REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 72 OF 2014

1. **COMMUNICATION WORKERS UNION**
2. **BENSON OKWARO OKUMU……PETITIONERS/APPLICANTS**

VERSUS

COMMUNICATION AUTHORITY OF KENYA…....…RESPONDENT

RULING

1. On 12th January 2014 when the matter appeared before me the appearances were as follows Tom Ojienda SC for the Petitioners/ Applicants and Ahmednassir Abdullahi SC appearing with Raymond Molenje for the Respondent. The Respondent herein had filed a preliminary objection on point of law dated 8th January 2015.

2. Mr. Ahmednassir urged the preliminary objection and submitted that the 1st Petitioner who is a Trade Union, which is to represent the unionisable employees of the Respondent, lacks *locus standi* to bring the action. The alleged grievants are directors and assistant directors of the Respondent and the trade union represents unionisable employees. He posed the question as to whether it is jurisdictionally competent to leave its folks and join the management of the company. He stated that the Petitioners sought to represent the workers who are the crème-de-la-crème of the Respondent while the parties it can represent is the lowest of the cadre who are the lowest of the low. He submitted that the Petitioner is not the right party, it's a stranger, a busy body. The relationship between Petitioners and Respondent is on account of recognition agreement dated 17th June 2011 and the Petitioners jurisdiction is determined. It serves job groups K, L & J which is limited to the unionisable staff. He submitted that the Petition offends Article 41 and Labour Relations Act Section 2, 54(1) and

74(b). He relied on the case of **Mukisa Biscuit** and the case of **Tailors and Textile Union v. Rivatex**. This Court, he said, has pronounced itself on what preliminary objection is and that he was confident that he had satisfied the Court that this is a preliminary objection. He asked whether a trade union and its Secretary General are entitled to represent a member of management which is a grave issue that flips the labour relations upside down. He stated that if Court accedes to the Petition it will lead to anarchy and chaos as the owners of capital will be unable to run companies. He submitted that it is preposterous and a coup d'état where the labour relations will be overturned. The petition offends the core principle and the purported representation offends the law. It is on the unprecedented hypothesis that trade union and management can interpose for non-unionisable employees. There is no way this is tenable. He submitted that the trade unions and management are protagonists and the law is in between. He relied on the case **Kenya Game and Hunting Union v. Lewa Cause 1627 of 2012** and **KAWU v. KCA**.

3. He submitted that on the strength of the authorities that labour rights are granted to both employee and employer and the Constitution of Kenya has not opened the door to the esoteric aspiration of cohabitation between Petitioner and Respondents. The day has not come where trade unions sit in boards of companies. Managerial prerogative is a principle, and the Court put this best, the separation between management and workers will if not kept delicately lead to anarchy and chaos.

4. He stated that the interactions are guided by the Industrial Relations Charter which brings together Government, employers and unions. The charter states what types of employees are unionisable and which ones are not. Only certain cadres are eligible. The Industrial Relations Charter is the bedrock of the labour relations in Kenya. He stated that Managing Directors, General Managers, branch managers, Departmental heads etc and personal secretaries to the above are not unionisable. Even staff who are excluded by agreement are not unionisable. He referred to the recognition agreement between the 1st Petitioner and the Respondent and stated that it is very clear which staff members the union represents and it excludes all management staff.

5. He relied on case of **BIFU v. Standard Chartered** where the court stated the categorization of staff does not confer unionisability of staff and held the employee in management cannot benefit. He submitted that this court states the only way a union has *locus* is where it represents a member and thus the Petitioner has no *locus*. If a person is not a member of a trade union the trade union has not *locus* to bring the suit. These cases restate Section 12 of the Industrial Court Act. A trade union can sue only for unionisable members.

