



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 604 OF 2015
BETWEEN
DOCK WORKERS UNION CLAIMANT
VERSUS
KENYA PORTS AUTHORITY..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Mungatana Advocate, instructed by Mungatana & Company Advocates for the Claimant

Mr. Munyao Advocate, instructed by Munyao, Muthama & Kashindi Advocates for the Respondent

RULING

1. The Claimant is a registered Trade Union, representing the Unionisable Employees of the Respondent. In a Statement of Claim filed on 13th August 2015, the Claimant seeks, among others, the following prayers: -

- a. A permanent injunction stopping any Committee set up by the Respondent to carry out investigations or hearings, or any proceedings whatsoever, or any report writing or action of such report, in respect of Academic Certificates of 136 Members of the Claimant.
- b. The Respondent is prohibited from giving any or any further information or documentation to any external Body with regard to the matter of the Academic Certificates of the 136 Members of the Claimant.
- c. Amnesty is granted to the 136 Members.

2. Filed simultaneously, under Certificate of Urgency, is a Notice of Motion which seeks the above prayers in the interim. The Application is expressed to be made pursuant to Section 12 of the Labour Institutions Act 2007; Section 35 to 50 and 87 of the Employment Act 2007 [Procedure] Rules 2010 and Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Laws of Kenya and all other enabling provisions of the Law. It is supported by the Affidavit of Claimant's General Secretary Simon K. Sang sworn on 13th August 2015; a Further Affidavit of the same deponent sworn on 25th August 2015; and an Affidavit

sworn by the Claimant's Advocate Hon. Mr. Mungatana on the same date.

3. The Respondent filed a Replying Affidavit sworn by its Head of Human Resource Mr. Amani Yuda Komora, on the 24th August 2015. The Respondent also filed its Statement of Response on the same date, which characterizes the Claim herein as a mockery of the judicial process. It questions the capacity of the Claimant to represent the Employees, and alleges the Advocate for the Claimant was the Chairman of the Board of Directors of the Respondent, and should therefore be impeached from further representation of the Respondent, on the basis of conflict of interest.

4. The Application was heard *inter partes* on 2nd September 2015.

Claimant's Position

5. The Claimant explains in the Affidavit of its General Secretary that it has a Membership of about 5000 Employees. 136 of these have been, in one way or the other affected by the investigation which was carried out by the Respondent. The investigation revealed discrepancies, with respect to Form 4 Certificates held by the 136 Employees.

6. The 136 Employees were employed by the Respondent. They have retained their jobs on the basis of their long term service, experience, and productivity. They got in-house training and furthered their education from other Institutions.

7. Most of the affected Employees are mostly in the lower cadre. They were recruited by the Respondent many years ago, by use of their National Identity Cards. They loaded and off-loaded goods at the Port. They started off in the lowest position of Dockers. Whenever other vacancies arose such as in the Clerical Docket, the Employees would apply. If successful, they would be attached to an Officer in the particular department who would train the Employee for 6 months in the new role. The Respondent adopted this labour practice many years ago.

8. About 5 years ago, the Respondent changed this practice. Instead of promoting Employees based on their length of service, experience and productivity, the Respondent demanded Employees must produce Form 4 Certificates to be considered for promotion. This change directly encouraged Employees to use unorthodox means, to acquire Form 4 Certificates, in order to be considered for promotion.

9. The Respondent wrote letters to the 136 Employees in mid- February 2015, asking them to show cause, within 72 hours, why they should not be dismissed from service. They were alleged to have presented the Respondent with forged Form 4 Certificates. They were alleged to have been employed/ promoted on the strength of the forged Form 4 Certificates. The Respondent alleged in the letters that the Employees were earning their salaries illegally, and their conduct amounted to gross misconduct, over which they stood to be summarily dismissed, in accordance with the Disciplinary Handbook of 2015.

10. The Claimant submits the Respondent has set up a Committee chaired by a Mr. Oyaro, which is looking at the anatomy of the alleged scandal, with a view to recommending the summary dismissal of the concerned Employees. The affected Members of the Claimant support the livelihoods of more than 952 persons. If the Application is not granted, these Persons would be prejudiced.

11. In his Further Affidavit, the General Secretary supports the position of the Claimant's Advocate that the Advocate did not sign the minutes of the Respondent Board's meeting, where the Board resolved to take action against the affected Employees. The Claimant's Advocate while serving as the Chairman of the Board took the position that the offending Employees should have an amnesty. There is no conflict of interest, the General Secretary states. The Claimant Union has the right to be represented by an Advocate of its choice. On the question of the Union to appear for all the 136, the General Secretary explains that he has a special and general authority to represent Workers' Interest. The Employees risk not getting a fair hearing. The Respondent cannot be the Judge and Juror. The participation of the Employees in the internal investigation and hearing, does not take away their right to come to Court.

