



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 31 OF 2013**

**COMMUNICATION WORKERS' UNION .....CLAIMANT**

**VERSUS**

**SAFARICOM LIMITED ..... RESPONDENT**

**RULING**

1. The Claimant union filed a claim dated 20<sup>th</sup> December 2012 against the Respondent for unfair termination of their members comprising 17 grievants. In defence dated 28<sup>th</sup> January 2013, the Respondent at their paragraph 2 raised an objection to the suit noting that the Claimant lacked the *locus standi* to represent the grievants in relation to the dispute. This being an issue of law, parties agreed to address it first and both the Claimant and the Respondent filed their written submissions. The objection is that;

*Paragraph 1 of the statement of claim is denied and the Respondent avers that there is no recognition agreement between itself and the communication workers' union as required under section 54(3) of the Labour Relations Act, 2007. Accordingly, the Respondent avers that the Claimant has no locus standi to commence or maintain this cause and shall at the earliest available opportunity apply to have this cause struck out in limine.*

2. The Respondent submitted that the dispute herein relate to allegations by the Claimant that there was unfair, malicious and unlawful termination of contracts of employment of 17 employees. The Claimant is seeking for a declaration that the Respondent unfairly terminated the grievants contracts, seeking reinstatement and in the alternative a compensation for the unfair termination.

3. The Claimant has no *locus standi* to institute this claim. Section 12(2) of the Industrial Court Act provide for persons entitled to lodge a complaint or claim with the Industrial Court, being an employee, employer, trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. The Respondent relied on **Law Society of Kenya versus Commissioner of Lands and Others, Nakuru High Court, Civil Case No.464 of 2000, KLR 706** where the Court held that the test of *locus standi* to be met, a party must have a sufficiency of interest to sustain its standing to sue in a Court of law. In this case, such sufficiency would take the form of recognition of the trade union by the employer so that the trade union may be able to represent those employees that form part of the union should any dispute arise.

4. Section 4 of the Labour Relations Act allow all employee to join a trade union and section 54(1) obligates an employer to recognise a trade union for purposes of negotiating a collective bargaining agreement (CBA), which becomes binding on both parties. Before having a CBA, an employer must first recognise the union in terms of section 54(3) of the Act. Such a CBA must be registered with the Court as under section 59 of the Labour Relations Act. In this case, there is no evidence that the grievants were

members of the Claimant as there lacks evidence of the Respondent having signed a Recognition Agreement with the Claimant Union to enable both parties have a CBA. In the evidence of such membership by the grievants, lack of a recognition agreement and CBA, the claimants lacks standing before the Court .

5. Even where the law safeguard the rights of employees to unionise, such unionisation must be recognised in law to enable the union represent employees. In this case, the Claimant has not demonstrated that they have recognition with the Respondent and thus lacks standing to institute the suit which should be struck out *in limine* with costs to the respondents.

6. In reply, the Claimant submitted that they are registered as of 7<sup>th</sup> February 1959 under the Trade Unions Act, Cap 233 (now repealed) and cover employees as under the Respondent's sector and or industry of mobile phone service provider. Under Article 41(2)(c ) of the Constitution, every employee has a right to join or participate in the activities and programmes of a union which provisions is further given meaning by section 4 of the Labour Relations Act. Representation is therefore a constitutional right which cannot be taken away by the mere absence of a recognition agreement between an employer and a trade union. the Claimant relied on **Kenya National Private Security Workers Union versus Lavington Security Limited [2013] eKLR** where the Court held that the Labour Relations Act and the Industrial Court (Procedure) Rules confer a special jurisdiction on trade unions in Industrial litigation where a trade union may sue in its own name on behalf of its members who are aggrieved by the action of their employer. Even where a trade union has *locus standi* to bring a suit against an employer, this does not in itself vitiates the employees' right to representation by a union.

7. In this case the claimants have proof of membership where the grievants have applied for such membership and check off forms and documentation showing registration fees with the claimant. Membership to a union is enough to offer an employee representation by the union. Such membership should be pleaded in the statement of claim. The Claimant at paragraph one of the statement of claim has pleaded such membership.

8. The objections raised by the Respondent should therefore be dismissed with costs to allow the Claimant be heard on merits.

### **Determination of the issues:**

#### **Whether the Claimant has *locus standi***

#### **Whether the claim as filed should struck out *in limine*.**

9. There are far-reaching benefits with regard to the provisions of Article 41 of the Constitution which creates a plethora of rights in employment and labour relations. Such rights include that of unionisation and fair labour practices as rights that are enforceable. The rights under Article 41 are further given meaning by the provisions of Article 162(2) with the establishment of the Labour Relations Court, which Court is governed by statutes as passed by Parliament with jurisdiction as under Article 162(3).

