



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**

**CAUSE NO. 338 OF 2014**

**KENYA FERRY SERVICES LIMITED**

**CLAIMANT**

**v**

**DOCK WORKERS UNION (FERRY BRANCH)**

**RESPONDENT**

**RULING**

1. The Kenya Ferry Services Ltd (Applicant) filed a motion under certificate of urgency on 23 July 2014 seeking various orders against Dock Workers Union (Respondent). The Court certified the motion urgent and directed the Applicant to serve the Respondent for an *inter partes* hearing on 28 July 2014.
2. The Respondent was duly served and on 28 July 2014 it filed Grounds of Opposition and Preliminary Objection. The Court directed that the Preliminary Objection be taken together with the Grounds of Opposition.

**Background**

3. The Applicant and Respondent have a subsisting recognition agreement and the parties concluded and registered a Collective Bargaining Agreement for the period 1 July 2012 to 30 June 2013.
4. In October 2013, the Respondent sent its proposals for negotiation of a new Collective Bargaining Agreement to commence on 1 July 2013 to which the Applicant responded to in January 2014. The parties met severally at the level of Joint Industrial Council but reached a deadlock on some 9 items. On 12 June 2014 the parties signed a deadlock agreement.
5. On 13 June 2014, the Respondent wrote to the Cabinet Secretaries, Ministries of Labour and Transport respectively. The letter was declaring the existence of a trade dispute and seeking a meeting with the Transport Cabinet Secretary in a move to unlock the stalemate.
6. On or around 3 July 2014 the Cabinet Secretary Labour appointed Mr. J. Nyaga as a conciliator and conciliation meetings were held and submissions made. The parties were unable to agree at conciliation and a Memorandum of Agreement indicating failure to agree was signed by the parties and the Conciliator.
7. On 22 July 2014 the Respondent issued a strike notice.

**Applicant's case**

8. The Applicant contends that the strike called by the Respondent is an unprotected strike, unfair, uncalled for and unjustified because the Applicant is engaged in provision of an essential service as defined in sections 78 and 81 of the Labour Relations Act.
9. The Applicant also contends that although the Constitution now recognises the right by workers to

strike, the right can be limited by virtue of Article 24 of the Constitution and that the right of the workers herein has been limited because the Applicant is engaged in the provision of an essential service.

10. The Applicant further contends that the recognition agreement between the parties expressly prohibits a strike and that the only legal avenue open to the parties is to move the Court pursuant to the provisions of parts IX and X of the Labour Relations Act in respect to the unresolved issues in dispute.

### **Respondent's case**

11. The Respondent's case was urged by its Executive Officer, Mr. Ochieng.
12. The first point taken by the Respondent was that the wrong party had been brought before Court. According to Mr. Ochieng, the Applicant had sued Dock Workers Union (Ferry Branch) which was not a trade union or body corporate capable of being sued by virtue of section 21 of the Labour Relations Act. He urged that the party named as Respondent was not a trade union capable of entering into contracts. He also submitted that Dock Workers Union (Ferry Branch) had not entered into a recognition agreement with the Applicant.
13. The Respondent therefore took the position that the Court lacked jurisdiction because the Respondent is not recognised in law as a party which can commence an action or be sued under section 12 of the Industrial Court Act.
14. The second point urged by the Respondent was that rule 25 of the Constitution of Dock Workers Union gave it the mandate to call a strike.
15. On the issue of the Applicant being involved in provision of an essential service, Mr. Ochieng strongly urged that the Constitution 2010 has shifted the ground and that pursuant to Article 24 of the Constitution, it is only the officers of the National Police Service and Kenya Defence Forces whose Article 41 rights can be and have been limited.
16. According to Mr. Ochieng, stopping the workers from striking would amount to servitude as employees and employers could not be compelled to work together. He further submitted that the Applicant had not negotiated in good faith.
17. In conclusion, Mr. Ochieng submitted that the application was defective and should be struck out with costs.
18. In brief reply, Mr. Kitur for the Applicant urged that cases should be determined based on substance rather than technicalities and that the clause 1(g) of the recognition agreement between the parties defined the union as *Kenya Ferry Services Ltd branch of Dock Workers Union* and that the Respondent had been delineated as a distinct entity (according to Mr. Ochieng the reference was a typographical error).

