



**Kenya Union of Commercial Food and Allied Workers v Kenya Meat Commission
(Cause E278 of 2023) [2024] KEELRC 1176 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1176 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E278 OF 2023**

SC RUTTO, J

MAY 17, 2024

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

KENYA MEAT COMMISSION RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated 4th April 2023, the Claimant Union brought the suit herein against the Respondent seeking the following orders:
 - a. A declaration that withholding union dues without any written instructions from any member to do so is unlawful.
 - b. An order that all outstanding dues of Kshs 4,940,643 less any amount paid through an order of this Court be settled within fourteen days of the date of this Judgment.
 - c. Interest on Kshs 4,940,643 at court rates be awarded to the Claimant from February 2013 to the date of full payment.
 - d. Any other relief the court finds fit to meet the ends of justice.
 - e. Costs of the Claim to be awarded to the Claimant in quantified amounts.
2. The gist of the Claimant’s case is that the Respondent deducted union dues from its employees between February 2013 and August 2020, but failed to remit the same.
3. Putting the Claimant to strict proof, the Respondent contends that the Claim is founded on misrepresentations and untruths as no evidence of unpaid dues has been produced. Consequently, the Respondent has asked the Court to dismiss the Claim with costs.



4. During the hearing which proceeded on 14th February 2024, both parties called oral evidence.

Claimant's Case

5. The Claimant called oral evidence through Ms. Rebecca Muthoki who identified herself as the Union's Branch Secretary for Athi River.
6. Ms. Muthoki told the Court that she represents workers at the branch level and is also a Board member of the Claimant Union.
7. She stated that the parties herein have a formal relationship following which several Collective Bargaining Agreements have been concluded.
8. It was her evidence that the Respondent's employees signed the requisite Form S, authorising the Respondent to deduct and remit union dues to the Claimant as required under the law.
9. That from February 2013 all the way to August 2020, the Respondent deducted but wavered in payment of union dues. During the said period, a total of Kshs 7,276, 050.00 in unpaid remittances accrued.
10. She further averred that all requests to have the Respondent settle the outstanding arrears or agree to a suitable payment plan were ignored.
11. That over the same period, the Respondent partly remitted the subscriptions amounting to Kshs 2,335,407.00 hence as of August 2020, the outstanding arrears stood at Kshs 4,940,643.00. It was her evidence that the subject matter of the instant dispute is the said sum of Kshs 4,940,643.00.
12. Ms. Muthoki further stated that the Respondent ignored the conciliator and ignored the conciliation report and equally ignored a request made to them to accept the report to form part of the basis for the settlement.
13. Closing her testimony in chief, Ms. Muthoki opined that the Claimant is entitled to the reliefs sought.

Respondent's Case.

14. The Respondent called oral evidence through Mr. Anthony Ademba who testified as RW1. He identified himself as the Respondent's Chief Legal Officer and proceeded to adopt his witness statement to constitute his evidence in chief.
15. It was Mr. Ademba's evidence that the Respondent's employees did not instruct the Respondent to deduct any dues and that the so-called requisite forms were not signed by its employees.
16. Mr. Ademba further testified that the Claimant has not relied on the correct payment slips. According to him, the pay slips produced by the Claimant are not authentic.
17. He further stated that the Claimant's allegations are unfounded in law and lack merit as there is no proof as to how much was deducted as union dues, and how much was remitted.
18. Mr. Ademba contended that the Respondent paid the full subscriptions as part of the terms of the Collective Bargaining Agreement. Putting the Claimant to strict proof, Mr Ademba asserted that the payments were not part payments but full payments.
19. He further stated that the Claimant's alleged disputed amount is not supported by any precise financial statements and a list of persons whose deductions were allegedly not paid.



