institutions, Hospital and Allied Workers (KUDHEIHA) and none of the school's employees are members of or has a member of the claimant, KUEVACO;*
2. *The Respondent is a public learning institution not a voluntary and charitable organisation. The Claimant union cannot be the right and proper union to represent the Grievant within the meaning of Article 41(2)(c) [of the Constitution] and section 12(1)(a) and (b) of the Industrial Court Act; and*
3. *The Claimant alleges to have been employed between 26th February 2002 and 26th February 2007. The suit herein was filed on 21st May 2013 hence its claim is time barred. The claim having been instituted outside the limitation period is incompetent ab initio and no claim can arise from it as it is time barred.*

2. On 29th January 2015, the Claimant filed a Replying Affidavit to the notice of preliminary objections and the Respondent also filed a reply thereto on 4th February 2015. Both parties agreed to file their written submissions with regard to the preliminary objections and the affidavits exchanged.

3. In the claimant's replying affidavit to the preliminary objections sworn by Odin Boaz Otieno, he states that according to Rule 13(2)(ii), (iii), (iv), (v) and (vi) of the Industrial Court (Procedure) Rules that to challenge the *locus standi* of a claimant, a Respondent must support such a ground with statements as

based on the Recognition Agreement, the Claimant has the requisite standing grounded on the provisions of section 4(1) and 23 of the Trade Disputes Act Cap 234 (now repealed) and section 22 of the Industrial Court Act. In this regard, a Recognition Agreement is a prerequisite for collective bargaining purposes pursuant to sections 5(2) of the Trade Disputes Act Cap 234 (now repealed) and section 54(1) of the Labour Relations Act, 2007. The record of employees is to be kept by the employer, the Respondent in this case, and where the question of standing arise, the duty to produce records is vested upon such an employer pursuant to sections section 74(1) and 93 of the Employment Act, 2007.

4. The Claimant also stated that the Respondent has not produced any evidence or record that the grievants are members of KUDHEIHA and not those of the claimant. The Claimant has the required check-off forms to prove membership. The Respondent is not defined as a commercial school and thus within the ambit of the Claimant constitutional mandate to recruit members therein and as under Article 41(2) (c) of the Constitution.

5. The Claimant also states that the claim herein is not statute barred as by letter of the Minister dated 6th August 2007 the dispute was accepted. The Claimant has relied on the ruling in **Kenya Plantation & Workers Union versus Mununga Leaf Base, Cause No.91 of 2012 (Nyeri).** In this regard therefore, the objections raised lack merit and should be dismissed to enable the Claimant proceed on the claims.

6. The Claimant also raises the objections that the firm of Waweru Gatonye & Co. Advocates have filed their records herein without filing the Power of Attorney contrary to sections 2(e) of the Labour Relations Act, 2007 and Order 9 Rule 1 of the Civil Procedure Rules and filed records are not legitimate.

7. In reply, the Respondent also in their affidavit had sworn by Zuhura Rajab a board member of the Respondent states that Johnstone kipg'eno Bett was not an employee of the Respondent and thus a stranger as evidenced by the Respondent payroll. The Claimant union is unknown to the Respondent and the known union is KUDHEIHA and none of the Respondent employees belong to the claimant. The Claimant on this basis lacks *locus standi.*

8. The Respondent also states that the question of time to file suit is regulated by statute and cannot be changed through Ministerial directives. The requirement for the respondent's advocate to have power of Attorney has no basis and the objections raised should be dismissed and the claim dismissed.

Submissions

9. In submissions and in support of the preliminary objections raised, the Respondent stated that the Claimant filed suit on 21st May 2013 for the Grievant Johnstone kipg'eno Bett over alleged termination on 26th February 2007. A defence was filed on 10th December 2014 and denied the claim and also filed the objections herein. To file the claim as outlined, the Claimant has failed to comply to the provisions of section 90 of the Employment Act, 2007 as the period since when the cause of action arose is over 5 years. Reference is made to **Fred Mudave Gogo versus G4S Security Services (K) Ltd, Cause No.846 of 2013** where the claim had been filed over 3 years since when the cause of action arose.

10. The Respondent also submitted that the Claimant has no *locus standi* Johnstone kipg'eno Bett was not their employee based on records in the possession of the respondent, and this notwithstanding section 54(3) of the Labour Relations Act there is no evidence of a Recognition Agreement between the parties herein. The Claimant has no interest in this case as held in **Law Society of Kenya versus Commissioner of Lands and Others, High Court, CCHC No.464 of 2000 (Nakuru).** The Respondent has a Recognition Agreement with KUDHEIHA and not the Claimant and hence the claim herein should be dismissed.