### **Evaluation**

19. The Court will deal with the preliminary objection first before discussing the substantive motion.

#### ***Whether wrong party has been sued***

20. The greater part of Mr. Ochieng's submissions was to the effect that the entity named as the Respondent is not recognised by law, has no recognition agreement with the Applicant and therefore a stranger to the relationship created when a recognition agreement was signed.
21. The Memorandum of Agreement made between the Managing Director of the Kenya Ferry Services Limited of the one part and the Dock Workers Union of the other part (recognition agreement) and annexed as appendix PN-18 to the motion has defined union in clause 1 as

*means the Kenya Ferry Services Ltd branch of the Dock Workers Union, which is a party to this Agreement.*

22. According to Mr. Kitur, this provision created the Respondent herein as a distinct entity with rights apart from the Dock Workers Union.
23. To my mind, the position urged by Mr. Kitur does not answer the issue raised by Mr. Ochieng.

- The establishment and creation of juristic persons are governed by various pieces of statutes in Kenya. Some of these statutes are the Societies Act, Companies Act, and Labour Relations Act in case of trade unions.
24. A trade union gets legal personality only after registration by the Registrar of Trade Unions pursuant to section 21 of the Labour Relations Act.
  25. Section 25 of the Labour Relations Act on its part makes provision for registration of branches of trade unions. But the section does not expressly clothe the branch with its own distinct juristic personality distinct from the mother trade union.
  26. In my view, a branch of a trade union cannot gain juristic personality of its own either on the strength of section 25 of the Labour Relations Act or from a recognition agreement.
  27. Trade disputes should therefore be commenced against and or instituted by the mother trade union as the entity with juristic personality. This leads to the issue of whether the proceedings herein should be struck out or be dismissed because a branch of the Dock Workers Union was named as the Respondent.
  28. Both parties voluntarily signed the recognition agreement in 2011 and were always aware of the definitions provided therein. The Respondent did not explain why it has never moved to rectify the typing error in the definition of the Union.
  29. The Dock Workers Union and or the Respondent have not suffered any prejudice or injustice because they have been aware of the definition of *union* in the recognition agreement. This misnomer of definition and correct and proper party in view of the recognition agreement, in my view is an irregularity which does not go to jurisdiction and can be cured by an appropriate amendment. The Applicant should therefore make appropriate amendments.

### **Substantive motion**

30. *The Applicant is seeking an order prohibiting the Respondent from calling an unprotected strike, cessation of work or go slow of its members. The principles for grant of such orders were set out in the case of *Giella v Cassman Brown & Co. Ltd.* (1973) EA 338 where Spry, VP said at page 360*

*the conditions for the grant of an interlocutory injunction are now, I think, well settled in E.A. **First**, an applicant must show a prima facie case with a probability of success. **Secondly**, an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury, which would not be compensated by an award of damages **Thirdly**, if the court is in doubt, it will decide an application on the balance of convenience.*

31. The principles set out in the *Giella* case are largely applicable in the Industrial Court. But because of the nature of some of the disputes handled by the Court, other considerations may be applicable before an injunctive relief is granted. The Court is therefore entitled to add to, adopt or modify the principles.
32. To help unravel and determine whether the Applicant has made out a case for the grant of the reliefs sought the Court will examine the statutory provisions governing the operations of the Applicant and the calling of a (un)protected strike.

### ***Is Applicant involved in provision of essential services and thus prohibited from strike action?***

33. Section 78(1)(f) of the Labour Relations Act prohibits a person from taking part in a strike or lock-out if the employer and employees are engaged in an essential service.
34. Essential services has been defined in section 81 of the Labour Relations Act as a service whose interruption would *probably endanger life or health of a population*, and the Cabinet Secretary is given the liberty to prescribe the list of essential service providers.
35. Ferry services have been listed in the fourth schedule to the Labour Relations Act as an essential service.
36. Therefore there can be no doubt that the Applicant is involved in provision of essential services and the statute does not allow strikes in essential services sector. Prima facie the applicant has

shown that it is involved in a listed enterprise where the right to strike has been prohibited. The Court notes though that this case is not one challenging the unconstitutionality of the listing of ferry services as an essential service and that debate must wait an appropriate case.

