



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 288 OF 2013

SULEIMAN MWANGEMA & 17 OTHERSCLAIMANTS

VERSUS

BAOBAB BEACH RESORT MOMBASARESPONDENT

RULING

INTRODUCTION

1. The Notice of Motion before the court is dated 8/9/2014 and it is brought by the respondent in the suit (Applicant). It seeks stay of proceedings in this suit and an order referring the dispute to the shop steward and the work committee for determination as provided for by clause 11 of the Collective Bargaining Agreement (CBA). The Motion is supported by the affidavit of Silvester Mbandi and the grounds stated in the body of Motion. The gist of the Motion is that the suit was prematurely filed before the dispute resolution mechanism provided for under the CBA was exhausted.
2. The Motion was disposed of by written submissions filed on 8/10/2014 and 24/20/2014 by the Applicant and 17/10/2014 by the claimant.

APPLICANTS SUBMISSIONS

3. The Applicant has submitted that she has Recognition Agreement and a CBA with the claimant's union which provided for an Alternative Dispute Resolution Mechanism (ADR). According to her the ADR provides for 4 levels starting with a report to the employees supervisor or Head of Department. If the matter is not settled, a report is made to the shop steward or works committee who shall refer the matter to a person appointed by the management. If the matter is not settled the shop steward or works committee member report the dispute to the Union's branch official who meets management to resolve it. If no settlement the dispute is referred to the Coast Dispute Committee.
4. According to the Applicant that ADR was not exhausted before the suit was filed herein and such the proceedings ought to be stayed to pave way for the ADR mechanism provided for under the CBA. In her opinion, the claimant are bound by the CBA even after their dismissal as per Section 59 of the Labour Relations Act (LRA). In conclusion the applicant submitted that there is no time limitation for lodging the dispute with the Coast Disputes Committee as per Clause 11 of the CBA. She cited several authorities, both local and international to drive her case home.

CLAIMANTS SUBMISSIONS

5. The claimant have opposed the Motion by submitting that the CBA does not take precedence over the jurisdiction of this court as conferred by Article 162 of the constitution. According to the claimants, it is the applicant who ignored the ADR after the statements were recorded and only woke up after this suit was filed and given a hearing date. In addition the claimants have contended that clause 11 of the CBA only applies to existing employees and not former employees as is the case with them herein . Consequently the claimants have maintained that the suit should be allowed to proceed because the applicant failed to effect the ADR mechanism.

ANALYSIS AND DETERMINATION

6. There is no dispute that the claimants are former employees of the applicants having been dismissed in 2013. There is also no dispute that there existed a Recognition Agreement and CBA between the applicant and the claimant's union which provided for a pre-industrial ADR. There is also no dispute that before this suit was filed the applicant and the claimants union attempted a preindustrial settlement based on which the claimant's recorded statements which were annexed as Exh.SM3 to applicants supporting affidavit.
7. The issues for determination are whether the suit herein is prematurely brought before exhausting ADR mechanism and whether the same should be stayed to pave way to ADR.

PREMATURE SUIT

8. The Court has perused Clause 11 of the Recognition Agreement and confirmed that it is coined in mandatory terms. Though not specific on whether the ADR is a private conciliation or arbitration, there is no doubt that the parties intended to settle their dispute thereunder and not through the court. Under Section 58 of the LRA, Employers and Trade unions have been mandated to conclude CBA's providing for ADR in the form of private conciliation or arbitration as held by Rika J, in ICC NO. 1114 OF 2013 KENYA COMMERCIAL & ALLIED WORKERS UNION vs EAST AFRICAN PORTLAND CEMENT CO. LTD [2013] e KLR cited by the Applicant.
9. In this case there is no evidence that the dispute went through the prescribed ADR procedures under clause 11 (a) (i)-(iii) of the Recognition Agreement. There is no evidence that a report was made to the supervisor or HOD and thereafter to the shopsteward then to the union branch officials. Never the less, assuming that the procedure was followed, the question is what happened after the dispute failed to get resolved at step 3 of the ADR. Did either the union or the Applicant or both refer it to the Coast Disputes Committee (CDC)? The answer is no because no evidence was adduced to prove that. The reason was possibly because referral of the disputes to the CDC was optional going by the proviso to clause 11(a) of the Agreement which states

“NB: Should any of the above steps (i) and (ii) not be completed within 7 days, then the dispute shall automatically advance to the next steps in the procedure. Should step (iii) not be completed within 14 days after it was reported, then the dispute may straight away be referred to the Coast disputes Committee or the Joint Industrial Council as applicable for solution”.

The use of the word “**may**” in the foregoing proviso to the ADR clause renders the referral of the dispute to CDC optional. The failure to exercise that option by the union or the applicant created an opportunity to the claimants to sue individually in a court of law. Under Article 162 of the constitution this is the correct court for the claimants have brought the suit. Consequently the court finds that the suit is properly before the court and as such the applicants Motions for stay of the suit and referral of the dispute to CDC is beref of merits. In this court's view the request to refer the dispute to the shop steward and Work Committee as per prayer 2 of the Motion is overtaken by events with respect to time schedules. in view of the proviso cited above.

DISPOSITION

For the foregoing reasons, the Notice of Motion dated 8/9/2014 is dismissed with costs.

Dated signed and delivered this 10th day of December 2014

O. N. Makau

Judge