He stated that the parties or the alleged aggrieved parties have individual contracts each of them have specific contracts, the terms are different, the benefits are different and that the contract creates a right *in personam* not *in rem*. The individuals if they are aggrieved can come to court to say the contract has been infringed and seek redress from court. He submitted that there is nothing in the realm of public law for the Petitioner to litigate the rights of Mr. Kibe or Mr. Omo who are in the management of the Respondent. He submitted that the Petitioners are not aggrieved and the parties alleged to be aggrieved have not come to court or said they are aggrieved. This, it was submitted, is a proxy litigation and there is no place for proxy litigation. It is said every person has an interest under Article 3(1). The terms person who can enforce compliance includes a company or body of persons incorporated or not to enforce these rights. The case is not about labour issues but to enforce the Constitution. It is untenable that the Petitioners have come to court to enforce the Constitution. From abstract perspective they do not go wrong but the problem is from abstract to the empirical. There must be a factual basis to give the empirical basis. The submissions are polemic and its only when a party does not have a case that they cite Article 1, 2 and 3 of the Constitution. He submitted that the overwhelming majority of reliefs sought are injunction and declarations. The prayers state Article 236(4)(b) has been infringed. He submitted that the Petitioners submit that the petition is not presented by a trade union alone. He stated that the petition is untruthful as Okumu is not here to protect the Constitution as he has not said so. Okumu has no history of defending the Constitution. He deposes he is the Secretary of the 1st Petitioner conversant with the facts and is swearing on behalf of the 1st Petitioner. It is not fair to say he has come to court to uphold the Constitution. There is an attempt to raise Article 22. He submitted that he was in agreement that Okumu is not one to whom the bill of rights applies in this case. He stated that his opponent had relied on Article 22(2) and the Petitioners are not members of the Respondent. They also don't qualify on the basis of a group or class. Okumu can only represent Group J, K and L. The management does not fall under that group or class. He submitted that the only time where union can have *locus* is under Article 22(2)(b). Okumu is of course not acting in the public interest. Okumu is not a name you hear in litigation on Constitution. He stated that he had shown Okumu is Secretary General of 1st Petitioner which represents job group, J,K, and L. The Petitioners now say he represents all the employees of the Respondent. This, submitted, is preposterous at best.

6. He referred to the case cited of **Mumo Matemu v Trusted Society** and stated that this case before the Court of Appeal and High Court expanded the position of laws. What does a determinate class of person mean? It was in his opinion that the only determinate class who can be represented by Union are job groups J, K, and L. In conclusion he submitted that the Petitioners are the wrong parties and there is no evidence the proper parties are aggrieved. The Petitioners are not aggrieved. Court has duty to balance the interest of the members. They have taken over management as a component of the Union. The express provision of the charter precludes management from union. The denial of membership of management to unionization is limited by justifiable limitation per Article 24 and it is a limitation justifiable in a democratic society. There is need for employees to enjoy the protection of union if they

are unionisable. The employer would suffer if the management is brought under the union and its officials. Article 41 sets the equilibrium. It looks at rights of employees and looks at rights of employers. The cadre of staff for the Petitioner have been unaffected and thus Petitioners have no *locus*.

