



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1435 of 2012

Combining claim for recognition agreement with other claims-umbrella claims

Whether union can commence proceedings in absence of recognition agreement

Transport Workers Union (K)

Claimant

and

Ideal Logistics Limited

Respondent

RULING

Background

1 The Claim herein was filed on 22 August 2012. Together with the Claim was a certificate of urgency and Notice of Motion. Justice Nzioki heard the ex parte motion and granted orders 1, 2 and 3 of the Motion.

2 The issues in dispute according to the Claim were stated to be:

1. Unfair termination of 3 employees through intimidation and threat for joining the Claimant.
2. Forcing the unionised employees to revoke their union membership
3. Refusal to effect Trade union dues deduction through the signed check off forms
4. Refusal to sign a Recognition agreement with the Claimant union.

3 The Respondent was served with both the Motion and Claim and on 24 September 2012, it filed a Notice of Preliminary Objection. It subsequently filed a Memorandum of Response and Replying Affidavit on 9 October 2012.

4 What concerns the Court at this time is the Preliminary Objection. The Objection was broadly on the ground that the application was incompetent, bad in law and fatally defective because the Claimant lacked the locus standi to institute the claim as envisaged under section 12 of the Labour Institutions Act, 2007.

Submissions of Respondent/Objector

5 According to the Respondent/Objector, first, the Claimant Union lacked the locus standi to institute any claim against it because the parties have not entered into a recognition agreement. Any rights would only be crystallised after the signing of a recognition agreement followed by a collective bargaining agreement. The Union could not purport to come to court to agitate rights of the named employees before the signing of a recognition agreement. The named employees should have instituted any claims in their names. The Claimant was yet to recruit a simple majority of the Respondents' employees to warrant signing of a recognition agreement.

6 Second, the objection was to the effect that the application by the Claimant was an umbrella application seeking both recognition and various substantive orders in relation to named employees and therefore must fail.

7 The Respondent had hinged its objection on section 12 of the Labour Institutions Act and when I brought it to the attention of its Counsel that that particular section had been repealed by the Industrial Court Act, 2011 she submitted that sections 48, 54 and 57 of the Labour Relations Act were also relevant.

Submissions by Claimant Union/Respondent

8 The Claimant union on the other hand submitted that the Court has the power to hear and determine cases where employers were committing injustices to union members.

9 The Union had recruited some 28 out of 40 employees of the Respondent and submitted the check-off forms but it had tried and exhausted all the machineries available to it to have the Respondent enter into a recognition agreement and hence it's instituting the Claim.

Issues for determination

10 To my mind there are 2 issues emerging for determination. These are:

- (i) Whether a union is competent to institute a claim against an employer when they have not entered into a recognition agreement/collective bargaining agreement
- (ii) Whether a Claim for recognition agreement can be mixed with other claims.

11 I will address the 2 issues in that order. The parties did not refer to any case law.

Whether a union is competent to institute a claim against an employer when they have not entered into a recognition agreement/collective bargaining agreement.

12 It is germane to start with the definition of a 'recognition agreement' and a collective agreement. The definition is found at section 2 of the Labour Relations Act thus:

'recognition agreement' means an agreement in writing made between a trade union and an employer, group of employers or employers organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers organisation;(my emphasis)

13 Before looking at the definition of a collective agreement I need to note that the term '*collective bargaining agreement*' which is used widely in the labour relations sphere is now referred to in our statutes as a collective agreement. The term '*collective bargaining agreement*' it appears went out legal currency with the repeal of the Trade Unions Act and the Trade Disputes Act with the enactment of the Labour Relations Act, 2007 and the Labour Institutions Act, 2007. Be that as it may, '*collective agreement*' according to section 2 of the Labour Relations Act:

'means a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers'.

14 Before delving into the legal implications of the two definitions it should be noted that essentially the relationship between an employer and an employee in Kenya is entered into between the two persons. And by the nature of contracts and the principle of privity of contract, it is the employer and employee who derive any rights or interests from the contract. At least in Kenya a union appears nowhere in the equation at this stage and level.

15 From the definition of a recognition agreement it becomes obvious that it is the recognition agreement that gives the union the capacity to represent the interests of those employees it represents in their dealings with the employer. In effect it modifies the contract between an employer and employee and the principle of privity of contract by allowing a 'third party' the legal capacity to represent the interests of the initial parties to an employment contract. The recognition agreement sets out the framework for industrial relations and also the rules and procedures between the union and employer on negotiations, representations and collective bargaining. In fact the recognition agreement provides for its purpose, basic principles, and scope of agreement, and structures for representation, facilities and dispute handling among others.

16 In my humble view, it is the recognition agreement which gives a union the legal right, both by contract and by law to pursue any issue affecting the bargaining unit workers it represents. Most of these issues would generally relate to terms and conditions of service.

17 Without recognition agreement in place a union lacks both contractual and legal capacity to commence any court proceedings on behalf of an employee against an employer.

18 I therefore answer the first issue in the negative.

Whether a Claim for recognition agreement can be mixed with other claims.

19 Disputes by unions seeking recognition agreements are covered primarily by sections 54, 55, 62 and 74 of the Labour Relations Act. Section 74 makes provision for disputes regarding recognition agreements to be referred to Court as a matter of urgency.

20 Sight should not be lost at this stage that it is the collective agreement which sets out the terms and conditions of service between employers and unions. Many a times, the majority of disputes referred to the Court will emanate from breach of the procedural or substantive provisions of the collective agreement.

21 More often than not disputes emanating from collective agreements will run simultaneously with allegations of breach of the Employment Act which defines the *fundamental rights* of employees.

22 The statutory provisions and legal principles applicable in determining recognition disputes and disputes on the conditions and terms of service emanating from collective agreements and the rights of employees defined in the Employment Act are different and in my humble opinion should not be mixed together. Recognition disputes concern union interests at the primary level whilst collective agreement and Employment Act disputes concern employee rights. I say recognition disputes concern union interests at the primary level because individual employees cannot commence litigation seeking an employer to recognise a union s/he has joined.

23 Mixing or combining litigation over disputes rooted on recognition agreement and collective agreements together is likely not only to cause prejudice to the Respondent but also conflate the issues for determination by the Court which is not proper.

24 This is a defect which cannot be cured in the course of proceedings and must be dealt with by the Court at the very onset of a Claim.

25 I also answer this question in the negative.

Conclusion

26 Considering the foregoing I do strike out issues 1, 2 and 3 in the Memorandum of Claim and prayers 1, 2 and 3 of the Notice of Motion dated 17 August 2012.

27 For avoidance of doubt the Claim in respect of the recognition agreement and deduction of union dues will proceed for hearing and determination.

28 There is no order as to costs.

Dated and delivered in open Court at Nairobi on this 26th day of October 2012.

Justice Radido Stephen
Judge of the Industrial Court.

Appearances

Mr. Tony Rogers Ndege instructed by Transport Workers Union

For Claimant Union/Respondent

Ms Achieng-Nyaiitho instructed by Archer & Wilcox

Advocates

For Respondent/Objector