



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 944 of 2011

JANET MUTHEU MARTIN.....CLAIMANT

VERSUS

M/S FUN AN SHOP LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on 17th December, 2012)

RULING

The claimant is Janet Mutheu Martin and the respondent is M/S Fun An Shop Limited. The claimant filed the memorandum of claim on 14th June 2011 in person and was subsequently represented by S.K. Opiyo and Company Advocates. The respondent's statement of defence was filed on 12th July 2011 through Tariq Khan and Associates.

In paragraph 3 of the statement of defence, the respondent stated that as a preliminary point, the claimant's suit is prematurely instituted as the claimant has not followed the clear dispute settlement procedure as set out in Section 87 of the Employment Act, 2007. The section provides as follows:

“87. (1) Subject to the provisions of this Act whenever—

(a) an employer or employee neglects or refuses to fulfill a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.”

The parties agreed to argue the preliminary objection by filing written submissions. The respondent's written submissions were filed on 3rd December 2012 and the claimant's were filed on 11th December 2012.

In raising the preliminary objection, the respondent is praying that the claimant's suit be dismissed with

costs to the respondent because:

- a. The claimant at paragraph 2 of the memorandum of claim alleges that on 7th March 2011 she was verbally terminated by the respondent. Further, at paragraph 8 and 9 of the claim, the claimant states that on 10th March, 2011 she decided to report the matter to the Kenya Hotel and Allied Workers Union who in turn wrote a letter to the respondent dated 6th April 2011 which has been annexed on the memorandum of claim.
- b. The respondent's case is that it had no recognition agreement with the union as per Section 54 (3) of the Labour Relations Act, 2007 so that the union had no jurisdiction, authority or mandate to preside over or enter into any conciliation with the respondent.
- c. The claimant filed the suit in her own name and not through the union yet, the claimant ought to have followed the procedure of dispute resolution prescribed in Section 87 (1) of the Employment Act, 2007. As per the section, the claimant failed to report the dispute to a labour officer and instead engaged in hunting a forum by seeking audience with the union in the hope of reaching a one sided settlement. Since the claimant chose the procedure under the Labour Relations Act, 2007 and not the one prescribed under Section 87 of the Employment Act, 2007 the respondent submitted that the claimant should pursue the filing procedures under the Labour Relations Act, 2007. Thus, it was submitted, the claimant must comply with rule 6 (1) and (2) of the Industrial Court Procedure Rules, 2010. The rule requires the statement of claim to be signed by the authorized representative of the party referring the dispute to the court and the claim be accompanied with the conciliator's report, minutes and certificate of conciliation issued under Section 69 (a) of the Labour Relations Act, 2007. Where the certificate of conciliation has not been issued, the rule prescribes that the statement of claim be accompanied with an affidavit sworn by the claimant or the claimant's representative as to why the conciliator did not issue the certificate.
- d. The claimant failed to comply with the rule and denied the respondent the opportunity for alternative dispute resolution as prescribed in the two cited Acts of Parliament. Instead, the claimant engaged in hunting for a unilateral forum in the hope of a favorable solution thereby undermining the statutory conciliatory procedure under the two Acts by which Parliament prescribed non acrimonious and non litigious solution to disputes between employers and employees.
- e. The court should dismiss the claim with costs so as to accord the parties alternative dispute settlement through conciliation as provided for in Section 87 of the Employment Act, 2007.

For the claimant, it has been submitted as follows:

- a. That the meaning of a preliminary objection is as per **Mukisa Biscuit Manufacturing Co. Ltd Versus West End Distributors Ltd [1969] E.A. 696 at page 700**, where Law, J.A. stated that, **“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute arbitration.”** Further, as per Sir Charles Newbold at page 701 in the same case, thus, **“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the opposite side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”** Further, that the High Court upheld that meaning of a preliminary objection in the case of **Laxmanbhai Construction Versus Anspar Beverages Ltd, civil suit No. 1327 of 2001, Milimani Commercial Court.**
- b. That the issues raised in the preliminary objection require evidence, and therefore, do not amount to a proper preliminary objection in view of the holding in the cited cases. Thus the preliminary objection should fail *“in limine”*.

c. That the claimant was entitled under Section 87 (1) of the Employment Act, 2007 to complain to a labour officer or to lodge a complaint or suit in the Industrial Court. She properly elected to file the suit in the Court as per the discretion she was entitled to exercise under the Act.

d. She was also entitled to file the claim in the court under Section 47 (3) of the Employment Act, 2007 which provides, with respect to complaints by employees on summary dismissal, as follows, **“47. (3) The right of the employee to present a complaint under this section shall be in addition to his right to complain to the Industrial Court on the same issue and to the right to complain of any other infringement of his statutory rights.”**

e. As for the respondent’s reference to the Labour and Relations Act, 2007 it was submitted for the claimant that the respondent cannot have its cake and eat it. The respondent cannot on the one hand reject the union and on the other rely on the law that regulates the relationship between unions and employers. That such submissions for the respondent are irrelevant to the present dispute. Nevertheless, there were no conciliation proceedings in this matter because the respondent declined to submit to the labour officer’s jurisdiction.

f. That the court should be guided with provisions of Article 159 of the Constitution of Kenya, 2010 and Sections 1A and 1B of the Civil Procedure Act.

The court has considered the submissions by the parties and agrees with all the submissions made for the claimant. The court upholds the decision on the scope, meaning and nature of a preliminary objection in the cited cases. In particular, the preliminary objection fails *ab initio* because it raises matters for which evidence would be required for proof. For example, whether there was a recognition agreement between the union and the respondent, whether conciliation proceedings took place and whether the claimant failed to invoke alternative dispute resolution. The court further finds that the statutory provisions under the Employment Act, 2007 and in particular Section 87 clearly entitled the claimant to move the conciliation process under the labour officer or to file the suit in court so that the election to file the suit did not breach the law. It is the court’s considered opinion that even if the parties were to be directed to invoke the statutory conciliation process or they were required to do so, a preliminary objection on such grounds would probably lead to stay of the proceedings before the court and invariably, not dismissal of the court case.

In conclusion, the respondent’s preliminary objection is dismissed with costs. The cause having been filed in 2011, the parties are now directed to fix a convenient hearing date at the registry and on priority basis.

Signed, dated and delivered in court at Nairobi, this 17th December 2012.

BYRAM ONGAYA
JUDGE