12. Learned Counsel Mr. Mungatana deposes it is true he was the Chairman of the Respondent's Board of Directors, from 31st December 2013 to 30th October 2014. He ceased to hold Public Office on 30th October 2014. The Cause herein was filed on 13th August 2015, almost 1 year after he left the Respondent. He had directed, while he was Chairman of the Board, that the Human Resource Committee of the Respondent, finds a humane way of resolving the dispute. He denied signing the minutes of the Board meeting where it was resolved to have the affected Employees investigated and disciplined. The minutes indicate Employees would have no room to challenge the Respondent's decision in Court. As an Advocate, he could not be a party to a resolution which curtailed the Employees' right to access justice. Mr. Mungatana states there is no conflict of interest, and the Respondent is deliberately attempting to block the Claimant from being represented by an Advocate of its choice.

13. The Claimant submits that the Court has the power under Section 12 of the Labour Institutions Act, to grant the Application. Relying on the High Court at Milimani Ruling between ***Liquid International Limited v. Panari Centre Limited [2009] e-KLR***, the Claimant argues that the principles to be considered by the Court in grant of interlocutory injunction are well-settled: the Applicant must demonstrate a *prima facie* case with probability of success; secondly, an interlocutory injunction will not normally be granted, unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages; and thirdly if the Court is in doubt, it will decide the Application on the balance of convenience. The High Court in the above decision, the Claimant submits, adopted the case of ***Giella v. Cassman Brown [1973] E.A. 358***.

14. *Under the first principle*, the Claimant states it has shown a *prima facie* case, with probability of success. Section 76 of the Employment Act 2007 requires the Employer to notify the Director of Employment of vacancies occurring in their Establishments. Details of the vacancies and the minimum qualifications required to fill the vacancies are to be given in the notice. It is the Respondent who commences the employment relationship. The Claimant's Members were engaged by the Respondent following this procedure. It is for the Employer to assess the qualities of the Employee before employing. Nobody is employed without undergoing a period of probation. The Employer must scrutinize the documents presented by the Employee on recruitment. The Employee does not define the standards of recruitment; this role is exercised by the Employer. The affected Employees subjected themselves to these standards and were recruited by the Respondent.

15. Employment records, with all the details of the Employee, are kept by the Employer under Section 74 of the Employment Act. The 136 Employees are not new Employees. They have worked for the Respondent for long. They started in the lower cadre; they were confirmed; and over the years, promoted. The Human Resource Department keeps the Employees' records. Employees do not have access of the records, and can even be promoted without their knowledge. The Human Resource Department generates a Memo recommending promotion; actual promotion is done by the CEO.

16. The affected Employees were promoted based on the skills they have gained. They have worked for long, and contributed to the productivity of the Port. The Respondent is guilty of laches, connivance and negligence. The Human Resource Department cannot claim total innocence. If liability for the scandal was to be apportioned, it would be 50-50 on the Employer and the Employees. The Court should therefore, favourably look at amnesty, and consultations.

17. The Court's role is to engender good Industrial Relations. One Party cannot be allowed to walk away and throw blame on one side. Section 45 of the Employment Act requires Employers to treat Employees justly and equitably. This is relevant in considering the procedure adopted in arriving at a particular decision.

18. The Committee formed by the Respondent is headed by a Management Officer. The final word would be appended by the Chair. The process is wrong. Conduct and capability of Employees are some of the elements to be considered as a component of justice and equity in the exercise. Employees do not have warnings in their files. Their services have been exemplary. The Respondent cannot turn around and dismiss them.

19. Section 45 of the Employment Act requires the previous practice of the Employer, in dealing with circumstances leading to termination, is considered. Amnesty has in the past been granted to the Respondent's Secretaries who had questionable academic certificates. The Court should look at the Employer's previous practice in similar circumstances, and examine if the Employees had previous warnings. The Claimant submits the Court must not only look at the written law, but look also, at justice and equity.

20. The Respondent is proceeding against the Employees, relies on the Handbook which was adopted in 2015. This should not be allowed to apply retrospectively, the acts complained about having taken place before the year 2015. Section 26 of the Employment Act, states that Awards of the Court override other Regulations. The Court has the jurisdiction to make an Award in favour of amnesty.

21. *Under the 2nd principle on grant of interlocutory injunctions*, the Claimant submits its Members will suffer irreparably, if the Respondent is not restrained in the manner particularized in the Application. The Respondent is the largest Employer in the Coast Region. The Employees and their Families have worked there for generations. There is no possibility they would be adequately compensated by damages.

22. *Under the balance of convenience*, the Claimant's position is that Employees are supporting over 500 Families with their income from their jobs. They have loans. There would be industrial chaos if they are dismissed. Public interest demands these Employees are protected. The Respondent relies on Court of Appeal decision in ***Esso Kenya Limited v. Mark Makwata Okiya [1992] e-KLR***, in emphasizing the need for the Court to protect public interest.

23. The Claimant charges that the Respondent, in its Replying Affidavit, has not responded to the substantive issues, and has instead chosen to focus the attention of the Court on side-issues. The Claimant reiterates the Minutes of the Board meeting were not signed by Mr. Mungatana. He did not authenticate the minutes. The meeting was held on the 27th August 2014. There were about 2 months to the date Mr. Mungatana left the Respondent. He could not have failed to sign the minutes for 63 days. He used to report to the Office at least once every week. He could not sign minutes, as an Advocate, which purported to bar the Employees from pursuing their Claims in Court. The Employees most affected by the decision of the Respondent, are from the Coast Region. The Counsel resisted their victimization as Chairman, preferring that Employees were granted amnesty.