### ***Whether the Respondent is contractually prohibited from calling a strike***

37. The Applicant submitted that the Respondent is also stopped from calling for a strike because of a prohibition in the contractual agreement (recognition agreement) between the parties. Clause 11(e) of the recognition agreement provide that

*In the event of failure to reach settlement at the Joint Industrial Council, there shall be no cessation of work and the dispute shall be dealt with strictly under the procedure laid down in the relevant sections of the Labour Relations Act.*

38. The dispute in the case under consideration relates to terms and conditions of service including wage increase. On the face of the above cited clause, the Respondent's members are enjoined not to stop work where there is no settlement of a trade dispute at the level of Joint Industrial Council or at conciliation.

39. In my view, having reached the end of the road in an attempt to voluntarily resolve the issues in dispute at the Joint Industrial Council and at conciliation, the option available to the Union or employer pursuant to the contractual agreement (recognition agreement) was to invoke the provisions of Part IX and X of the Labour Relations Act and refer the dispute to Court and not to call a strike.

40. The strike is a weapon of last resort just like termination which should be deployed as the ultimate sanction and before resorting to a strike, the statute and the agreement between the parties oblige them to refer the dispute to Court.

### ***Was a valid strike notice issued ?***

41. The Union issued a strike notice through a letter dated 22 July 2014. The notice was addressed to the Cabinet Secretary, Ministry of Labour, Social Security & Services and copied to the Applicant's Managing Director among others.

42. The notice at the subject line indicated that it was a *Seven days strike notice-trade dispute between Kenya Ferry Services & Dock Workers Union* while in the body of the notice it was stated that *We therefore have no option than to issue a 21 days strike notice as provided in law with effect from today, Tuesday, 22<sup>nd</sup> July 2014.*

43. In my view, although this is not determinative of the application herein, a strike notice should be directed at the employer with whom a Union has a recognition agreement and copied to other relevant parties. It should also be clear and unambiguous as to the notice period.

### ***Irreparable lose***

44. The Court also needs to discuss whether irreparable loss may be occasioned were the orders sought be refused. The Applicant personally may not suffer irreparable loss but it is in the public domain that hundreds of thousands of workers, traders, citizens and non citizens rely on the ferry services provided by the Applicant to move between the south coast, Mombasa Island and other parts of the country. It is these citizens and visitors who would suffer direct irreparable loss with the attendant consequences on the national economy.

45. The alternative to the ferry service provided by the Applicant is to require the citizens and visitors to Kenya to move or be moved by air. Because of the numbers involved, this is not a viable option.

46. The loss which would be occasioned to the public at large and these users of the services provided by the Applicant would not be remedied by an award of damages. It would be massive in terms of effects on the security, economy and convenience. The health of the population would be in endangered were the strike to go on.

47. Before concluding, the Court wishes to observe that negotiations between employers and unions

should be conducted in utmost good faith, more so where the constitutional right to strike has been fettered by the listing of an employer as an essential service entity. Otherwise there is a risk of unprotected strikes and go slows being the weapon of choice of employees who feel that they are not being treated fairly. There must be a proportionate balance between the apparent limitation of right of the workers concerned to go on strike and an amicable resolution of their legitimate expectations on disputes involving their terms and conditions of service.

### **Conclusion and Orders**

48. From the foregoing, the Court reaches the conclusion that the Applicant has made out a case for the grant of an injunctive relief and the Court hereby orders that

- a. an Order do issue prohibiting and or restraining the Dock Workers Union by itself, officials, agents and or members from taking part, calling, instigating or inciting others to take part in a strike, cessation of work, go-slow, sit in or any form of industrial action pending the hearing and determination of the economic dispute between the parties herein.
- b. the Respondent files its Response to the Statement of Claim and any other relevant documents within the next 14 days.
- c. Applicant be at liberty to file any documents in reply within 5 days of service by the Respondent.
- d. The main Cause be heard on a priority basis on a date convenient to the parties and Court, to be agreed forthwith.
- e. Costs to abide the main Cause

**Delivered, dated and signed in open Court in Mombasa on this 7<sup>th</sup> day of August 2014**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant/Applicant Mr. Kitur, Company Secretary & Head of Legal Services, Kenya Ferry services Ltd

For Respondent

Mr. Ochieng, Executive Officer, Dock Workers Union