



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 299 OF 2013

1. ROBERT KENYA

2. LILIAN WEDDAHCLAIMANT

VERSUS

OCEAN SPORTS RESORTRESPONDENT

R U L I N G

INTRODUCTION

This is a ruling on the Notice of Motion dated 13/2/2014 filed by the respondent in the main suit (hereinafter called the application). The Motion seeks the striking out of the suit for being filed prematurely. In the alternative the Motion urges the court to stay the proceedings in the suit pending negotiations between the parties as provided for under the Collective Bargaining Agreement (CBA). The gist of the Motion is that the suit offends the constitution of Kenya, Labour Relations Act and the CBA.

The Motion is opposed by the claimants affidavit sworn on 17/2/2014 and reply to the Motion dated 17/2/2014 which the court will treat as grounds of opposition. The gist of the opposition is that the suit is properly before the court and the claimants had the legal right to institute it under Section 87 of the Employment Act. In addition the claimants contented that there is no other suit or proceedings pending before any other forum to warrant granting of the orders sought.

Finally the claimants contend that this court has the necessary jurisdiction to hear and determine all disputes between employers and employees.

BACKGROUND

The claimant filed this suit on 18/9/2013 accusing the applicant of unfair termination of their employment and refusing to reinstate them with full benefits. They prayed for reinstatement to work or in the alternative, they be awarded damages calculated at ksh.822,806 and ksh.915,462 for the first and second claimant respectively.

The applicant filed her defence on 6/12/2013 and served it on the claimants on 9/12/2013. The defence denied liability, appreciated that the claimants were bound by the CBA between their union and herself but raised an objection to the suit for the breach of the law or the CBA. On 9/12/2013 the two sides appeared before the court for hearing but the suit was adjourned on account of ill-health for the counsel for the applicant. By consent of the parties the suit was adjourned to 16/12/2013 for hearing. On

the said 16/12/2013, the applicant never turned up and the claimants were heard ex parte and the court fixed the same for judgment on 21/2/2014.

In the meanwhile, the applicant brought a Notice of Motion dated 17/12/2013 seeking:

1. **To stay delivery of judgment scheduled for 21/2/14**
2. **Setting aside the proceedings of 16/12/2013 and ordering for the suit to start afresh.**
3. **In the alternative the court to re-open the hearing to allow the respondent to cross-examine the claimants on the evidence given on 16/12/2013 and be allowed to lead defence evidence.**

The court granted interim stay order on 18/12/2013 pending inter partes hearing on 1-2-2014. Due to vacation the Motion was heard on 11/2/14 when the parties recorded a consent order in terms of the alternative prayer thereby reopening the hearing for purposes of cross examination of the claimant on the evidence tendered ex parte on 16/12/2013 and thereafter to call defence evidence. Further by consent the parties fixed the case for hearing on 17/2/2014.

Surprisingly, the respondent filed the present Motion on 14/2/2014 but fixed no hearing date for it. The Motion occasioned the adjournment of the hearing of the suit to 19/2/2014 when the counsel for the applicant failed to attend court but a defence witness in the name of Rehema Abdullahi appeared. The case was adjourned at 3pm for hearing on 15/4/14 which unfortunately was affected by the Easter vacation.

On 20/5/2014 the case came up for hearing but again, the defence sought adjournment on ground that the date was fixed ex parte by the claimant. Lastly the Motion was heard on 11/6/2014.

APPLICANT'S SUBMISSION

Mr. Ole Kina, learned counsel for applicant relied on the supporting affidavit sworn by Rehema Abdullahi and the grounds set out in the body of the Motion. He submitted that the claimants were members of KUDHEIHA (union) who had a CBA and Recognition Agreement with the applicant. He contended that after the dispute failed to get solution in the meeting with the union Branch office the claimants lodged dispute with the Coast Dispute Committee (CDC) as provided for under paragraph 13 of the CBA. He referred to the Memorandum of Trade Dispute allegedly filed by the claimants to the CDC which is created under paragraph 12 of the CBA.

According to Ole Kina, there should be no two suits on the same dispute continuing in two different fora at the same time. He cited **ICC 114 of 2012 KENYA CHEMICAL AND ALLIED WORKERS UNION vs EAST AFRICAN PORTLAND CEMENT AND ANOTHER** where the court ordered stay of the suit pending arbitration as was provided for under the CBA between the parties. Mr. Ole Kina prayed for stay of this suit or striking out of the suit.

CLAIMANT'S SUBMISSION

Mr. Robert Kenga, the first claimant relied on the response filed on 18/2/2014. He contended that although they reported the dispute to their union, no dispute was ever lodged with the CDC. According to him, the memorandum of dispute cited by the applicant, was never lodged at the CDC and it remains a draft. He submitted that under Section 87 of the Employment Act they opted not to go before the CDC and instead filed this suit. He cited letter from their union dated 17/2/2014 which confirmed that indeed the union never lodged any dispute before the CDC. He also contended that chapter 4 of the Constitution of Kenya allowed him to come to this court. He urged the court to hear the suit to the end.

Ms Lilian Weda, second claimant submitted that after the respondent refused to reverse her decision to dismiss her, she filed suit before this court as it was her legal entitlement. She denied ever lodging any dispute before the CDC and maintained that no such dispute is existing there. She cited the letter dated 17/2/2014 by her union which confirmed that the union never lodged any dispute before the CDC. She however contended that even if such dispute existed the law granted her the right to chose to

come fore this court or go to the CDC. She urged the court to hear and determine this suit.

