



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1109 of 2012

AFRICA LABOUR CONSULTANTS INSTITUTES.....CLAIMANT

VERSUS

KENYA BUILDING, CONSTRUCTION, TIMBER &

FURNITURE INDUSTRIES EMPLOYEES.....RESPONDENT

RULING

The Claim herein is filed by African Labour Consultants Institute against Kenya Building, Construction, Timber and Furniture Industries Employee Union. The Issue in dispute is ***“Unlawful and unconstitutional dismissal of Mr. Paul Marekya Kimilu (who is an elected Branch Union Official) by the Respondent.”***

The Memorandum of Claim was filed on 29th June 2012 together with a Certificate of Urgency signed by Seth Panyako acting for Mr. Paul Marekya Kimilu, Notice of Motion, and a Verifying Affidavit of the said Seth Panyako sworn on 29th June 2012. There is a second Verifying Affidavit sworn by Seth Panyako accompanying the Memorandum of Claim identical to the first one attached to the Notice of Motion but sworn on the 28th June 2012.

It is worth noting that there is no description of the Claimant and the capacity in which the Claimant is making a claim on behalf of Mr. Paul Marekya Kimilu who is referred to as the grievant in the body of the Memorandum of Claim. The Respondent is described at paragraph 5 of the Memorandum of Claim as the Secretary General of Kenya Building, Construction, Timber, and Furniture Industries Employees Union.

It is averred in the Memorandum of Claim that the Grievant is duly elected as the Nairobi Branch Secretary of the Respondent, that he was elected on 22nd January 2011 and the Registrar of Trade Union notified of his election by a letter dated 5th July 2011 appended as annexure PKM-1 of the Memorandum of Claim, that the Grievant was dismissed through a letter delegating his duties to the Branch Assistant secretary and that there was no meeting of the Branch at which the dismissal was discussed and approved. The claims of insubordination by the Grievant alleged in the letter of dismissal are denied. The Claimant avers that the action taken against the Grievant is unlawful, unconstitutional and unprocedural and is therefore null and void.

In the Reply dated 10th July 2012 and filed in Court on 12th July 2012, the Respondent has raised objection on the legal capacity of the Claimant to either institute the present claim or purport to represent the subject in the claim. The Respondent admits that the grievant was elected as the Nairobi Branch

Secretary on 8th January 2011 without any influence from the Respondents head office. The Respondent avers further that the Grievant's continued stay in the office is at the sole discretion of the branch electorate who voted him into office, that the meeting called to discuss his conduct and the resultant decision to suspend him are administrative actions of the branch, that there was no malice, discrimination or victimization and that the suspension was lawful and justified within the provisions of the Respondents Constitution.

The case came before the Court for the first time on 2nd July 2012 when the Claimant was heard ex-parte. After hearing the Claimant, the Court ruled that the matter comes before the Court for further hearing on 3rd July 2012 when the court ruled as follows:-

1. That the application is certified as urgent and to be heard ex parte in the first instance.
2. That the application be served upon the Respondent forthwith.
3. That the Respondent is directed to file its memorandum of response and replying affidavit on or before 13th July 2012.
4. That the application be heard inter parties on 20th July 2012 at 10.00 a.m. in Court No. 2.

The matter came before this Court for inter parties hearing on 20th July 2012 when the Claimant was represented by Mr. Seth Panyako and the Respondent By Ms. Judith Guserwa. The Respondent raised a preliminary objection contesting the *locus standi* of the Claimant in the Claim. Counsel for the Respondent submitted that it is the duty of the Court to ensure that the Claimant is represented by a recognized representative and that the Claimant has not indicated that it is a registered union to qualify to represent the Claimant.

In reply, the Claimant submitted that the provisions of Article 22(1) and (2) of the Constitution of Kenya 2010 permit the Claimant to represent the Grievant. The Claimant further relied on Article 1(2) and Article 3 of the Constitution. The Representative of the Claimant submitted that Africa Labour Consultants Institute is registered under the law. He further relied on Section 12(2) of the Industrial Court Act.

