



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1264 OF 2014

KENYA NATIONAL PRIVATE SECURITY WORKERS UNIONCLAIMANT

VERSUS

NATIONAL SOCIAL SECURITY FUND..... 1ST RESPONDENT

TOTAL SECURITY SURVEILLANCE SERVICES LIMITED.....2ND RESPONDENT

AND

BOB MORGAN SECURITY SERVICES LIMITEDINTERESTED PARTY

RULING

1. On 1st August 2014, the 2nd Respondent filed Notice of Preliminary Objection on the following grounds;

- a. *That the Industrial Court has no jurisdiction to hear and determine the matter;*
- b. *The provisions of the Civil Procedure Rules cited in the Claimant's Notice of Motion are not applicable in the Industrial Court*
- c. *The Claimant has no locus standi to institute these proceeding in the Industrial Court as its mandate is limited to disputes arising between them and an employer organisation as stipulated under the Labour Relations Act;*
- d. *That in so far as the dispute relates to claim Wage order issued under section 46 of the Labour Institutions Act, the power to institute any legal proceedings is conferred to the labour officer and not to the Claimant and section 49 of the Labour Institutions Act is clear on the same;*
- e. *That in so far as the Claimant's claim relates to a wage order against the 2nd Respondent the Claimant cannot sue the 1st Respondent or at all;*
- f. *That claimants arising from procurement of services and those from a wage order are distinct in law; and*
- g. *That for the reasons aforesaid the Claimant's notice of motion and the memorandum of claim is [are] frivolous, incurably defective and amounts to an abuse of the Court process and must be struck out.*

2. Parties made their oral submissions.

3. The 2nd Respondent submitted that looking at the undisputed facts from the Claimant's claim, the cause of action arise from a decision by 1st respondent to award a contract to the 2nd Respondent instead of the interested party. This Court lacks the jurisdiction to hear the matter as under section 12 of the Industrial Court Act a dispute from an award of a contract cannot fall under section 12 of the Act. There

is no dispute that can arise between the Claimant and the 1st and 2nd Respondent on award of contract that relates to the interested party as this was awarded through a tendering process. Where the interested party is aggrieved by the award to the 2nd Respondent there is provision for a review application filed with the procurement Appeals board on grounds that the contract was not awarded to them.

4. The Claimant submitted that the preliminary objection raised do not meet the set principles established in *Mukisa Biscuits Manufacturing Limited versus West End Distributors (1969) EA 696* as there are statements that invite detailed analysis, submissions and evidence for the Court to reach a fair determination on all the issues raised. The submission that the claim by the Claimant is based on a contract of services under the Public Procurement Act, for the Court to base the claim as such, a call of evidence is required thus an invitation to delve into facts and evidence to discern the nature of the claim. The Court must hear the parties to establish if this is a case that it can give orders or direct the same be heard by the tribunal for resolution. These are not matters of law to be addressed through a preliminary objection.

5. The dispute before Court is not on the award of a tender but based on the enforcement of the law on employment and employee wages within the security industry. A narrow interpretation of the suit is therefore not sufficient to have the same dismissed at this stage without going into evidence. Each party at this point has a different interpretation of the suit and thus the need to call for evidence.

6. The submission that the Claimant has wrongly relied on the Civil Procedure Act is misplaced as the Notice of Motion filed by the Claimant is premised on the provisions of section 12 of the Industrial Court Act which Act gives the Court jurisdiction to borrow from any other Act so that it is not fatal to the for the Claimant to apply any other law in these proceedings.

7. The Claimant has *locus standi* by application of Article 162(2) of the Constitution being the Court given the jurisdiction to hear employment and labour relations matters. The Claimant has a legitimate right to come before the Court on an employment and labour matter as this one. At the hearing the claimants will demonstrate there is a dispute on the employment and labour relations concerning the Claimant union. Members of the union have their rights in jeopardy due to acts of the respondents to the extent that the interested party is also affected in matters forming a series of labour relations that generate serious legal issues within the security industry. The Claimant is the union that has been authorized by the Court to represent employees within the security sector and have a right to complain to the Court when that sector is affected.

8. Though there is provision that the Claimant could have gone to the labour officer, nothing ousts the jurisdiction of the Court as the original Court with jurisdiction on employment and labour relations matters. The objections by the 2nd Respondent must therefore be dismissed to allow the claimant argue their application.