11. The Claimant of their part submitted and admitted to not having a Recognition Agreement or collective bargaining Agreement with the Respondent but this is a pre-emptive assertion made in the memorandum of claim for the Respondent to reply. Section 54 54(1) of the Labour Relations Act make provision for Recognition agreements only as a prerequisite for collective bargaining only and this does

not affect the juristic person in the claimant.

12. The Claimant also submitted that the claim herein is not statute barred as the Minister has power in law to accepted trade disputes and section 62 (2) of the Labour Relations Act remove the law on limitations with regard to trade disputes. Once a party has complied with section 62(2) of the Labour Relations Act, section 90 of the Employment Act or section 4(4) of the Limitations of Actions Act do not apply. The Grievant is not a stranger to the Respondent, the Respondent was using services of casuals, and this is a matter of evidence that the Claimant will call as appropriate.

Determination

The preliminary objections raised by the Respondent raise several issues for determination

The question of *locus standi*;

The question of the suit being time barred; and

The question of representation.

13. The very old principles on the question of preliminary objections set out in 1969 still reverberate to this day. These principles were laid down in **Mukisa Biscuits Manufacturing Co. Limited Versus Westend Distributors Ltd (1969) EA 696,** where the Court held that such an objection must be on a point of law that may dispose of the suit and should not contain issues of facts that require to be ascertained. I will come back to these principles.

14. On the question of *locus standi,* in the case of **Law Society of Kenya versus Commissioner of Lands and Others, Nakuru High Court, Civil Case No.464 of 2000, KLR 706** the Court held that the test of *locus standi* to be met, a party must have a sufficiency of interest to sustain its standing to sue in a Court of law. In this case, such sufficiency would take the form of Recognition of the trade union by the employer so that the trade union may be able to represent those employees that form part of the union should any dispute arise. 4. Section 4 of the Labour Relations Act allow all employee to join a trade union of their choice and section 54(1) obligates an employer to recognise a trade union for purposes of negotiating a collective bargaining Agreement (CBA), which becomes binding on both parties. Before having a CBA, an employer must first recognise the union in terms of section 54(3) of the Act. Such a CBA must be registered with the Court as under section 59 of the Labour Relations Act. In this case, the Claimant admits there is no Recognition by the Respondent as they have not singed a Recognition Agreement with the Claimant Union to enable both parties have a CBA. The evidence of lack of a Recognition Agreement and CBA, the claimants lacks standing before the Court.

15. Standing before this Court is crucial as despite the provisions of section 21 of the Industrial Court Act that require the Court not to overly rely on technicalities and address the substantive issues before the court, the issue of representation and standing before the Court is regulated by law and the Court has no discretion. Recognition that create *locus standi* for a union to file trade disputes is regulated under Section 2 of the Labour Relations Act that define a Recognition Agreement as;

> *"Recognition agreement" means an Agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the Recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organization;*

16. Where thus a dispute exists between an employer and an employee, a suit may be filed by the party subject to the dispute, their legal representative or the union where the employee or association where the employer is member. A dispute is this case must relate to;

> *"trade dispute" means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers'*

organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the Recognition of a trade union;

17. Once a trade union has addressed Recognition with a particular employer or employer organisation, other rights flow from such Recognition especially the right under section 54 of the Labour Relations Act – the right to collective bargaining. It is thus essential for a union thus registered for the sector theory represent to follow such registration and seek Recognition based on the provisions of section 54 (1) and (2). There requirements set out for Recognition where met by a trade union and the employer or the employer association fails to give the required recognition, sections 54(3) and (6) apply.

> *54 (3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written Recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.*
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> …
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> *(6) If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of Recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.*

18. Failure to give Recognition where the prerequisite requirements have been met, a trade union seeking such Recognition is allowed to file suit in court. Without *Recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organization,* such a trade union without Recognition cannot file a trade dispute within the meaning of the Labour Relations Act. The starting point would be to apply the provisions of sections 54(3) and (6) for such a union to have the *locus standi* in dealing with trade disputes, Recognition agreements or any negotiations for and on behalf of members and their employers.

19. Even where the law safeguard the rights of employees to unionise, such unionisation must be recognised in law to enable the union represent employees. In this case, the Claimant has not demonstrated that they have Recognition with the Respondent and thus lacks standing to institute the suit for an on behalf of the grievant.

