Kenya Union of Commercial, Food and Allied and Allied Workers v Pavan Auto Hardware Limited (Cause E009 of 2024) [2024] KEELRC 13583 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13583 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE E009 OF 2024

MA ONYANGO, J

DECEMBER 19, 2024

BETWEEN

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED AND ALLIED WORKERS ..... CLAIMANT

AND

PAVAN AUTO HARDWARE LIMITED ..... RESPONDENT

RULING

1. Before me for determination is a Notice of Preliminary Objection dated 29th April 2024 filed by the Respondent in which it objects to the suit herein on the following grounds:

    a. The suit is per incurium Section 54(3) of the *Labour relations Act* since there is no recognition agreement to enable the applicant have locus to represent the alleged employees. The suit has been filed without the requisite locus standi.

    b. This suit is sub judis in contravention of section 6 of the *Civil Procedure Act* reason being there is another suit being Eldoret ELRC Cause No. E022 Of 2022 Kenya Union Of Commercial Food And Allied Workers Vs. Pavan Auto Hardware.

    c. The application dated 26th March, 2024 ought to be filed in Eldoret ELRC Cause No. E022 Of 2022 Kenya Union Of Commercial Food And Allied Workers Vs. Pavan Auto Hardware reason being it is par incurium the express provisions of Section 6 of the Civil Procedure Rule.

2. The Preliminary objection was disposed of by way of written submissions. The Respondent filed submissions dated 10th June, 2024 in support of the preliminary objection while the Claimant filed its submissions in opposition to the same dated 28th October, 2024.

3. The Respondent submitted that the Claimant has no locus standi to file the claim as there is no recognition agreement between the Claimant and the Respondent. The Respondent cited section 54

of the *Labour Relations Act* which provides for recognition of a trade union by an employer where the trade union has recruited a simple majority of unionisable employees.

4. The Respondent submitted that for the Claimant to represent its employees the Claimant must have recruited a simple majority. The Respondent relied on the decision in Transport Workers Union v Etihad Airways [2019] where the court held:

> Section 54 (1) of the *Labour Relations Act* No. 14 of 2007 states as follows:
>
> "An employer, including an employer in the public sector, shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees."
>
> From the above provisions the main requirement for a recognition is that the trade union must be representative of a simple majority of the unionisable employees. The Claimant herein avers that it has recruited 90% of the Respondent's unionisable workers and to that end it has annexed 9 check off forms signed by 9 employees in support of this assertion. There is however no evidence before the Court of how many unionisable employees are engaged by the Respondent and it is therefore not possible to determine whether the evidence attached is representative of a simple majority.
>
> For this reason I find that the claimant has not proved its case on a balance of probabilities with the result that the claim is dismissed.

5. It was further the submission of the Respondent that the Claimant should wait for the determination of Eldoret ELRC Cause NO. E022 OF 2023 to determine whether or not it has locus to sue the Respondent.

6. It is submitted that the suit is misguided. That the Claimant should instead have filed an application for contempt in Cause No. E022 of 2023 if it thinks that the Respondent has acted in breach of the court orders. That any order issued in this suit shall have a direct bearing and might be contradictory to the said suit that is awaiting judgment.

7. It submitted that the Claimant has not even attached check off forms to prove the simple majority required for recognition. That the instant suit has been filed prematurely and should be dismissed.

8. It is further the submission of the Respondent that this suit is sub judice as there is a similar suit filed earlier which if successful would grant the Claimant recognition. That the issue in dispute in this suit is directly in issue in the other suit. For emphasis the Respondent relied on the decision in Darren Mutinda v Kisii University Council. Fredrick Wanyama, C.S. Ministry of Education & Attorney General [2022] eKLR where the court cited the Supreme Court in Kenya National Commission of Human Rights v Attorney General & others [2020] e KLR where the Supreme Court expressed itself as follows: -

> " The term sub judice is defined in Black's Law Dictionary 9th Edition as "Before the court or Judge for determination". The purpose of the sub judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the mater that was filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of re sub judice must therefore establish that; there is more than one suit over

the same subject matter; that one suit was institute before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives"

9. The Respondent prayed that the suit be dismissed.

10. For the Claimant it is submitted that the suit is not sub judice as section 54 exclusively deals with recognition agreements and collective agreements.

11. It is submitted that under rule 63 of the Employment and Labour Relations Court (Procedure) Rules it is provided that a trade union including an employers' or employees' association registered under the *Labour Relations Act* is entitled to represent itself or its members by filing and acting in suits accordingly.

12. That from the said provision the Claimant union does not need to have a recognition agreement to represent its members. That it has locus standi to file the instant suit.

13. The Claimant states that this suit is not sub judice in contravention of section 6 of the Civil Procedure as in ELDORET CAUSE NO, E022 OF 2023 the issue in dispute is on recognition agreement and deduction and remittance of union dues while the issue in dispute in the instant suit is unlawful and unfair redundancy of Mr. Harrison Okundu and Tony Kiplagat. That the issues in the two suits are different.

14. The Claimant prays that the preliminary objection be dismissed.

Analysis and Determination

15. I have considered the grounds of objection in the notice of Preliminary Objection. I have also considered the submissions of the parties.

16. To restate the relevant principle in preliminary objections from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors (1969) EA 696: '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 the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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 other 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'.

17. In Kenya National Commission on Human Rights v Attorney General; *Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017*) [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling) the Supreme Court observed as follows regarding preliminary objections:

> The Joho decision has been subsequently cited by this Court in *Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014*; and in *Aviation & Allied Workers Union Kenya vs. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014*, in which the Court further stated at paragraph 15; "Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."(16)It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application

to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014*, [2014] eKLR).

18. The Supreme Court further observed that:

> " The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

19. In the instant suit the Respondent did not attach the pleadings in ELDORET CAUSE NO, E022 OF 2023 to enable this court confirm if the cause of action in the said suit is the same as in this suit as alleged by the Respondent. However based on the submissions of the Claimant which the Respondent did not dispute, the issue in dispute in the said suit is recognition agreement and deduction and remittance of union dues while the issue in dispute in the instant suit is unlawful and unfair redundancy of Mr. Harrison Okundu and Tony Kiplagat. The issues in the two suits are therefore different. The suit herein is therefore not sub judice as alleged by the Respondent.

20. The other objection raised by the Respondent is on locus of the Claimant to lodge this claim on behalf of the Grievants. According to the Respondent the Claimant does not meet the threshold to represent the Grievants. The Respondent relies on section 54(1) of the *Labour Relations Act* which provides for recognition of a trade union which has recruited a simple majority of unionisable employees of an employer. The section provides:

> 54. Recognition of trade union by employer
>
> (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
>
> (2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.
>
> (3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.
>
> (4) The Minister may, after consultation with the Board, publish a model recognition agreement.

(5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.

(6) If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.

(7) If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.

(8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.

21. As the section clearly states, the section is only relevant for recognition of a trade union.

22. As is evident from the section, it does not refer to representation of employees of an employer who does not have a recognition agreement with the trade union. For representation all a union needs is to prove that the employee it wishes to represent is its member. It does not need to have a recognition agreement with an employer in order to represent its employees.

23. I thus find that the Claimant has locus standi to represent the Grievants who are its members.

24. For the foregoing reasons I find no merit in the preliminary objection raised by the Respondent and dismiss the same. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 19TH DAY OF DECEMBER, 2024

MAUREEN ONYANGO

JUDGE