



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 826 OF 2012

BETWEEN

KENYA SHOE & LEATHER WORKERS UNION.....CLAIMANT

VERSUS

FALCON TANNERS
LTD.....RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Julius Maina for the Claimant

*Mr. Nduva Kitonga instructed by Nduva Kitonga & Co. Advocates
for the Respondent*

RULING

The claim was initiated by the Claimant Union, on behalf of 5 of its Members, who were Employees of the Respondent. The Statement of Claim was filed on 21st May 2012.

The 5 Employees allege their contracts were terminated after they were recruited by the Claimant, as its Members. The Respondent declared their positions redundant. They seek compensation for unfair termination and terminal benefits.

The Respondent filed a Statement of Reply on 3rd July 2012. At paragraph 9 of the Reply, the Respondent avers that the Claimant has no capacity to bring the claim in its own name, on behalf of the Employees.

This preliminary challenge was canvassed on 20th May 2013.

Mr. Kitonga for the Respondent submits that only an aggrieved person, has the right to file a claim, under Section 87 of the Employment Act No. 11 of 2007. The Claimant is not an aggrieved person. It has no contractual relations with the Respondent. Black's Law Dictionary 4th Edition, says an aggrieved party is a person who has been offended by another. There is no dispute shown between the Claimant and the Respondent. The issue is not one of representation; It is about who should be in Court as the Claimant. It is not conceivable that Trade Union Officials will come to Court and testify on behalf of the Employees. Mr. Maina replies that under Section 87 of the Employment Act 2007, the Trade Union merits the description of an aggrieved person. Section 48 of the Labour Relations Act No. 14 of 2007, empowers the Trade Union to represent the Grievants. Section 22 of the Industrial Court Act No. 20 of 2011 allows the Trade Union to represent its Members in Court. The Advocates for the Respondent appear in Court under the same provision. Mr. Maina informs the Court he is authorized by the duly elected General Secretary of the Claimant, to represent the Claimant.

The Court Finds and Orders:-

1. The Claimant Union appears not to have captured the gist of the Respondent's preliminary challenge. The question is not whether the Trade Union has the right to represent its Members [Grievants] in prosecuting the Claim; rather, the question is whether a Trade Union has the capacity to file and prosecute the Claim in its own name.

2. There is no legal obscurity on the right of representation of the Employees by the Trade Union. The law including the Industrial Court Act and the Labour Relations Act, as correctly argued by Mr. Maina, extends the right of representation of the Employees in Court, to the Trade Union, acting through its authorized Officers. Mr. Maina is authorized by the General Secretary of the Claimant, to appear for the Trade Union and its Members. The response of the Claimant while giving the correct position on representation, did not answer the challenge, which is on the capacity of the Trade Union to initiate and prosecute the Claim, in its own name as the Claimant, instead of the names of the 5 Employees.

3. Trade Unions are formed for various purposes. Their objectives can be read from their Internal Constitutions, Labour Laws, Industrial Relations Charter and the National Constitution. Their objectives imbue them with different capacities, aimed at the attainment of various levels of associational freedoms. A Trade Union may act in any one, or more, of the following capacities in any dispute to which its Member is a party:-

[a] In its own interest;

[b] On behalf of its Members; and

[c] In the interest of its Members.

4. The capacity in which the Trade Union acts in each case, must be determined by reference to the circumstances of the case. Upon registration, the Trade Union becomes a body corporate, with the capacity to sue, be sued, own and dispose of properties. A Trade Union is not just a body corporate; a Trade Union is defined across the Labour Relations Act No. 14 of 2007, the Employment Act No. 11 of 2007 and the Industrial Court Act No. 20 of 2011, as: -

“an association of employees, whose principal purpose is to regulate relations between employees and employers, and includes employer’s organizations.”

5. An Association is glued together with its Members by the identity of interests. While it is true that Trade Unions become like Companies on registration, their personality is distinctive from that of registered Companies. The interests of Companies and their Shareholders may diverge. Shareholders may freely sue the Company, just like they may any other person. This is not the case with Trade Unions. A Trade Union shares an identity of interests with its Members. Courts have observed that Shareholders of a company hold a mere financial stake in the Company, whereas Trade Union Members have a collective interest which they pursue through the Trade Union.

6. Trade Unions are not merely body corporates; they are Associations of Employees and Employers. They have a right to bring claims to Court in their own names, on behalf of their Members, as an aspect of the constitutional freedom of association. A question which relates to the termination of the contract of employment of Trade Union Members, touches on the Trade Union’s labour relations functions and operations.