24. The other side-issue according to the Claimant is the assertion by the Respondent, that the Claimant Union has no capacity to file the Claim on behalf of the 136 Employees. It is claimed by the Respondent there are 4 other Employees who have filed Claims in this Court based on similar facts to the present Claim. This has no effect on the capacity of the Claimant to file the present Claim. The Respondent enjoys a general authority to represent Workers. In any event, the Court is not limited by technicalities; it has a constitutional obligation to administer justice substantively.

25. The Claimant concludes that the general attitude of the Respondent, in its treatment of its Employees in question, is wrong. This is an Employer-Employee dispute, and that is why the Claimant seeks that other agencies, such as the Police, are not engaged in the investigations. The Constitution of Kenya has granted all persons the capacity to litigate. Contrary to the position advanced by the Respondent, the Claimant submits the Court is not bound by its own decision in the Cause Number 551 of 2015 between ***Geoffrey Mareko v. the National General Secretary, Dock Workers Union & 2 Others***, which held that Membership of a Trade Union is not automatic, and given by the fact of employment. The cause of action herein is based on employment practice, not on crime as suggested by the Respondent. If there was crime involved, there would have been no need to set up an Internal Committee; Police would have been engaged. This is entirely an Employer- Employee dispute. An injunction seeks to stop an apprehended injury. Both Parties have tainted hands. ***The Claimant prays the Court to grant the Orders detailed in the Notice of Motion.***

The Response

26. The Respondent answers that the Claimant has not met any of the principles on grant of interlocutory

injunctions. Orders of this nature are equitable and discretionary, and a Party seeking such orders must come to Court with clean hands.

27. *There is no prima facie case, with the likelihood of success shown.* The Claimant is the Dock Workers Union. It has come to Court on behalf of 136 Employees. There is no list of these Employees filed in Court. There are no names. Details of their membership to the Claimant Union are unknown. Their employment details are not given. They are faceless Employees. Relying on ***Cause Number 551 of 2015 between Geoffrey Mareko v The General Secretary Dock Workers Union & 2 Others*** the Respondent urges the Court to restate that membership of a Trade Union cannot be presumed. The Claimant must show it is representing 136 known Persons.

28. The Respondent submits there are 132 Employees suspected of having forged academic certificates. Out of these, 25 are Management Staff and 107 are Unionisable, bringing the total to 132. Of the 132, 3 are deceased, 2 have forfeited employment [deserted], and 1 resigned. The Employees under active investigation are 126. The Claimant does not know who it is representing, and has no *locus* to bring the Claim.

29. The Respondent states 4 Employees under investigations on account of forging academic certificates, have filed individual Claims here in Court. The Court declined to issue injunction in the 4 Claims. In the present Claim there are no known aggrieved Employees represented by the Claimant Union.

30. The majority of the affected Employees have subjected themselves to the internal processes which the Court is being asked to stop. Investigation is nearly complete. The findings and recommendations of the Committee remain to be released. The Claimant should wait for those findings and recommendations.

31. Conflict of interest with respect to the representation of the Claimant by Mr. Mungatana is real and cannot be wished away. He was the Chairman of the Board of Directors. He does not deny that he chaired the meeting which deliberated on the issue of forged academic certificates. He only denies signing the minutes; he does not deny he chaired the relevant meeting. He remains a prime Witness, if the deliberations of the Board are to be interrogated. He cannot distance himself. There is a real conflict of interest which would prejudice the Respondent.

32. The cause of action is based on crime. Section 349 of the Penal Code declares forgery a crime. Section 34 of the Kenya National Examination Council Act criminalizes the presentation of forged certificates to an Employer. The Employees have admitted these crimes. It would be against public policy to allow Employees to benefit from crime. In support of this submission the Respondent relies on the Court of Appeal decision in ***National Bank of Kenya Limited v. Wilson Ndolo Ayah [2009] e-KLR***, as quoted in ***H.C.C.C between Fredrick Mukua Njigoru & Another v. the Liquidator Kenya National Assurance Bank Limited & Another [2013] e-KLR***, which established that it is public policy, that Courts should not aid Parties in perpetuating of illegalities.

33. Employment is based on trust and confidence. It is the duty of the Employee to act honestly. The Employer has the right to carry out investigations. This right was restated by the ***Court in Samuel Muchiri Gikonyo v. Henkel Chemicals [E.A.] Limited [2014] e-KLR***. The Court has the duty to allow such investigations to go on. The Employer has the right to discipline its Employees, if they do wrong. Employees cannot dictate what punishment is to be meted. The Court endorsed the Employer's right to discipline its Employee in the Case of ***Miguna Miguna v. Permanent Secretary, Office of the Prime Minister and the Attorney- General [2011] e-KLR***. Both cases cited here are from the Industrial Court of Kenya [now Employment and Labour Relations Court].

