



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2113 OF 2012

BANKING INSURANCE AND FINANCE UNION CLAIMANT

VERSUS

AGRICULTURAL FINANCE CORPORATION RESPONDENT

RULING

1. The respondent the Agricultural Finance Corporation (AFC) through their preliminary objection filed on 3rd September 2013 raise issues that the claimant has no *locus standi* to institute and maintain this claim and that there is no cause of action against the respondent that warrant a defence. the claimant Banking Insurance and Finance Union (BIFU) opposed these objections and stated that they have the requisite capacity to act herein as claimants.
2. Maboga Advocate for AFC submitted that BIFU has no *locus standi* to file this suit on behalf of Charity Wairimu Maina (the grievant) on the basis that the grievant was once the employee of AFC and was terminated in 2011 and in the circumstance of this case BIFU who filed this suit as the claimant on behalf of a terminated employee lacks the capacity to act for the grievant. That since the employment relationship with AFC terminated the grievant relationship with her Union, BIFU also terminated and or ceased as an employee is corrected defined under section 2 of the Labour Relations Act. That a trade union is also defined to mean;

An association of employees whose principal purpose are to regulate relations between employees and employers and include an employer's organisation

3. With the mandate to regulate the relations as between an employer and an employee and that once such a relationship ceases to exist, then a trade union loses the capacity to regulate the same on behalf of a terminated employee. That in this claim the claimant is a trade union and can only maintain suits for its members and in this case a union member is an employee working in the banking, insurance or any other banking institution and such a members has to pay monthly subscriptions to maintain such membership as under section 48 Labour Relations Act. Thus there is a condition precedent to an employee being a member of a trade union which is to maintain payments of monthly subscriptions. The employer is the one who makes such payments for membership for and on behalf of an employee member of a trade union. That since the grievant ceased being an employee of AFC or an employee of any banking or insurance firm, and then she ceased membership of BIFU.
4. Further that under section 59(1) and (2) of the Labour Relations Act, under the Collective Bargaining Agreement (CBA), the terms are only binding to an employer and employee even where an employee has resigned from employment but in this case, the grievant did not resign from her position, she was terminated due to gross misconduct and thus as a former employee of AFC, if aggrieved she can only file her claim in person but not under BIFU as this would be contrary to section 89 of the Employment Act. That membership in a trade union is not in

perpetuity as this ceases when an employee resigns from employment or moves to another sector that is not a member to the existing trade union or when they have been terminated by an employer.

5. The respondent cited **Industrial Cause No. 371 of 2012, BIFU versus AFC** where the same issues as herein arose and the court struck off the claim as the court found that the claimant, BIFU had no *locus standi* to represent the grievant. Similarly in this case BIFU should not use its funds as provided for under Section 39 of the Labour Relations Act to represent a non-member as this would be a violation of the law. If this is allowed there will be a flood of cases by former employees seeking that their rights have been violated. That in this case, BIFU has no capacity to represent a member once that member ceases remittance of their subscriptions.
6. In response, Mr. Monoru for BIFU submitted that the industrial Court is a creature of the constitution as under Article 162 as read together with Article 165, as a superior court to resolve labour disputes and under the Industrial Court Act, section 12 give the court exclusive jurisdiction to hear all labour disputes. A trade dispute is defined under section 4 of the Labour Relations Act;

a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union

that such a dispute should not thus be handled under the common law jurisprudence but under labour relations regime noting that Under the Constitution Article 2 make all international treaties ratified by Kenya applicable and in this regard Convention 87 of the ILO on unionisation and right to associate are applicable. Further that under the provisions of Article 39 and 41 of the Constitution, an employee can join a trade union voluntarily. In this case the grievant was member of BIFU before she was terminated by AFC and she is challenging that termination with the registration of a trade dispute which can only be challenged on substance or procedure applied but not on the grievant being unionised.

7. That BIFU is a juristic person as under section 21 of the Labour Relations Act with the capacity to represent the grievant where her labour rights have been violated. That AFC and BIFU have a recognition agreement and a CBA that remains in force and binding. SFC cannot regulate membership of BIFU where they decide to represent their members. That under Article 22(1) of the Constitution, anybody whose rights have been violated can institute proceedings and BIFU herein has the right under the Constitution and Labour Relations Act to bring this suit. Mr. Monoru relied on the case of **Court of Appeal, in Mumo Matemu versus the Trusted Society of Human Rights Alliance et al, CA 290 of 2012** where the Court of Appeal dealt with the issue of Locus standi that is also applicable in this case.
8. One of the outstanding features of the new labour regime in Kenya is the finding of the protection of fair labour practices within the realm of Bill of rights under the fundamental principles as under Article 41 of the Constitution. The right to join a trade union has now been elevated to a high level that is protected, respected and promoted for all employees in their exercise and or enjoyment of their human rights and rights at work. In this regard, where an employee chooses to join and belong to a trade union, that right cannot be infringed upon and the same is founded and protected as a constitutional right. Equally, from 2007 the enactment of new labour laws has rejuvenated labour relations in Kenya with the enactment of the Labour Relations Act and the employment Act that have a plethora of rights for unionised employees and those who are not unionised. This shift is fundamental as under the Labour Relations Act, an employee in their exercise of their right to associate can chose to belong to a trade union without restriction by the employer. Upon this recognition, such an employee is equally protected under the provisions of the Employment Act whether unionised or not.