9. The interested party relied on the submissions of the Claimant.

10. Though there are several issues raised by the 2nd respondent, these can be compressed for determination as follows;

Whether the Court has jurisdiction;

Whether the application of the Civil Procedure Act in proceedings before the Court is fatal

Whether the Claimant has *locus standi*

11. The application of the Civil Procedure Act and the Rules thereto is a practice that the Court has now adopted especially with regard to matters not adequately addressed by the Industrial Court Act or the Rules thereto. The Court also begin a Superior Court of record is bound to apply itself on written law where the statutes of application for and by the Court do not address a particular issue. The use of the Civil Procedure Act and the Rules thereto is therefore not fatal unless these are used in utter disregard to a

set procedure that is specifically ousted by the Constitution or the statute establishing the Court, the Industrial Court Act. In find no such misapplication of the Civil Procedure here.

12. The question of jurisdiction when raised, through pleadings, notice or orally before the Court is of great importance for the Court to determine at the earliest as where there is no jurisdiction, any other proceedings, orders or direction are fruitless. This is the essence of ***Owners of the Motor Vessel "Lillian S" v. Caltex Oil, (Kenya) Ltd [1989] KLR 1***. However, even where there is a challenge to jurisdiction the party so relying on the same must articulate the constitutional and legal basis of the same as to lack in this regard by reference to matters of fact would be to go contrary to what is set out in *Mukisa Biscuits Manufacturing Limited versus West End Distributors (1969) EA 696*, the basis upon which points of law should be raised – matters of law and not facts that require the call for evidence.

13. the 2nd Respondent challenge to the Court jurisdiction is based on the provisions of section 12 of the Industrial Court Act on the basis that the claim does not address any of the matters listed therein since this was a matter that emanated from an award of the a contract between the respondents whereas the interested party was not awarded. There is no nexus between the Claimant and the respondents. This invites the Court to look at the claim with regard to the cause of action and thus give an analysis on the issue of locus standi and jurisdiction as where the former lacks there may be jurisdiction and where the latter lacks, its standing is of no consequence. Where both standing and jurisdiction is lacking then the suit is fatal and must fall in its entirety.

14. The claim outlines the issues in dispute as;

- a. *Engaging a security firm that flouts law and is non-compliant with the basic Minimum Wage Order*
- b. *Perpetuation of impunity in the security industry by a workers body engaging and dealing with non-compliant companies.*

15. The orders sought in the claim are also relevant to refer. Declaration orders the Claimant seeks are directed at the 2nd Respondent that all contracts entered into between the Respondent are null and void and that the same be cancelled for fresh tenders for security services be issued and that the 2nd respondent should comply with all the labour laws and regulations. Such are the nature of cause of action and the orders the Claimant is seeking from the suit against the respondents as the Union representing security workers industry.

16. The relationship of the Claimant and the 1st Respondent is by virtue of the Claimant members being employees of the interested party while the relationship with the 2nd respondent is by virtue of matters touching on security sector vide their award of contract by the 1st respondent. With the best application of the Industrial Court Act section 12 and also Article 162(2) of the Constitution and further the rights as under the Employment Act with regard to employers and employees and the provisions of the Labour Relations Act with regard to unionization of employees in the same sector, I find no direct link to the claim as between the Claimant and the two respondents as the subject of contention relate to matters as between the two respondents as the interested party. Even where there is an indirect claim by the Claimant as against the respondents, to grant the orders sought would be an effort that would have best been addressed by the interested party whether before the Court or any other relevant bodies that was to address the non-issue of a contract to them.

17. Section 12(2) provide for a trade union aggrieved may lodge a claim before this Court. However such a claim must have a basis in the constitution or in law. The Court under section 12(3) of the Act has jurisdiction to grant various orders inclusive of declaratory orders as appropriate. Matters outlined under section 12(1) of the Act though not limited, there must be a nexus between the cause of action and the orders sought from the Respondent in court. I find no nexus here with regard to the cause of action and the final orders sought. Despite the Claimant having the requisite standing before the Court, where the Court were to proceed to hear the claim, to grant the orders sought as outlined and in their nature would be a miscarriage of justice. For the Claimant s to sue as such in this cause, even with standing, does not

cure injustice. The powers of the Court must be exercised in context and relate to orders that are capable of being enforced as mandated under section 12(3) (viii) of the Industrial Court Act to grant.

18. Where the Claimant is aggrieved by matters as within the respondents that indirectly touch on a sector they have an interest, and where they have standing before this Court the Claimant would not be rendered remediless if the Court declined to assume jurisdiction because they have the right to judicial review, and if the right to access judicial review has been foreclosed by effluxion of time, then there is the remedy by way of declaratory suit and or by way of petition.

The preliminary objection is therefore allowed to the extent that the suit/cause as filed is struck out. Each party will bear their own costs.

Delivered in open Court at Nairobi this 7th Day of October 2014

M. Mbaru

JUDGE

In the presence of;

Lilian Njenga: Court Assistant

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