34. The Employees' hands are tainted. He who comes to equity must do so with clean hands. The Claimant asks the Court to order the Respondent not to submit Employees' records to external Bodies. The Respondent replies to call in other Bodies, is the Respondent's civic duty. Law Enforcement Agencies must be involved. It must be known if there is a crime committed. The High Court, in ***Catherine Wanjiku Kariuki v. Attorney- General & Another [2011] e-KLR***, ruled ' *it is the duty of every Citizen to report to the Police any crime suspected, upon reasonable ground, to have been committed, or*

being committed, or about to be committed. Once that civic duty is done, it is the business of the Police to independently investigate the matter and arrive at their own conclusion... whether to charge anyone with such crime.”

35. The orders sought are pre-emptive. They seek to stop the Respondent from investigating its Employees. It is not the role of the Court to investigate. The Claimant should not be allowed to pre-empt the action intended to be taken by the Employer against its Employees. The Claim is based wholly on pure misconception and speculation. The Supreme Court of Kenya ***in Communications Commission of Kenya & 4 Others v. Royal Media Services Limited & 7 Others [2014] e-KLR***, determined that an Application which is premised upon mere apprehension and speculation, that rights not yet crystallized will be violated, is not meritorious and should not be brought before a Court of Law in the first place.

36. *The Claimant has not shown irreparable injury not capable of redress through damages, shall be suffered, if the orders sought, are declined.* No injury arises from being investigated. The issue of Employees' loans is not before the Court. There are no documents supporting the statement on the presence of Employees' Loans. Nothing legal can emanate from a criminal act. It is the Respondent who stands to suffer irreparably if the orders are made; it will be compelled to continue employing Criminal Suspects.

37. *The balance of convenience* tilts in favour of allowing the Respondent to go on with the investigations against its Employees. The authentication exercise originated from a Circular of the Public Service Commission, dated 27th June 2012, which directed all Ministries and State Corporations to audit academic and professional certificates. Employees of the Respondent were required to comply with the directive. The balance of convenience cannot tilt in favour of crime. Other Employees are watching. They are looking at what message the Court sends in the Labour Market.

38. The Claimant argues the case for grant of amnesty. This cannot be considered before the investigations are completed. Amnesty can only be discussed at the end of the process. Justice and equity cannot be balanced against crime. The cases of Secretaries, who were allegedly pardoned, cannot be taken as binding precedents. It was not shown to the Court what the circumstances surrounding those cases were. Were they investigated and for what crime? The allegation about their pardon is contained solely in the Affidavit of the General Secretary. It is of no probative value.

39. The allegation that the Employees are being subjected to the Disciplinary Handbook 2015 retroactively is not ground to warrant stoppage of the process. Handbooks are amended from time to time. Forgery will always be a crime. It is not sanitized by the number of years an Employee has served. There is nothing wrong with the Management Officer chairing the Committee. The Union is represented in that Committee. The Respondent finally submits that criminal activities must be shunned. No law allows presentation of forged documents. ***The Respondent prays the Court to disallow the Application and the Main Claim, with costs to the Respondent.***

40. The issues to be determined in this Application and Claim are these:-

- a. Whether the Claimant Trade Union is properly before the Court.
- b. Whether the Claimant's Advocate should be impeached.
- c. Whether the Court should restrain the Respondent provisionally, or permanently, from investigating and disciplining its Employees.
- d. Who should meet the costs of the Claim?

The Court Finds:-

Uncontested Facts

41. The facts are largely undisputed. The Claimant Union is a registered Trade Union. It represents Unionisable Employees working for the Respondent. The Respondent is a State Corporation, running the Port of Mombasa. It is accepted the Claimant's Advocate, the Hon. Danson Buya Mungatana, was the

Chairman of the Respondent Corporation's Board of Directors, between 31st December 2013 and 30th October 2014.

42. The Court accepts also, that vide a Circular dated 27th June 2012, the Public Service Commission, directed Ministries and State Corporations to authenticate academic and professional certificates of serving Officers. This was to be done by 1st September 2012.

43. Consequently the Respondent's Managing Director Mr. Gichiri Ndua wrote to all Kenya Ports Authority Employees through their Departments, asking Employees to submit their certificates to their Departmental Heads by 2nd August 2012. This directive involved all Employees at Mombasa, and others working at the Nairobi Inland Depots; Kisumu Inland Depot; and the Jetty in Lamu. It likewise issued to the Resident Representative Great Lakes, in Kampala Uganda. It was not a localized directive, aimed at one regional unit.

44. In very clear language, the Circular from the Public Service Commission states, *'where certificates are not authenticated due to unreasonable cause attributable to a Public Officer, or a Public Officer is found to possess forged or invalid certificates, the authorized officer shall take the necessary disciplinary action in accordance with the applicable service regulations and inform the Commission of the disciplinary action so taken in the annual returns.'*

45. The Employees submitted their academic and professional certificates as required. The Respondent then forwarded what was submitted by the Employees to the Kenya National Examinations Council, which was alleged to have originated the submitted certificates. In its Report of 22nd July 2013 which is not disputed by either of the Parties, the KNEC concludes 122 copies of the academic certificates are forgeries.