APPLICANTS REPLY

Ole Kina maintained that Section 58 of the Labour Relations Act (LRA) provides that parties are bound by their CBA including the dispute settlement. He contended that the letter dated 17/2/2014 by the union was an afterthought since the memorandum of trade dispute to the CDC was an exhibit annexed to the claim by the claimants.

Regarding Section 87 of the Employment Act, Mr. Ole Kina submitted that it did not provide for concurrent proceedings. According to him Section 87(3), barred filing suit involving the same subject in issue before another institution. He maintained that Section 12 of the Industrial court Act (ICA) donated jurisdiction to this court subject to Section 87(3). According to him, parties should comply with their CBA and only come to court as a last resort.

ANALYSIS AND DETERMINATION

After carefully perusing the pleadings, Motion, affidavits, responses and upon hearing the oral submissions by the parties, the following issues arose for determination.

- a. **Whether the suit offends Section 58 of LRA and the CBA between their union and the applicant.**
- b. **Whether Section 87 of the Employment Act and the constitution grants unfettered right to the claimants to sue in person before this court.**
- c. **Whether Motion has merits and ought to be allowed.**

Offence to Section 58 LRA and the CBA

The applicants believes that the suit offends Section 58 LRA and CBA because the suit was prematurely filed before first exhausting the conciliatory process provided under the CBA. Referring to the memorandum of dispute drawn by the claimants union, the applicant contends that the suit was filed before determination of that dispute by the CDC. The applicant therefore argues that there existed parallel proceedings including this suit and the other one pending before the CDC and that offends Section 58 LRA and the CBA.

Section 58 of LRA provides that parties to a CBA may provide for settlement of disputes through conciliation or arbitration. The applicant did not produce the entire CBA but only page 12 and 13 of an unknown documents as exhibit S01. She calls it CBA but the court has doubt whether that could be a CBA. Never the less, assuming that it is a CBA, clause (b) on page 12 of the CBA provides for compulsory conciliation before the CDC or the Joint Industrial Council for all collective claims or grievances. The said paragraph defines collective claims or grievances as those affecting all employees or any related group of companies throughout the republic.

Going by the foregoing definition, the present claims is not a collective one and compulsory conciliation was not applicable to it. The proviso to the paragraph (b) of the CBA above, clarifies that non-collective claims may only be referred to the CDC or Joint Industrial Council by the union and the Association jointly. That means that, individual right claims like the claim herein could not be lodged at the CDC by the union alone. It required the consent of both the union and the respondent for it to be lodged there.

In the court's view therefore the suit does not offend Section 58 of the LRA and the CBA. The reason being that the CBA did not provide for compulsory conciliation process, for individual rights claims before the CDC under Section 58(1) (a) of LRA nor did it provide for arbitration as contemplated under Section 58 (1) (b) and (3) of the LRA. Consequently the court finds that, **ICC NO. 1114 of 2012 KENYA CHEMICAL AND ALLIED WORKERS UNION vs EAST AFRICAN PORTLAND CEMENT AND COMPANY LTD**, is irrelevant to this case because in that case the CBA provided for

an arbitration agreement.

In the present case the CBA did not provide for arbitration or compulsory conciliation for individual rights claims.

Rights to sue under Section 87 of the Employment Act and the Constitution

The claimants believe that their right to agitate the grievances before this court is granted by Section 87 *supra* and the Bill of rights enshrined under Chapter 4 of the constitution of Kenya. However the court finds that Section 87(3) of the Act takes away the absolute right to sue where there exist another suit involving similar or related dispute to the suit intended to be filed before this court under Section 87(1). In the court's view that limitation should be extended to court competent proceedings arising from an agreement for compulsory Alternative Dispute Resolution (ADR) mechanisms.

Likewise, the court does not agree with the claimants contention that parties rights to access justice refers to the right to institute proceedings before a court of law. Article 50 of the constitution provides for the right to resolve disputes before a court, or if appropriate before another independent and impartial tribunal or body. Such other bodies for reference of disputes including tribunals and Alternative Dispute Resolution (ADR) mechanism is a constitutional and statutory means of limiting the absolute right to sue before this court.

Does the Motion have merits

In view of the earlier finding that the suit does not offend Section 58 of the LRA and the CBA, the Motion lacks merits. In addition the court finds that from the background of the proceedings herein, the Motion has come too late and it is an afterthought. Even if indeed the applicant had the right to object to the suit under Section 58 of the LRA, the said right was waived and extinguished when she filed defence to the suit and participated in setting down the suit for hearing. Indeed after the suit proceeded *exparte* on 16/12/2013, the applicant applied for re-opening of the hearing in order to cross examine the claimants on their testimony and call defence evidence which was allowed by consent. The said consent order allowing the parties to be heard by this court is still in force and binding to the parties herein.

In the circumstances the court finds that the applicant has voluntarily subjected herself to the jurisdiction of this court for the reasons stated above. The court also finds that the Motion was only intended to delay finalization of the suit and it indeed succeeded in that line considering the time taken so far after the hearing was reopened.

DISPOSITION

In view of all the reasons above stated, the Motion is dismissed with costs to the claimants. The parties are directed to fix the main suit for hearing without any further delay.

Orders accordingly.

Dated, Signed and delivered this 20th June 2014

O. N. Makau

Judge