7. There is nothing in our labour law that bars the right of an Association to bring a claim in its own name on behalf of its Members. The preliminary challenge appears influenced by the law of contract, which states that only a person, who is a party to the contract, can sue on it. The doctrine holds that the law knows nothing of a *jus quaesitum tertio* arising by way of a contract. Meaning in plain language that a contract cannot confer rights on third parties, and a third party, in this case the Claimant Union, cannot sue on the contract between the Respondent and its 5 Employees who are Members of the Claimant Union. The doctrine does not recognize the right of third parties to bring claims, except as may be allowed under trust. The real party in interest must therefore come to Court and be heard.

8. This orthodoxy has no place in labour and employment relations. Labour contracts are not standard contracts. The Court has in the past hazarded the opinion that contractual principles such as freedom of contract, privity of contract and even capacity to contract do not have the same influence on labour contracts, as they do upon other forms of contracts. Members and Non- Members of the Trade Union may for instance, benefit and be bound by a CBA concluded by the Trade Union. Closed Shop Union arrangements do not leave individual Employees and Employers with the freedom to contract. Individual contracts of employment given at the beginning of employment, are modified by CBAs subsequently concluded at the workplace. The terms of the CBA are incorporated into the individual contracts of employment. The Employee may not necessarily be a Member of the negotiating Trade Union, and even where a Member, need not participate directly in the making of the CBA. An Association may bring suit

on behalf of its Members, when its Members would otherwise have the right to sue on their own behalf.

9. The Industrial Justice System has procedurally facilitated associational standing. The rules of evidence have long been deliberately flexible. Application of the Evidence Act Cap 80 the Laws of Kenya is not binding on the proceedings of the Industrial Court. The rule against hearsay is not of a universal application.

10. Associational standing recognizes that while the Trade Union may not have a claim to the proceeds of the final decision, it has a significant interest in the outcome. The facts of this dispute are that 5 Employees were recruited by the Claimant Union. The Respondent is alleged to have terminated their contracts, alleging the occurrence of a redundancy situation. The Trade Union and the Employees allege termination resulted from the membership of the Employees to the Trade Union. It is alleged the Employees were victimized. This is a clear example of a Trade Union and its Members having an identity of interests. Trade Union recognition, and the termination of contracts of employment of 5 Trade Union Members merge into an associational concern, in which the Trade Union has a full mandate to approach the Court in its own name.

11. The interest sought to be protected, or the legal right sought to be enforced, are germane to the Trade Union's purpose. Neither the claims asserted, nor the remedies sought, require the Claim to be filed and prosecuted in the names of the individual Members. Litigation in the Trade Unions own names, grants Trade Unions the opportunity to define, clarify and concretize Trade Union and Employee rights. Without the associational standing granted to the Trade Unions right from the early era of the Trade Disputes Act to the modern Constitutional era, labour law would be all the poorer. Employees have severe barriers to self advocacy. If the Court were to declare that Employees must bring termination claims in their individual names, this would expose disadvantaged Employees to orders for costs, barriers of a technical nature, and discourage Employees from pursuing remedies for workplace injustices. Allowing Trade Unions associational standing insulates Employees against some of these realities of litigation. Associational standing also ensures that Trade Unions are able to enforce CBAs through Court intervention. Without the direct involvement of the Trade Unions in the litigation history of the Industrial Court, most of the developments in Kenyan Labour Law would not have been actualized. The new Constitution of Kenya has strongly endorsed the concept of associational standing, and in the view of this Court, it would be retrogressive to Industrial Relations, if the Court were to hold that Employees, who are Members of Trade Unions, or beneficiaries under CBAs concluded by Trade Unions, must now come to Court in their own names.

12. The rights of disadvantaged individuals and groups in the society cannot adequately be protected and promoted, if only the real parties in interest are permitted to file and prosecute claims in their individual names. Trade Unions in their associational role merit the description of '*aggrieved parties*' under the Employment Law. When an Employee is victimized for associating with the Trade Union, the entire Association is offended. The interpretation given by the Respondent in mounting its challenge is very narrow, and oblivious of the unique characteristics of *associational locus standi*. The Court is of the view that the Trade Union has the right to represent its Members in Court, and to bring the Claim on their behalf, in its own name. *IT IS HEREBY ORDERED-*:

[a] The preliminary objection is declined.

[b] Parties to schedule the main dispute for hearing.

[c] Costs in the cause.

Dated and delivered at Nairobi this 21st day of June 2013

James Rika

Judge