7. Mr. Ojienda opposed the preliminary objection and the notice filed on 8th January 2015. He indicated that he had in a response filed list of authorities and the written submissions as well as a Supplementary Affidavit sworn by Benson Okwaro Okumu, Secretary General of 1st Petitioner. He stated that what was filed on 22nd December 2014 during vacation was a petition founded on Article 3, 4, and on pure notations of the Constitution. The Petition was filed by 2 Petitioners – Communication Workers Union and Benson Okwaro. This Petition is grounded on Article 21 and the Mutunga Rules and sought to enforce specific constitutional provisions through declarations. This petition was occasioned by the wicked and unexpected act of the Board of the Respondent in purporting to invite application for promotions enumerated in pages 33-35 of Benson Okwaro's supplementary affidavit. Invitations had been made through advertisement in the newspapers while the Board knew the positions are not vacant. This was an unequivocal backdoor redundancy of workers in Director positions. By this design the positions were declared redundant and the Petitioners sought that the Court declares the act unconstitutional as it selected directors and senior managers for sacking while leaving others intact. This was contrary to Article 41 and is not fair labour practice. This Petition sought to interpret the provisions of Article 236(b) of the Constitution as these are employees in the public service. Their jobs were protected under section 24(1)(a) when the Communications Commission of Kenya was transformed to the Communications Authority. He submitted that the board is acting illegally in spite of a lawyer being on the board. He submitted that the 2nd Petitioner, though he has no prior history of enforcing the Constitution, came to Court and that this Court has held that any person has an obligation to protect a violation of the Constitution. He stated that the Petition is hinged in Article 22(1) and is squarely founded on violations of chapter 4 of the Constitution, para 44 and 43 of the Petition is instructive. He submitted that the Board suspended the HR manual of the Respondent. It was this manual that informed the contract of the employee. When the Board suspends the HR manual it affects the rest of the staff. He said he had come to Court to agitate for proper and fair administrative action. The Respondent violated the right to fair practice in burning desire to replace the staff with their own, rename positions and advertise the positions and leave other staff no place as they replace the management and he called this wickedness, pure wickedness. He submitted that what has been raised is not a preliminary objection. It is the act of a party who has no defence and they seek to see if this will work and they are trying gymnastics of legal process to stop the suit. They have taken long to do this as a demonstration of the lack of substance. A preliminary objection is hinged on a pure question of law. What is before court is not an objection as it seeks to split the petition into 2. It seeks that the Court investigates in what capacity Benson Okwaro has brought this Petition. He deposed he is authorized and competent to depose to the facts and he is an independent petitioner and thus has authority and capacity to file the petition like the Okiya Omtatah's of

this world he can file such a petition. He submitted that it is on this basis that the 2nd Petitioner filed the Petition. He stated that decisions cited were out of context. In section 12 claims can only be brought by unions on behalf of members and this is not a claim but a petition under Article 21. The 1st Petitioner under Article 236 qualifies as a person who can only bring a petition. Article 260 defines a person to include an incorporated or unincorporated body. The Constitution has sought to unlock the narrow interpretation of the *locus standi*. This was done to ensure access to justice per Article 48 to all persons. He submitted that the narrow perspective taken runs counter to Article 260 and Article 22(2). This is not a claim and the 2 decisions do not apply. He stated that he wished to define Article 258 and submitted that Benson Okwaro is grounded under 3(1). The Communications Authority is a public body performing a public function and any person can bring a Petition. This is the simple definition. When a public body acts unconstitutionally it falls under any person to come to court to take action to remedy. Benson Okwaro has acted pursuant to Article 258. He stated that he was not submitting the 2nd Petitioner is a member of the Communications Authority, he can act in place of the employees. He stated that these are constitutional questions and the questions of the employee. The preliminary objection falls flat and ought to be dismissed. He reiterated the submissions filed and the finding of the 5 judges in the case of **Mumo Matemo v Trusted Society**. The society commenced suit and Court of Appeal determined the question of *locus*. Where any burden is imposed and where there is inability any member of the public can maintain an application under Article 22 and 258 of the Constitution. He urged the Court to be guided by the **Mumo Matemo** case, the authorities cited and the grounds that inform the preliminary objection taken are not serious. For instance the argument that the Petition offends sections of the Labour Relations Act are not worth responding to. This Petition is not founded on a CBA. The other objection raised is not a serious objection. It is that if Petition is allowed the union will be representing managers. This is a Petition brought by Benson Okwaro as an individual and the Union under Article 258. This will not turn the labour relations upside down.