46. The Employees were engaged in various forms of falsification and forgery of documents. **Onyuna Andrew Muga** was a bona fide candidate at Mariakani Secondary School. He obtained a mean grade D. He altered grades in all subjects, awarding himself a mean grade C plain, in the certificate submitted to his Employer. **Asha Dawa Mwanyungu** produced a certificate indicating she sat for the examination and obtained the certificate at Coast Girls High School. It was confirmed she was not a candidate at that School. **Kiama Anthony** was found to neither have registered, nor sat the KCSE examination at Kaheti High School in Nyeri, as his certificate indicated. **Jane Kamau** neither registered nor sat for the KCSE examination at Wanjohi Secondary School, and the registered candidate using the index she gave for that Centre, was one Paul Kang'ethe Njung'e. **Christine Chepkemoi** was found to neither have registered nor sat for KCSE at Kibuk Girls High School, as claimed in her academic certificate. **Kwanya Faith Walegwa** was found to be a bona fide candidate at Kyuna Academy. However she altered grades in various subjects, and changed her mean grade from D+ to C plain. These are just some of names in the KNEC Report. The crimes are all reported in black and white with regard to 122 documents submitted to the KNEC. It is not denied by any of the Employees that they engaged in these crimes.

47. The last observation on the undisputed facts is this: the Respondent issued the affected Employees letters to show cause sometime in February 2015. The Employees were given specific charges. They were told they were employed, or got promotion, on the strength of forged documents. They earned salaries illegally. They were informed they would be disciplined in accordance with the Employee Disciplinary Handbook of 2015. It is not contested that a number of the Employees requested for personal hearing from the Respondent, in accordance with the Staff Regulations. 4 Employees, **Ken Obala Oaga, Faith Walegwa Kwanya, Eckla Jesang Kirop** and **Richard Atandi John**, have filed separate Claims against the Respondent in this Court, based on the same facts, in which they seek the following Orders:

1. Declaration that the Respondent's intended dismissal of the Claimants is unfair, un-procedural, against employment law, and in breach of the constitutional right of a fair hearing.
2. Permanent injunction restraining the Respondent from continuing with the disciplinary action and in future, cease from continuing to threaten the employment and livelihoods of the Claimants.
3. In the alternative Prohibitory Order to issue directing the Respondent not to dismiss the Claimants.

These Claims are pending in Court.

48. **Capacity of the Union to bring the Present Claim:** The Claimant Union states the Claim is brought on behalf of 136 Employees or thereabouts. Their names are not given. Although the Claimant states and correctly so, that as a Trade Union it enjoys associational standing, it was imperative that specific names of Members on whose behalf the Claim is initiated, are made known to the Court and the Respondent.

49. This is more so particularly because the Respondent has explained in its Response, that there were a total of 132 Employees who were suspected of having forged academic certificates. Of these, 107 were Unionisable, and 25 in Management. 3 have died, 2 have fled and forfeited employment, while 1 resigned. The result is that there are 126 Employees under investigation by the Respondent.

50. How does the Claimant explain the balance of 6 Employees it claims to represent? The Court does not think Trade Unions exercise legitimate trade unionism, by representing ghost Employees. The Claimant can only be allowed to speak in this Court, for real and known Persons.

51. There is also evidence that some Employees have filed Claims against the Respondent, in the same Court, based on the same cause of action. The Claimant has not told the Court if these are its Members, and if so, why the Claimant should file a second Claim which includes these Employees. The Claim in so far as it purports to cover all the suspected Employees, is duplicitous and in abuse of the Process of the Court. Rule 9 of the Industrial Court [Procedure] Rules 2010, gives the Court the Discretion, to allow the institution of one Claim by several Employees against the same Employer. The Rule states such a Statement of Claim, must be accompanied by a Schedule of the names of the Employees, and other personal details. Claims initiated in this Court by Trade Unions on behalf on their Members, normally give the names of those Members [Grievants].

52. In the Industrial Court cases of **Thomas Sila Nzivo v. Bamburi Cement [2014] e-KLR** and **Transport & Allied Workers Union v. Societe Internationale De Telecommunications Aeronatique [SITA] [2011] e-KLR**, the Court upheld the dichotomization between Unionisable Staff and Management Staff, and the capacity of the Trade Union to represent them, as set out in the Industrial Relations Charter. Persons who are formulating, administering, coordinating or controlling any aspect of the Organization's Policy; staff who perform work of confidential nature; and any Staff who may in the case of any particular undertaking, be excluded from union representation by mutual agreement, are not eligible for Union Representation. Managers, as a general rule, cannot be represented by the Union.

53. The Constitution of Kenya however, does not bar Managers from belonging to Trade Unions. But the Court has observed in the past that such Membership would only confer the Manager belonging to a Trade Union, limited benefits as opposed to Unionisable Employees. The Union cannot agitate the interest of the Manager collectively, with the interest of Unionisable staff. It is argued there is no community of interests between Management Staff and Unionisable Staff. The interests of the two categories are frequently at cross-purposes.

