



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATION COURT
AT MOMBASA
CAUSE NO. 845 OF 2015
DOCK WORKERS UNION (K).....CLAIMANT
VS
KENYA PORTS AUTHORITY.....RESPONDENT
RULING

Introduction

1. The claimant brought this suit on 9.11.2015 seeking
 - a. declaration of her right to represent her members who as employees of the respondent including the right of access to the respondents premises.
 - b. declaration that the respondent has no mandate to supervise the operations, programmes and activities of the claimant.
 - c. an order compelling the respondent to allow unlimited access to its premises all the claimant's registered officials and to continue to convene the Joint Industrial Council (JIC) for purposes of handling disputes and negotiating collective Bargaining Agreement (CBA).
 - d. permanent injunction to restrain the respondent from interfering with the claimants programmes, activities, functions, officials and/or inciting union members against the union officials.
2. Contemporaneously with the suit the claimant filed a Notice of Motion seeking prayer (a) and (d) above on the interim basis pending the hearing and determination of the main suit. The motion is supported by the affidavit of Mr. Simon Kiprono Sang, the claimant's General Secretary.
3. In response to the said suit and the Notice of Motion, the respondent has filed the Notice of Preliminary Objection (PO) dated 10.11.2015. The Preliminary Objection seeks to have both the suit and the Motion struck out on grounds that:
 - a. The statement of claim has been signed by un authorised representative of the claimant union.
 - b. The motion and the suit amount to abuse of the court process and as it is **subjudice** because the relief sought are directly and substantially in issue in an earlier suit filed by officials of the claimant in person against the respondent being **ELRCC 448 of 2015, Muhamed Yakub Athman & 19 vs Kenya Ports Authority** which is pending before this court.

The preliminary objection was argued on 10.11.2015 by Mr. Muniyao learned counsel for the

respondent and Mr. Ochieng representing the claimant.

Analysis and Determination

4. The main issue for determination is whether the Preliminary Objection raised by the defence has merits. The contention by the respondent in the Preliminary Objection is that the suit is incompetent because it has been signed by an unauthorized representative of the union, namely Mr. Leonard Rufus Ochieng. That in addition to the foregoing the Notice of Authority to Represent the union purportedly signed by the General Secretary Simon Sang is a forgery. That the said forgery should be investigated and action taken against Mr. Ochieng and the union.
5. On the second ground, Mr. Munyao submitted that the reliefs in this suit both in the Motion and the Suit are *subjudice* in relation to the Motion and the Suit in **ELRCC NO. 448 of 2015** pending before Rika J. That officials of the claimant have sued in their own name in the said **ELRCC No. 448 of 2015** but essentially they are seeking access to the respondents premises. That the said order for access has already been denied by Rika J in the **ELRCC NO. 448 of 2015** at the interlocutory stage and the matter is now pending for judgment.
6. In response, Mr. Ochieng has opposed the Preliminary Objection on ground that this court lacks the capacity to investigate the alleged forgery of signature in the pleadings. That it is only Mr. Sang who can deny or confirm whether the signature belongs to him. In that regard, he contended that the respondent should have brought Mr. Sang to court to deny the signature. On the issue of *subjudice*, Mr. Ochieng contended that the parties to the suit and the reliefs being sought in this suit and **ELRCC 448 of 2015** are different. That in the said case the claimant have sued in person as former employees seeking access to the Port to collect their belongings which were left after they were summarily dismissed. That in the present suit the union is seeking access to the respondents premises by the union officials, to represent their members in their official capacity pursuant to the Law and the Recognition Agreement between the parties herein.
7. After careful considerations of the Notice of the Preliminary Objection and the submission made, this court is of the opinion that the respondent's objection does not qualify to be a P.O. It is trite law that a P.O must be purely on points of law which if allowed, it would terminate the suit *in limine*. Such P.O must be capable of prosecution without calling evidence or any investigations of facts by the parties or the court. In this case, the respondent raised the Preliminary objection before filing his defence and as such the Preliminary objection is not founded on the pleadings. The court was asked to investigate forgery and indeed the respondent went ahead and appointed a Document Examiner to verify whether or not there was forgery of signatures in the claimant's pleadings. In addition the defence counsel produced a copy of the pleadings in **ELRCC 448 of 2015** while prosecuting the preliminary objection to prove that the suit herein and the Motion are *subjudice*.
8. The reason for the respondent to make such effort to avail evidence to support the preliminary objection is because the preliminary objection was not a preliminary objection on pure points of law. It was founded and depended on facts. There cannot be a preliminary objection on points of facts but only on pure points of law. In this courts opinion, the respondent should have filed a Motion supported by evidence to challenge the suit and the motion instead of a Notice of preliminary objection.

Dispositions

9. For the reasons stated above, the preliminary objection is dismissed with no order as to costs.

Dated, Signed and Delivered this 4th day of December 2015.

ONESMUS MAKAU

JUDGE