



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 327 OF 2012

SEBASTIAN GWANDA OGOT

ABDALLA KANURE

PETER KAMAU.....CLAIMANTS

(Suing for and on behalf of 51 former employees of KENYA POWER)

VERSUS

KENYA POWER.....RESPONDENT

(Formerly KENYA POWER & LIGHTING COMPANY LIMITED)

RULING

1. The Respondent has raised a preliminary objection to the suit on the basis of the uncertainty as to the Claimants in the suit. Miss Mumia for the Respondent submits that the suit involves 52,39,51 Claimants and that the 2 lists attached as well as failure to comply with the law regarding the filing of a representative suit makes the suit incompetent and fit for striking out. She submits that it's difficult to tell what terms of the employees were, when they were employed. She submits it's impossible to hear all 52 claimants. She submits that the law places a burden of proof on the Claimants. He who asserts must prove. She stated that there is no authority donated to the 3 Claimants.

She relied on Rule 9(1) which permits the filing of representative suit.

2. The Claimants submitted that the application before Court is an afterthought as no prior notice was filed. The Claimant assets that was not included in the Defence filed on 17th December 2012. The parties have appeared in Court severally and nothing of that nature has been raised. Mr. Mandala submitted that the Respondents even at one time indicated they were ready to proceed. He stated that there are 54 Claimants and not 51 as the 54 include Claimant numbers 1 to 3. He states that the list attached show what the respective claims are. He stated most of the issues raised are issues of fact and not issues of law. He stated that Rule 9 of the Industrial Court (Procedure) Rules 2010 is not couched on mandatory terms. He submits the issue of leave is not in mandatory terms.

He relied on Article 165 of the constitution and submitted that technicality is something that can be cured. He submitted that the 3 filed the suit with authority of the rest of the Claimants and they total 54. He stated the preliminary objection reeks of mischief.

3. In a brief Response Miss Mumia submitted that the issues raised are points of law and it's been demonstrated the issues being raised are points of law. She stated these issues go to jurisdiction. She submitted that she did not need to issue a notice prior to raising an objection on points of law. She stated points of law are the governing parameters. She submits there is no proof leave to file representative was sought or obtained. She submitted the Court could not proceed in a defective suit. She thus urged the court to strike out the suit.
4. The Court considered the issues raised by Miss Mumia and must first determine whether they fit the parameters of a preliminary objection. Time and time again this Court has cited the case of **Mukisa Biscuits v. West End Distributors [1969] EA 696.**

The learned Judges of the Court of Appeal for East Africa – Law, Duffus and Newbold held that a preliminary objection is a pure point of law which when upheld can determine the suit. In this case the Respondent asserts the suit is defective. The Court is minded that if the suit is defective the Court would on treacherous grounds. Jurisdiction is everything. Without it a Court can do nothing. This is held by Justice Nyarangi in the case of **The Motor Vessel Lilian "S" v. Caltex Kenya Ltd. [1985] KLR 1.**

The Court would be misplaced to entertain a suit when it has no jurisdiction.

5. Is a defective suit in the category of the matters for which there is no jurisdiction? In this case the alleged defect does not affect jurisdiction. It not a criminal trial or a probate cause before me. The defect is not which is curable by amendment all accounts. Miss Mumia had all the right to raise the preliminary objection to the suit as she did as the objection as to the authority of the Claimants can be proper basis for challenge.

While the rules are not couched in mandatory terms, it would seem that the interpretation ascribed to the Rule by Mr. Mandala is wrong. The use of the word may is to the Court. It's not that a party may apply to have a representative suit. That goes without saying. Claimants with a common cause may do so. What the rule provides is that the Court may allow one person to stand in representative capacity. The Court can also refuse to allow a party to sue in representative capacity on his or her own behalf and on behalf of others.

6. The list attached to the claim does not accord to Rule 9 of the Industrial Court (Procedure) Rules 2010. The Rules are clear on what should be contained in the Rules. These are not suggestions. In the premises I strike out the list and order that a proper list be filed within 14 days. I will grant Miss Mumia cost of 25,000/= for the partial success of the objection.

Orders accordingly.

Dated and Delivered at Nairobi this 2nd day of April 2014

NZIOKI WA MAKAU

JUDGE