54. In this case there are 25 Management Staff involved in the scandal. Their relationship with the Trade Union is unknown. They are themselves unknown, their names and positions with the Employer, having been excluded from the Pleadings. It is not shown they are Members of the Union, so as to have any chance of the Union including them in this representative Claim. As observed in **Cause Number 551 of 2015 between Geoffrey Mareko v. The General Secretary Dock Workers Union**, membership of the Union, even in the case of clearly unionisable Employees, cannot be presumed, and is not automatic. Contrary to the position of the General Secretary, Trade Unions do not have a special and general authority to protect Workers' Interests. They do not exercise associational standing, by representing Workers at-large. They represent specific class of Employees, who must be identifiable, specific Collective Bargaining Units, which must have a face. The Grievants, whether they are Management or Unionisable Staff, are not known. There is reason to believe some of those presumed to be Grievants herein, have already filed individual Claims in Court against their Employer based on the same facts; while another group, has not been shown to be incontestably eligible, to be represented by the Trade Union. Others have fled, and others have passed on. Who does the Union represent?

55. On these grounds the Court agrees with the Respondent, that the Claim is improperly before the Court.

56. **Impeachment of Counsel:** In the *High Court Election Petition Number 3 of 2003 between Kagunyi v. Gathua & Another*, the Court, adopting the decisions of the *CA 286/ 2001 between UHDL v. Central Bank of Kenya Limited* and *CA 55/ 99 between King Woolen Limited v Stratton & Company Advocates [unreported]*, and also relying on the *Halsbury's Laws of England [3rd Edition Vol.3 Paragraph 102]*, concluded that “ *if it appears that the information and material the Advocate got acquainted with from previous services would require him to be a Witness in the action, interest of justice mandates the Advocate to refrain himself/ herself, and not wait to be impeached by the Opposite Party.*”

57. Courts have held that a Party is entitled, as argued by the Claimant, to have an Advocate of its choice. This right is recognized under Section 22 of the Employment and Labour Relations Court Act. It was held to be a constitutional right in the High Court case of *Kenya Pipeline v. Port Conveyors Limited [2014] e-KLR*, which nonetheless cited Article 50 [2] [g] of the Constitution, which is on the right of representation of accused persons. The Courts have emphasized that save where the cause of justice appears likely to be compromised, a Party, is entitled to have an Advocate of its choice.

58. Rule 9 of the Advocates [Practice] Rules states: “ *no Advocate may appear as such before any Court or Tribunal in any matter in which he has reason he may be required as a Witness to give evidence, whether verbally or by declaration, or affidavit; and if, while so appearing in any matter it becomes apparent that he will be required to give evidence, whether verbally or by declaration, or affidavit, he shall not continue to appear.*” The rule applies in cases where the Advocate against whom impeachment is sought, had an Advocate-Client relationship with the Applicant for impeachment. The High Court of Kenya in *H.F. Fire Africa Limited v AMR Ghariieb* concluded however that the principle of conflict of interest is not restricted to Advocate-Client relationship; it applies to confidential agents of all kinds.

59. The right of a Party to be represented by an Advocate of its choice, and the power of the Court to disqualify such an Advocate, must therefore be balanced carefully. The conflict of interest must be of a serious form. The motion to disqualify, it has been said, should not be used as a tactical device to delay proceedings, or remove an Advocate from the picture because he or she is dangerously competent.

60. What relations of the Advocate give rise to the conflict? Who stands to be harmed by that conflict? These are some of the questions the Court must look at, in determining Motions for impeachment of an Advocate. In most cases, relations of the Advocate include those of a personal nature; present representation of potentially adverse Party; and prior representation of adverse Party. Parties who may be injured include the present Client of the Advocate moving to disqualify; the present Client of the Advocate targeted for impeachment; and 3rd Parties.

61. In the instant Motion to impeach Hon. Mungatana, it is not alleged he acted as an Advocate for the Respondent. He was however, a Lawyer serving the Respondent, in a confidential and influential position as Chairman of the Board. He participated in decision-making, in the matter of the forged academic papers. He gave advice to the Respondent.

62. He was the Chairman at the time the Board met, and resolved how to implement the directive of the Public Service Commission, on authentication of Staff professional and academic certificates. There is a dispute, on the signing by the Chairman of the minutes recording that meeting. The Hon. Mungatana has given affidavit evidence denying he signed the minutes. Somebody signed those minutes. If not the Chairman, the question would arise who did so? Who forged the Chairman's signature? Such questions would necessitate the Hon. Mungatana to testify. He made submissions on the issue, which appeared to the Court, to fit the description of evidence from the bar. If the proceedings are to continue, there is no doubt the Advocate for the Claimant would be a prime Witness. He does not deny chairing the Board meeting. It appears to this Court he would be a prime Witness.

63. Besides the contested minutes, the Claimant's Advocate reveals that as Chairman of the Board, he

gave directions that the Employees involved in forgery should be treated humanely and granted amnesty. Those Employees who forged academic certificates should, he advised, be given a chance to sit examinations they lied to have sat, and redeem themselves. At paragraph 8, the Hon. Mungatana deposes he was informed by sources, that those affected by the Employer's actions, are Persons of Coastal origin. These sources can only be presumed to be from within the KPA. They are confidential sources. They allege employment discrimination. These in the respectful view of the Court, are statements which would require the Hon. Mungatana to take the Witness stand.