20. The standing of the Claimant thus held as wanting does not however effect the grievants claim where valid. The removal of the Claimant as the representative of the Grievant is not fatal to the entire claim as the basis of the claim where legitimate must be established by the right-holder – the grievant. The assumed role of the Claimant thus removed, the Grievant must comply with the rules or requirements of filing his claim in person

21. On this finding on the lack of the Claimant not having the requisite *locus standi* in this dispute against the respondent, the question of representation must then be addressed. Reorientation in trade disputes as outlined above is a matter of evidence. A trade union seeking to represent a party before this court, even on an admission as the Claimant has made herein that they do not have a Recognition Agreement with the Respondent still remain a matter of evidence. Where the Grievant is able to proof membership with the claimant, such right to belong must be demonstrated. The right to choose which trade union to join is constitutional and cannot be taken away simply because there is no Recognition by a particular employer or employer's association. However, on the above finding on *locus standi*, I would urge the Claimant to carefully analyse their case and Without going into the merits of the claim, I will say that much.

22. On the question of the suit being time barred, the Court must look at the multiple layers of dispute resolution in labour relations that do not exist in ordinary civil and criminal matters before other divisions of the High Court. This is because; parties coming to this Court enjoy tripartite arrangements, collective bargaining and Recognition agreements and *locus standi* before this Court is quite unique unlike other

courts. The Court is also clothed with a special mandate that cannot be exercised by other superior courts. In this regard, the Court unlike the other Superior Courts has its own Rules of Procedure, the Industrial Court (Procedure) Rules, 2011.

23. where the Grievant is able to prove unionisation, he enjoys protections under the Labour Relations Act. Section 4(4) of the Trade Disputes Act, now repealed, and allowed any dispute involving termination, dismissal, redundancy to be reported to the Minister. With the enactment of the Labour Relations Act, 2007, disputes that arise from the dates of its force are also reported to the Minister under section 62. Where the dispute arose before the coming into force of the Labour Relations Act, 2007 and fell under the Trade Disputes Act, in each case, the process of the dispute resolution had to meet various procedural processes culminating in the issuance of certificate of settlement, disagreement, directions to file the same in court, or as the Minister was able to make a finding. Upon issuance of such certification, the matter would then be filed in for enforcement or where there is no settlement, the Court would hear such a dispute. The time of issuance of such certificate and the time of filing suit before this Court then becomes crucial.

24. On the converse, where an employee is not unionised, and cause of action arose prior to the coming into force of the Employment Act or the Industrial Court Act, the applicable law with regard to time in filing suit must be complied with. Where a claim falls under the Employment Act, section 90 apply. Where the suit related to loss of employment or termination of contract, the civil procedure and the Rules thereto apply.

25. In this case, the issue in dispute is that the Johnstone Bett was terminated by the Respondent on 26th February 2007. On 27th February 2007 the Grievant through the Claimant wrote a demand to the respondent; on 11th June 2007 the Claimant reported a dispute to the Minister; on 6th August 2007 the Minister wrote to both parties and appointed Mr L K Karanja as the investigator. On 20th July 2010, the Minister sent Notification of dispute to the parties and this was signed by the claimant, but the Respondent has not signed on their part. Subsequent to these procedures on 17th December 2010, the Minister through the Appointed Conciliator invited parties to make their written memoranda.

26. The above outlined, it is apparent to the Court that the Claimant for the Grievant complied with the provisions of the Trade Disputes Act, now repealed, and when the cause of action arose as of 26th February 2007 and with the coming into force of the Labour Relations Act, the dispute resolution process before the Minister were still being pursued as of 17th December 2010. The record on file is not the certified though. The call for submissions by the Conciliator is just but one step toward the parties getting the certificate to be able to file the claim in court.

27. The upshot of it is that to arbitrate on the issue of time, there is need for the call of evidence as set out in the principles in **Mukisa Biscuit case**. This cannot be set out in a preliminary stage as to do so would be pre-emptive of the entire suit.

28. The claimant also countered with objections to the respondent noting they have no Power of Attorney and hence no authority to reply as herein. Filing of records before the Court is regulated by sections 22 of the Industrial Court Act read together with Rule 13 of the Industrial Court (Procedure) Rules with regard to representation of parties before this Court and how to file responses to claim. The Advocates Act is also relevant here as it creates the right of parties to exercise choice is seeking legal representation. The objections thus raised by the Claimant must fail.

The objections raised by the Respondent succeed to the extent that the Claimant lacks the requisite standing to file the dispute herein; Johnstone Kipg'eno Bett as the right-holder to call for evidence with regard to his unionisation; and the objections with regard to the suit being time barred fails. In the interests of justice, noting the question of standing now settled, Johnstone kipng'eno Bett shall amend the suit accordingly within the next 14 days. Time stopped running on the 21st May 2013. Noting the ruling and directions herein, costs shall be in the cause.

Delivered in open Court dated and signed in Nairobi on this 19th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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