10. With the above granted, unionisation of employees is governed by an Act of Parliament, the Labour Relations Act, which Act is set out to;

*...to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratisation of trade unions and employers organisations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes. [Emphasis added].*

11. The law therefore sets out the parameters for unionisation by settling the preamble within which unionisation of employees and employer organisations is to be registered, regulated, managed to foster

democratisation and more fundamentally to encourage effective collective bargaining and promotion of orderly and expeditious disputes settlement. Such orderliness is what to ensure social justice and economic development. Otherwise there would be chaos, industrial unrest and no order as to settlement of disputes before the Industrial Court. Such is the performance of the law, to set regulations that parties are to adhere to even as they hold the constitutional right to association.

12. For this purpose, the Labour Relations Act defines a Recognition Agreement at section 2 as;

*“recognition agreement” means an agreement in writing made between a trade union and an employer, group of employers or employers’ organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers’ organization;*

13. Further, the Act defines a Collective Agreement as;

*“collective agreement” means a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers;*

14. Therefore, where there is a union such as the Claimant herein and an employer such as the Respondent herein, for there to be a legal relationship biding upon the parties, an agreement in writing, regulating the recognition of the trade union as the representative of the interests of the unionisable employees employed by the employer is imperative. Once there is such recognition, a trade union becomes the legal entity to enter into written agreement concerning the terms and conditions of employment for the member/employees of the employer they represent. Such agreements must be registered with the Industrial Court to take effect as under section 59 of the Labour Relations Act. Such representation is further regulated by the provisions of Part VII of the Labour Relations Act.

15. With recognition, a union acquire special status with regard to the relationship with the employer so recognising the union. With recognition, a union is able to deal with a number of issues and organisational rights in respect of shop stewards, the election of shop stewards, the roles and responsibilities of shop stewards, meetings and training of shop stewards. Such recognition also make provision on how shop stewards shall not leave their place of work for the purpose of carrying out their duties as shop stewards, without the permission of their immediate supervisor, taking into consideration the operational requirements of the employer, the role and duties of the shop steward and the ability of the supervisor to cover the shop steward’s duties in his absence. Further with recognition the parties agree to a dispute resolution procedure in the event that they reach a deadlock in respect of disputes that are not the subject of negotiations at bargaining level. With recognition parties make provision on industrial action in that neither party shall encourage, organise or participate in any strike or lock-out that is not in compliance with the provisions of the law.

16. Such is the essence of recognition. This has a firm basis within the law. Even where there is a constitutional right to associate and receive representation, the same must be enjoyed within lawful means.

17. The question here with regard to *locus standi* is that the Claimant union has no recognition with the Respondent and even where such recognition is lacking; there is no CBA between the parties to regulate terms and conditions of work. Without recognition by an employer, a trade union, even where registered as such, becomes a by-stander waiting by the road side for instructions. Similar to a lawyer, though having a first class honours lacks a certificate of practice as an advocate of the High Court of Kenya. Such a lawyer though well versed in law and well suited to give legal advice to various citizens, lacks the capacity to stand in Court as an advocate representing a client.

18. In the instant case, the grievants constitutional right to unionise and associate with the Claimant cannot be curtailed. However beyond such unionisation, the law regulating the recognition of the union of choice must be adhered to. Even where the Claimant heavily relies on the decision in **Kenya National**

**Private Security Workers Union versus Lavington Security Limited [2013] eKLR**, my reading of the preamble to the Labour Relations Act, section 54 and 59 of the Act make mandatory provisions with regard to recognition of a union by the employer.

*54.(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.*

19. The law is stated in mandatory terms. Had Parliament intended to have any union to come in and offer representation to any employee on the basis that there is a constitutional right to association, nothing would have been easier than to do so. I find no such provisions under any law in Kenya.

20. Even in a case where the Claimant lacks the requisite standing before the Court to file the current claim, the grievants rights do not abet out of that fact. The grievants retain the right to file such claims where they exist under their own names, through their legal representative or through their union as recognised by the employer.

**In the circumstances, I will allow the objections raised by the respondent. Strike out the suit without limiting the grievants rights to approach this Court with their claims. Noting that the grievants had made efforts to assert their rights as of 10<sup>th</sup> January 2013 when they swore the affidavits in support of the claim as filed, time stopped running then. Each party shall bear their own costs.**

**Delivered in open court at Nairobi this 25<sup>th</sup> Day of September 2014**

**M. Mbaru**

**Judge**

In the presence of:

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