8. He submitted that if preliminary objection is allowed it will undermine rights of Petitioners to protection under Article 21, 22 and 47. The Court should uphold Article 48 of the Constitution. He stated that he would have been happier if Respondent had come to Court to defend the Petition not split hairs. He urged the Court to interpret Constitution under Article 259 and the rights under it should be upheld. Article 259(b) mandates Court to interpret the Constitution to bring about good governance. The Communication Authority has become a leading authority and the Board comes to position and tries to act God. He urged the Court to disallow the preliminary objection and allow the employee rights to be upheld.

9. In his reprise counsel for the Respondent stated that he would be very brief in reply to the loud silence to answer the issues he had raised. He submitted that opposing counsel had digressed. He thus addressed the point counsel had missed. He stated that his colleague had

over emphasized Okumu's role under Article 3(1). Okumu is only known as Secretary General of the 1st Petitioner. Does Article 3 give him the duty to defend the Constitution? Article 3 is the civic duty of a citizen to uphold, defend and protect the Constitution. The Constitution does not give Okumu roving powers to look at the plateau of this Country and say who is not upholding it. He submitted that Article 258 is misapplied and that there is a distinction between Article 22 and 258. Article 22(1) is on the fundamental rights and freedoms. The person as individual can approach court in person. In Article 22(2) there can be a person who can act on behalf of another person who cannot act in his own name. Okumu has not shown that Omo and Kibe cannot act on their own behalf. Okumu does not represent all the employees except job group J, K, and L. The people he is grieving for are on job groups other than these. He is not acting in public interest. There is no action on job groups J, K and L. He stated that in Article 256 the difference is any person can come to Court asserting the Constitution has been infringed and Okumu does not fall under Article 22, 260 and even Article 3 does not give him the power. He submitted that this view he holds is not a narrow interpretation but it is only that which Constitution provides. He stated that he had raised a pure preliminary objection. Counsel admits that if this was case under the labour laws the union can only do so on behalf of trade union members. He agreed that the court must always go to Article 259 when applying the law. He submitted that the Court cannot have the likes of the Petitioners as roving warriors. The 2nd Petitioner should concentrate on his lot and that this is a rogue Secretary General oblivious to his mandate. If the parties who are aggrieved come the Respondent will answer them. He thus urged the Court to allow the objection and strike out the Petition as Okumu is not asking the right questions.

10. I have considered the lengthy submissions of parties condensed above and the Submissions filed by the Respondent on 8th January 2015 and the voluminous bundle of authorities and submissions and further affidavit by the Petitioners filed on 12th January 2015. I thank counsel for their research and erudite submissions before the Court.

11. The starting point is to establish whether the objection raised by the Respondent fits in the prism of preliminary objection. The leading case on the issue is the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696.** wherein Law J.A. stated a preliminary objection to be thus:-

> *"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 the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

Sir Charles Newbold, President stated thus in the same judgment:-

> *"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."*

12. Does the Respondent seek judicial discretion? No. Does the objection consist of a point of law which has been pleaded or arises by clear implication of pleadings and which if argued as a preliminary objection dispose of the suit? Counsel for the Respondent submits that the Petitioner lack *locus standi* to bring the suit on behalf of the parties who are stated to have been affected by the actions of the Respondent. He submits that the Petitioners are not qualified to seek answers on the Petition on behalf of the aggrieved parties. Counsel for the Petitioners on the other hand cites Article 3 of the Constitution, 22 and 258 as well as Article 260 in support of the argument that where there is a breach of the Constitution that any person may come to Court to seek redress.

13. The issues raised in the objection by the Respondent squarely fit the bill. If indeed the Petitioners have no *locus* then the Petition could be struck out and the suit could thus be disposed of. What is raised fits between the pillars of **Mukisa Biscuit** above.

14. The Respondent cites various decisions of the Court and the Court of Appeal in support of the contention that the Petitioners lack capacity to sue on behalf of the Respondent's employees in the cadre of the aggrieved parties. The Petition was brought under Certificate of Urgency on 22nd December 2014. In the Petition the Petitioners sought various reliefs. The reliefs sought, in brief, were conservatory orders directed against the Respondent restraining the Respondent either by itself, assign, agent, organ or any person claiming through it from advertising or taking any steps to recruit or retain any persons to the positions of general managers, chief managers, and all senior manager positions. The Petitioners sought the scrapping of the positions created by the Respondent.