The Claimant objected to the preliminary objection on the grounds that it is defective and against the provisions of Rule 14(5) of the Industrial Court Procedure Rules 2010. The Claimant further raised objection to the admissibility of the Replying Affidavit which it submitted is defective, bad in law for non compliance with section 35 of the Advocates Act. The Claimant submitted that the replying affidavit was signed by Francis K. Murage and not endorsed by J.A. Guserwa & Company Advocates who filed it and that this contravenes the provisions of the Advocates Act.

For the purposes of this ruling, the Court will confine itself to the issue of the *locus standi* of the Claimant, Africa Labour Consultants Institute.

It is regretted that the Respondent who raised the issue on *locus standi* did not cite any law or authority in support of the preliminary objection. This has left the Court with the responsibility to look for the authorities. Article 162 (2) (a) of the Constitution provides for the establishment of the Employment and Labour Relations Court by Parliament and Article 162(3) provides that Parliament shall determine the jurisdiction and functions of the Court.

The Industrial Court Act 2011 is the legislation contemplated under Article 162(2) and (3) and provides for jurisdiction of this Court at section 12. Section 12(2) provides that the parties who may lodge claims in this court or against whom claims may be lodged are an employee, an employer, or trade union, an employers' organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

The Claimant herein has not given a description of itself or the capacity in which it has filed this claim. It is in the opinion of the court, not an employee, an employer, or trade union, an employers' organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. When asked in Court under what law it is established the representative of the Claimant stated that it is registered under the Companies Act. There was no evidence submitted to the Court to prove such a claim. As has already been mentioned above, the Claimant has not shown the capacity in which it has filed this claim as a Claimant representing the person it refers to in the Memorandum of Claim as the grievant herein.

There is no explanation given about the relationship between the Claimant and the grievant.

A party who comes to Court as a Claimant must show how the claim arises, otherwise, it stands the risk of being found to be non suited.

The Claimant has referred this Court to Article 22(2) of the Constitution. The said Article is clear on the persons who may institute court proceedings other than a person acting in their own interest. These are

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

The Claimant has not stated in the claim that it is acting in any of the above capacities. The Claimant has also not stated or explained why it is acting on behalf of the Grievant Mr. Paul Marekya Kimilu or that the said Grievant lacks capacity to act in his own name. Indeed, the Claimant has not shown that it has any interest at all giving it a right to institute proceedings in this Case.

The Claimant further cited Article 1(2) of the Constitution as a basis for its instituting this claim. Article 1(2) provides that the people may exercise their sovereign power either directly or through their democratically elected representatives. The Claimant has not shown that it is a democratically elected representative of the grievant Mr. Paul Marekya Kimilu, or that it is acting in that capacity.

The Claimant further cited on Article 3(1) of the Constitution. I reproduce Article 3(1) here below:

3(1) Every person has an obligation to respect, uphold and defend this Constitution.

The Claimant has not shown that any person has failed to respect, uphold or defend the Constitution. These are matters that must be specifically pleaded.

Article 3(1) must be read together with Article 22(2) which provides for the enforcement of the Bill of Rights. As already stated above, the Claimant has not shown in what capacity it would be defending the Bill of Rights under Article 22(2). Again as already stated above the Claimant has not stated in the Claim that it has a right or fundamental freedom in the Bill of Rights which has been denied, violated or infringed or is threatened. It has not pleaded in what capacity it is acting on behalf of the Grievant.

Article 22(3)(e) permits an organization or individual with particular expertise to appear as a friend of the court but only with the leave of the Court. The Claimant has not pleaded that it has such expertise, nor has it sought leave of the court to appear as a friend of the court.

The upshot of the matter is that the Claimant has not shown that it has *locus standi* to file this claim. This leaves the Court with no option but to strike out the claim on the grounds that the Claimant has no *locus standi* to file the Claim.

The Court however notes that the Grievant Mr. Paul Marekya Kimilu may have a valid claim against the Respondent and that it has not been indicated anywhere that he suffers a disability that prevents him from filing a claim in his own name. The striking out of these pleadings is therefore does not bar the grievant from filing a claim in his name against the Respondent.

ORDER

- (1) The Claim herein is struck out for lack of *locus standi* by the Claimant
- (2) Paul Marekya Kimilu is free to file a new claim in his own name against the defendant
- (3) Each party shall bear its costs

Hon. Lady Justice Maureen Onyango

JUDGE
3RD AUGUST 2012