64. Motions to impeach Advocates from representing their Clients as discussed above, must not be used as tactical devices to delay or frustrate proceedings. They must not be used to harass the targeted Party or its Advocate. The Court is convinced the Motion to impeach Hon. Mungatana is merited: it is not intended to harass the Claimant or its Advocate; it is not made as a tactical device to delay or frustrate the proceedings; and is based on a serious conflict of interest. The Respondent is a Public Body, and the evidence the Advocate appears to have, which was obtained in his role as the Chairman of the Respondent, creates a serious conflict of interest. The Advocate was not merely a Chairman, but a Lawyer by profession, discharging his mandate with a legal mind. He gave advice of a legal nature to the Respondent. His continued representation of the Claimant-Union against the Respondent-Employer, has the appearance of impropriety, and would injure public confidence in the Legal Profession.

65. **On the substantive Application for Injunction and the Claim:** From the foregoing, the Claimant has not shown a *prima facie* case, with probability of success. The entire Claim is brought before the Court improperly. It is not necessary to discuss the possibility of the Claimant sustaining irreparable injury if the Orders sought are not granted. It is not necessary to explore the balance of convenience, as the Court is not in doubt there is indeed, no case at all.

66. The Employer retains the managerial prerogative to run its business, as held in the cases of ***Miguna Miguna v Permanent Secretary, Office of the Prime Minister*** and ***Samuel Muchiri Gikonyo v. Henkel Chemicals Limited*** cited in the Respondent's submissions. This managerial prerogative includes the right to investigate employment offences and to impose disciplinary sanctions. This was the same holding in ***Industrial Court at Nairobi, Cause Number 1200 of 2012 between Professor Gitile G. Naituli v The University Council, Multimedia University College of Kenya & Another***, where the Court concluded that Employment Law merely seeks to protect the weaker Party in the employer-employee relationship, and not to deprive the Employer the power to run its business altogether. In the ***Industrial Court at Nairobi, Cause Number 1567 of 2011 between Kenya Game Hunting and Safaris Workers Union v Lewa Wildlife Conservancy Limited***, the Court upheld the managerial prerogative, stating this is a fundamental principle in capitalist production, which must be protected, and not consumed, in the liberal slide into egalitarian anarchy.

67. The actions taken by the Respondent against its Employees have their source in the Public Service Commission. The Respondent is exercising its mandate, pursuant to a Policy initiated by a Constitutional Commission. The Court cannot interfere with the implementation of a Policy which is generated by the Public Service Commission of Kenya, and which is applicable nationwide, across all the Ministries and State Corporations. The Claim and the Application are against public policy.

68. Considerable weight attaches to the submission of the Respondent that, the Claimant and the Employees it claims to represent have come to the Court with tainted hands. He who comes to equity must do so with clean hands. The Employees admit they forged academic certificates. They engaged in crime. The Claimant Union on its part, seems to this Court not engaged in legitimate trade union activity, when it pushes a case for amnesty even before the report on the investigation and findings of the Committee undertaking the exercise, has been placed on the table. A party cannot seek the Court to endorse criminal activities, all in the name of equity and justice, fairness and good industrial relations. The position of the Claimant Union does not foster the rule of law. The Industrial Relations Charter; the Constitution of Kenya; and the Labour Relations Act, guarantee Trade Unions the right to exercise legitimate trade unionism. The vigorous pursuit by the Claimant Union, of a means by which the affected Employees could avoid the consequences of their crimes, does not accord to the spirit and letter of these legal instruments.

69. The submission by the Claimant that Employees were initially employed through identity cards, and gained promotion gradually through in-house training, does not justify forgery. What was the difficulty in these Employees explaining this history to the Public Service Commission through their Union, at the time they were asked to submit their certificates for scrutiny? Why would Employees change their grades, altogether manufacture certificates, and even create own Examination Centres, to meet a demand made by the Public Service Commission for authentication of certificates? Why did the Trade Union not guide them on how to engage with the Employer, without the Employees resorting to crime? Why did not the Claimant constructively engage the PSC when the directive issued in 2012, if it was felt the directive could not be met, without pushing the Employees into crime? The argument by the Claimant that many families would be adversely affected if the concerned Employees are dismissed, does not justify stoppage of the investigation and disciplinary processes. Income earned from the KPA on the basis of forged academic and professional papers cannot be legitimate income. These are not wages which have the protection of the law, under Part 4 of the Employment Act 2007. The Court would be sending the wrong message to other Employees, the general Labour Market, and sadly to our School Children, if it was to aid the Employees in avoiding the consequences of forging academic and professional certificates.

70. It is not contested that the Employees committed crimes under the **Penal Code** and the **Kenya National Examination Council Act**. It is incomprehensible that they would concede to these offences and at the same time move the Court to stop investigations against them. The Court agrees that in the words of the *Court of Appeal of Kenya in CA Number 144 of 2001 between Robert Njenga Ndichu v. Brush Manufacturers*, blame must lie where it falls. It falls upon the Employees, and they must grin and bear it as best as they can. The decision to be taken by the Respondent against the Employees at the end of the process: whether to punish the Employees; the forms of punishment; or declaration of individual or general amnesty, is entirely in the discretion of the Respondent. The Respondent is itself answerable to the Public Service Commission on the matter, and to the People of Kenya through their Institutions of Public Governance.

