



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSES NO 1450, 1451, 1452 AND 1453 OF 2012

CHRISTOPHER MUTUNGA MUNYWOKI1ST CLAIMANT

DAVID OTIENO OSAIAKO.....2ND CLAIMANT

JOSEPH MUSYOKA MATHITU.....3RD CLAIMANT

FRANCIS MURIMA KIGIA.....4TH CLAIMANT

VS

KENBLEST LIMITED.....RESPONDENT

RULING

Introduction

1. By consent of the parties, the Claimants' claims were consolidated and Cause No 1450 of 2012 appointed as the control file. In its amended Memorandum of Defence filed on 3rd December 2012, the Respondent raised a Preliminary Objection in the following terms:
 - a. That the Claimants do not have *locus standi* to bring claims against the Respondent in their own names since they were at all material times, members of the Bakery, Confectionery, Food Manufacturing and Allied Workers Union;
 - b. That since the Claimants chose to proceed on an illegal and unprotected strike they were not entitled to any benefits;
 - c. That the Claimants failed to avail themselves of the pretrial dispute resolution mechanism provided under the Collective Bargaining Agreement and the Labour Relations Act. Further, the Claimants were paid all their dues as directed by the Provincial Labour Officer in Nyeri.

The Preliminary Objection

2. The Respondents' preliminary objection is hinged on three points namely; the Claimants' *locus standi* to bring claims in their own names, the consequences of proceeding on an unprotected strike and the effect of a pretrial dispute resolution mechanism.

3. A preliminary objection is defined in the well known case of *Mukisa Biscuits Vs West End Distributors Limited (1969 EALR)* as that which:

“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.”

Locus Standi

4. On the issue of *locus standi* Mr. Onyony, Counsel for the Respondent submitted that the Claimants were unionisable employees of the Respondent

and were at all material times members of the Bakery, Confectionery, Food Manufacturing and Allied Workers Union.

5. Pursuant to a Recognition Agreement between the Union and the Respondent, a Collective Bargaining Agreement to regulate the Claimants' terms and conditions of employment had been negotiated and concluded in May 2009. The Claimants were bound by the Collective Bargaining Agreement and any dispute arising from their employment could only be pursued by the Union in the terms set out in the Collective Bargaining Agreement. The claims as brought by the Claimants in their own names were therefore unsustainable.

6. In the Claimants' submissions filed on 21st June 2013, Counsel for the Claimants L.M. Wambua submitted that after the strike, only a part of the unionisable employees were terminated. According to the Claimants, they could not sue through the Union as the Union had, in the process of resolving the dispute forming the subject matter of the strike, become conflicted.

7. Counsel for the Respondent referred the Court to several authorities on the binding nature of Collective Bargaining Agreements on union members. It is not in contest that the Claimants were members of the Bakery, Confectionery, Food Manufacturing and Allied Workers Union.

8. The law confers a special role on Trade Unions in industrial litigation, to sue in their own name on behalf of its members who are aggrieved by the action of their employer. In such cases, the member who is referred to as a grievant cedes his prosecution right to the Trade Union.

9. However, it is expected that the Trade Union will always act in the best interests of its members and in cases where a member feels that the Union no longer represents his interests, he may apply to act in person much like a client would withdraw instructions from an Advocate.

10. In the case before me, it is not clear whether the Union took any action beyond the conciliation stage and the Claimants submit that the Union somehow became conflicted. From the agreement to disagree dated 3rd December 2009 to which the 1st Claimant was a signatory, it is clear that the conciliation process concluded with a disagreement. Some payments appear to have been made to the Claimants post the agreement to disagree but the Claimants claim that not all their claims were met. It seems to me therefore that the relationship between the Claimants and their Union and the sustainability of their claims are issues of fact to be determined in a full trial.

Unprotected Strike

11. Counsel for the Respondent submitted that the Claimants had on 1st December 2009 proceeded on an illegal and unprotected strike without reference to the Secretary General of the Bakery Confectionery, Food Manufacturing and Allied Workers Union and the Ministry of Labour. The Claimants had ignored several ultimatums issued by the Respondent to resume duty. It was the Respondent's contention therefore that the Claimants could not seek protection either under the Collective Bargaining Agreement or the law.

12. Part X of the Labour Relations Acts sets out the law on strikes and lock-outs. While Section 76 provides the conditions under which one may participate in a strike or lock-out, Section 78 sets out what constitutes a prohibited strike or lock-out. It was submitted on behalf of the Respondent that the strike in which the Claimants participated was illegal because it was called without reference to the Union and the Ministry of Labour. In my view, these are issues of fact that cannot be determined *in limine*.

Pretrial Dispute Resolution

13. Counsel for the Respondent submitted that the Claimants did not avail themselves of the pretrial dispute resolution mechanism provided under the Collective Bargaining Agreement and the Labour Relations Act. Further, they were paid all their dues as directed by the Provincial Labour Officer in Nyeri. Their claims were therefore not properly before the Court.

14. In reply, Counsel for the Claimants submitted that the Claimants' claims had gone through the full conciliation process, culminating with an agreement to disagree. Further, only a part of the Claimants' dues were paid.

15. From the record, it appears that the dispute between the Claimants and the Respondent was the subject of a substantive conciliation process facilitated by the Provincial Labour Officer in Nyeri. I am therefore satisfied that the Claimants' claims went full circle through the conciliation process culminating with an agreement to disagree. The claims are therefore properly before this Court. The question as to whether the Claimants were paid all their dues is one of fact to determine at trial.

16. In view of the foregoing I find the Respondent's Preliminary Objection not well taken and hereby overrule it. The costs of this application will be in the cause.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF JANUARY 2014

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimants*

.....*Respondent*