Assessment

9. The right to association having been established between the claimant and the grievant, BIFU and

Charity Wairimu Macharia, a third party seeking to interfere with this constitutional rights must have very exceptional grounds upon which they can be found to interfere with the same. The membership of BIFU is on voluntary basis and once one becomes such a member, they have legitimate expectations that BIFU will offer various services, the condition of subscriptions as remitted on a monthly basis is only one of the requirements but does not affect the relationship of such a member to relate and or be offered that which other members paying in subscriptions get. If this were the case, then it is for BIFU to raise such conditional requirements and not AFC as the employer, a third party to the relationship as between the BIFU and the grievant. This is for the two, BIFU and the grievant to regulate and not AFC. Therefore there are no exceptional circumstances that I find to have been established by AFC so as to warrant this court to allow any interference with the relationship between BUIFU and the grievant.

10. I have looked carefully at the two authorities that both parties heavily rely on and **in Industrial Cause No. 371 of 2012, BIFU versus AFC**, this case is only persuasive to this court, this is a court with original jurisdiction in labour relations matters with requisite powers to interpret the Constitution to give it life in a manner that is progressive and that promotes industrial peace and harmony. This is what is democratic and fair in an open and democratic society. The right to association is a fundamental human right that should not be infringed unless there exists exceptional circumstances that are legitimate and valid that can be find justification weighed against constitutional values. I do not find such exceptional cause here to justify this court in this case to interfere with the right to association.

11. In the case of **Mumo Matemu versus the Trusted Society of Human Rights Alliance et al, CA 290 of 2012**, this matter can also very clearly distinguished from this cause in that the same related to a party making a constitutional reference as under the provisions of Article 22 of the Constitution which is clearly separate from the provisions of section 22 of the Industrial Court Act where a party, being unionised can be represented at the Industrial Court by their union. The nexus here between BIFU and the grievant is that of a Union and the union member as under the provisions of the Industrial Court Act and the Labour Relations Act whereas the link between the case in Mumo Matemu and Trusted Society of Human Rights Alliance related to their public interest with regard to constitutional provisions hence their application to appear as under Article 22 of the Constitution.

12. Further to the above, I wish to note that, the grievant, while in the employ of AFC was a member of BIFU and part of the benefits of such membership was to receive representation as under section 39 (c) and (d) of the Labour Relations Act or benefit when negotiating a new CBA. Section 39 of Labour Relations Act is very wide in its coverage of what a trade union can do for its members thus;

(c) the prosecution or defence of any legal proceedings to which the trade union, employers organization or federation or any member thereof is a party, when the prosecution or defence is undertaken for the purpose of securing or protecting its rights or the rights of any member in any matter concerning employment or the application of any employment law;

(d) The conduct of trade disputes on its behalf or on behalf of any member thereof;

(e) The compensation of members for loss arising out of trade disputes;

13. This section of the law does not separate the representation of a member from those that have paid their subscriptions as against those who have not. To do so would be to micro-manage the affairs of the union by prescribing what they ought to do with their non-paying members. In this regard the intentions of the law as read by this court, it to have the union represent their members in cases of labour disputes, compensate members for loss arising out of trade disputes and conduct such trade disputes on behalf of their members even where these disputes involve termination. To find otherwise would be a misapplication of the very law that seek to protect the right to a union representing their members in this court with regard to trade disputes. However, the drafters of the law in their clarity went out and singled out areas where in their view, membership can be scrutinised and restricted, only in cases of seeking elections as outlined under section 33 of the

Labour Relations Act. A member who is not employed in the sector that the union operates under and a member whose subscriptions are more than 13 weeks in arrears, are not eligible to vote. Had the law intended to extend this to members who had ceased their employment relationship or were in subscriptions arrears, it would have been easy to state so. This is not the case here.

14. Following the grievant termination of her employment by AFC, this has been challenged and BIFU filed this claim. This was the very essence of the grievant's membership with BIFU to address labour relations as between employees and the employer and to find that the termination of the grievant then ends her relationship with BIFU would to ignore the very purpose of her BIFU membership and the reasons she continued to pay her monthly subscriptions as remitted by the employer during the pendency of her employment relationship with them. She has challenged her termination and without going into the merits or demerits of the claim, BIFU has the right standing to institute a claim for any of their members until such a member does apply or seek to be removed from such membership.

I will therefore dismiss the preliminary objections raised herein and direct the parties to schedule the matter for hearing.

Delivered in open court and dated at Nairobi this 30th day of October 2013.

M. Mbaru

Judge

In the presence of