15. Article 3 of the Constitution places an obligation upon every person to respect, uphold and defend the Constitution. The Petitioners submit that when read with Article 258 the Petitioners are merited in seeking the orders in the Petition. Article 258 provides as follows:-

> 258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
>
> (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
>
> (*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;
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> (*c*) a person acting in the public interest; or
>
> (*d*) an association acting in the interest of one or more of its members.

16. The Constitution further provides in Article 259 as follows:-

> 259. (1) This Constitution shall be interpreted in a manner
>
> that—
>
> (*a*) promotes its purposes, values and principles;
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> (*b*) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
>
> (*c*) permits the development of the law; and (*d*) contributes to good governance.

17. Labour rights under Article 41 also come into play. Article 41 strikes a balance between the owners of capital and labour. The role of unions is to engage the employer so as to protect the employment interests of workers and will negotiate on employee wages, overtime payments, benefits and allowances, hours of work, termination and the like. It is also within the role of trade unions to ensure that its members get satisfactory work terms and conditions and to further ensure that the employer does not breach any terms of the agreement. On the side of capital, the employer is represented by a cadre of officers whose positions in the organization preclude them from being members of trade unions. The persons aggrieved and on whose benefit the Petition has been brought by the 1st and 2nd Petitioner who are a trade union and the Secretary General of the trade union respectively are in managerial positions in the Respondent.

18. The Petitioners cited the cases of **Fredrick Ngari Muchira & 99 others v Pyrethrum Board of Kenya [2013] eKLR**, **James Omariba Nyaoga v Speaker of Kisii County Assembly & 2 Others [2014] eKLR** *inter alia* in support of the Petitioner's position. I find these cases to be very instructive as none of them relate to a trade union or union official seeking relief on behalf of the aggrieved parties. In the case of **Nyaoga v Speaker Kisii County Assembly** the Petitioner therein was seeking reliefs specific to him. That is markedly different from the case before me.

19. Whereas the decision in the **Mumo Matemu** case is considered good law, I am not persuaded that in this case there is sufficient basis to suggest that there is sufficient interest by the 1st Petitioner and the 2nd Petitioner in the upholding of the tenets of good labour practice or the enforcement of the Constitution on behalf of the Respondent's management. In any event, as was held in the case of **Republic v. Mwangi S. Kaimenyi ex parte KIPPRA [2013] eKLR** the breach or the threatened breach of the aggrieved parties contracts of service is not a public act or a matter of public law. I am in agreement with the learned Judges of Appeal – Warsame, Otieno-Odek & Kantai JJA and hold that the breach or the threatened breach of the aggrieved parties contracts of service is not a public act or a matter of public law notwithstanding the fact the Respondent is a public body, but is a matter of private law more specifically contractual law. If a society such as the Trusted Society had approached the Court or the likes of Okiya Omtatah who is not a trade union member or official or a registered trade union such as the 1st Petitioner I could perhaps have bought the argument that there is an attempt to uphold the Constitution though this is far from the truth given the contractual nature of the dispute.

20. As matters lie, it is clear that to allow the Petition to subsist would be encouraging an incestuous relationship between labour and capital and elevate contractual disputes into Constitutional questions where there is no basis to do so. Trade unions are not representatives of management. This would fly in the face of international obligations and treaties under Article 2 of the Constitution relating to the International Labour treaties Kenya has ratified and in some cases domesticated. The order that commends itself for me to make is one striking out the Petition with costs to the Respondents. The aggrieved parties are more than free to make suitable efforts to safeguard their interests in person.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of January 2015

Nzioki wa Makau

Judge