71. Not only does the Respondent retain the managerial prerogative, it has the civic obligation to report crime to The Police, the Anti-Corruption Commission and the Director of Public Prosecutions. It is absurd to seek to bar the Respondent from fulfilling its civic obligation, and to bar Independent Agencies from enforcing the law. There would be no law and order, if the Courts were to readily restrain other Constitutional Authorities, from playing their roles within the parameters drawn by the Constitution. The participation of these other Bodies in the investigations against the concerned Employees, their Union, and the KPA Management, for their roles in the scandal, would be necessary if this matter is to be brought to a fair and just conclusion. It is in the discretion of the Respondent to invite other Bodies. The Court agrees entirely with the decision of the High Court in *Catherine Wanjiku Kariuki v The Attorney General* that every Person bears the responsibility of bringing to the attention of competent Law Enforcement Agencies, the occurrence of crime or apprehended crime.

72. The Claimant submits that in issue is an Employer-Employee dispute, which should be sorted out at that level, without the involvement of other Bodies. It is suggested the Court directs Parties in the route of Article 159 [2] [c] of the Constitution, where negotiations, conciliation and other alternative dispute resolution mechanisms are adopted, culminating in some form of amnesty.

73. The Court's view is that an acknowledged crime, cannot be sanitized by years of service, as rightly submitted by the Respondent, or dealt with through the vehicle of alternative dispute resolution mechanism. The Claimant Union has sought consultations with the Respondent on the matter, and even suggested there is precedence to guide the Parties in the current dispute, the Respondent having pardoned Secretaries who were previously caught up in such crimes. Details of these precedents were not made clear. The role of alternative dispute resolution mechanisms in Employment and Labour Relations is not to cover up criminal activities.

74. Justice and equity follow the law. The maxim that a Person ought not to derive advantage from his own injurious behaviour cuts across all fields of the law. There is a Latin maxim in nearly all the areas of the law, expressing the view that a Person ought not to derive advantage from his own wrongdoing. There are statutes preventing criminals from retaining profits garnered from their crimes; murderers do not

inherit the estates of their victims; widows, who create their own widowhood through crime, do not inherit their deceased husbands' properties; deliberately self-caused injury is not compensated under insurance law; and contracts based on illegality and immorality, are not enforced by the Courts of law. No Party should benefit from their own acts of wrongdoing. What is described to be a crime in Criminal Law, must remain objectionable even in Employment and Labour Laws; Contract Law; and Succession Law. The law aspires to be one. In the ***House of Lords Opinion in Moore Stephens v Stone Rolls Limited [in Liquidation] [2009] UKHL***, the Lords concluded, " it is important we bear in mind that the law must aspire to be a unified institution, the parts of which- contract, tort, the criminal law- must be in essential harmony. For the Court to punish conduct with one hand, while rewarding with the other, would be to create an intolerable fissure in the law's seamless web."

75. In the end the Court finds the Application and the entire Claim, have no merit. The Court cannot restrain the Employer provisionally or permanently, from doing what is the legal and proper thing to do. Having regard to the crimes at the centre of the dispute, it would be an affront to the public conscience, to grant the reliefs sought. It is noted the Application is made under Section 12 of the Labour Institutions Act 2007, and the Advocate for the Claimant submitted under this law, while the same was repealed in the year 2011, through the Industrial Court Act 2011. The Application also appears to invoke unspecified Procedure Rules. Technically and substantively, the Application is defective. The Employees have submitted themselves to the due process of the law. Others have filed separate Claims. The Union has not established who the Grievants are, who it represents, and the Advocate instructed by the Union would be a potential Witness, were the proceedings to continue. The crimes the Employees are faced with have not been denied. The Employer is acting pursuant to a directive of the Public Service Commission, and has the managerial prerogative, and responsibility to the Public, to do so. The Employees named in the Report of the KNEC appear to the Court to have their origins, in all parts of this Country. The authentication exercise is not limited to the Port of Mombasa, or the Coast Region, but extends to all Inland Depots. It covers the whole Public Service, incorporating Government Ministries and State Corporations. How does the Court stop the implementation of Public Policy in just this one Corporation?

76. And why has it taken years, to conclude investigations and take disciplinary action, while the directive from the PSC was that the first authentication exercise should have been completed by 1st September 2012? The Respondent must be encouraged to continue with its internal processes, and placed at liberty to invite other external Agencies to investigate the roles if any, of the Employees, the Union, the Management, and any Other Persons, in these crimes against the Public.

IT IS ORDERED:-

[a] The Advocate for the Claimant is hereby disqualified, from further representation of the Claimant Union.

[b] The Claim and the Application are misconceived, bad in law, and without merit, and are hereby struck out in their totality.

[c] Parties shall bear their costs.

Dated and delivered at Mombasa this 22nd day of September, 2015

James Rika

Judge