Submissions

20. It was the Claimant's submission that it had proved by documentary evidence that the Respondent deducted union dues but chose to withhold the same unlawfully. The Claimant further submitted that there is no evidence by the Respondent of any employee disputing his or her membership.
21. According to the Claimant, it was the duty of the employer to provide its payroll details showing the list of members of the Union authorizing deduction and remittance of their union dues. That the Respondent should have disputed the names by availing records of NSSF and NHIF payments showing that indeed, the names provided by the Claimant are not in their employ and do not subscribe to union membership.
22. The Claimant further submitted that the Respondent was under a duty to provide pay slips showing their unionisable employees' wages and deductions therefrom to dispute the claim.
23. It was further submitted that the Claimant having proved her union membership and having proved that deductions were actually made from employee's pay slips, the Respondent was under a duty to make returns to the Registrar of trade unions as required under the Gazette notice. It was the Claimant's contention that such returns have not been availed to the Court.
24. In the Claimant's view, the burden was on the Respondent to provide evidence that what it (Claimant) had provided did not exist or was not authentic.
25. On the Respondent's part, it was submitted that it is untenable for the Claimant to allege that the deductions of the year 2013 onwards were not remitted yet no single complaint or claim was ever made at that time which is over 10 years.
26. The Respondent further posited that delay defeats equity as the Claimant is unable to precisely prove the employees from whom it deducted their dues but failed to remit.
27. It was the Respondent's further position that it has always remitted the Union dues to the Claimant as and when they fall due on a monthly basis and in full.
28. The Respondent further contended that he who alleges must prove and that the onus was on the Claimant to state with precision how much was deducted in a particular month and how much was remitted to enable the Court to ascertain the truthfulness.
29. It was the Respondent's further contention that the Claimant did not provide any appointment letters or resignation letters to show that they were in any formal relationship with the Respondent.
30. According to the Respondent, some of the unionisable employees might have died in the period of 2013-2020 and no evidence was produced to show that all the employees were alive.

Analysis and Determination

31. Flowing from the pleadings, the evidence on record as well as the rival submissions, it is clear that the singular issue falling for the Court's determination is whether the Claimant is entitled to the reliefs sought.
32. From the record, it is evident that the Claimant's claim against the Respondent is for the sum of KShs 4,940,643.00 being unremitted union dues between the month of February 2013 and August 2020.
33. As it is, the Claimant's claim is in the nature of specific damages. It is trite law that a claim for special damages must not only be specifically pleaded but also strictly proved. This position was reiterated by



the Court of Appeal in *Capital Fish Kenya Limited v the Kenya Power and Lighting Company Limited* [2016] eKLR.

34. Needless to say, a party who desires the court to award him special damages, must as a matter of law, strictly prove its claim to the required standard.
35. In the case herein, the Claimant exhibited copies of check-off forms containing the names of the Respondent's employees who had acknowledged membership to the Union between 2010 and 2019. Further to that, the Claimant exhibited copies of employees' pay slips indicating that the Respondent effected union dues from their salaries.
36. I have carefully scrutinized the check-off forms exhibited against the copies of the pay slips on record.
37. Upon scrutiny, the Court notes that there are employees whose names are missing from the check-off forms but whose pay slips have been exhibited. Case in point is, Hudson Simiyu Situma, Charity Wairimu Thiongo, Beatrice Njoki Ndungu, Mosi Ndinda Kirathi and Ndongye Evanson Kyalo.
38. With respect to the employees whose names appear in the check-off forms and whose pay slips have been exhibited, it is notable that cumulatively, their deductions amount to Kshs 2,589.00.
39. From the record, the Claimant Union admitted to receiving the sum of Kshs 2,335,407.00 from the Respondent during the period in question. This being the case, the question that begs is whether there is a probability that the said amount is part of the sum of Kshs 2,859.00 deducted from the employees whose pay slips have been exhibited. The answer to this question is yes and no.
40. Why do I say so? No schedule was exhibited before Court containing the names of the employees with respect to whom remittances of Kshs 2,335,407.00 were made. Without a schedule of names, it is not possible to ascertain the specific employees whose deductions were not remitted during the period in question.
41. As it is, the evidence on record has not proved in a specific manner, the outstanding amounts claimed by the Claimant.
42. For the Claimant to prove its case, it could have sought the assistance of the court to compel the Respondent to produce the schedule of the names of the employees whose remittances had been made during the period in question.
43. In terms of Section 69 as read together with Section 68 (a) of the *Evidence Act*, a party may require production of specific documents that are in the possession of the other party whom the document is sought to be proved. Such production is normally preceded by a Notice to Produce. Hence, I can't help but question why the Claimant failed to exercise this option by seeking to compel the Respondent to produce the schedule of names of employees with respect to whom the remittances were made. That is if the said information was not within its possession.
44. At the end of the day, the Claimant merely pleaded the sums claimed in a global manner but did not correlate the said figures to the deductions from each employee whose pay slips were exhibited. It is this Court's view that this did not satisfy the required threshold of strict proof.
45. Revisiting the determination of the Court of Appeal in *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* (*supra*), the learned Judges observed as follows:

“The appellant apart from listing the alleged loss and damage, it did not...lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court



to award them. Indeed there was not (sic) credible documentary evidence in support of the alleged special damages.”

46. Suffice to say, the Claimant herein was required to prove its claim strictly. As it is, the documents on record do not support the claim before Court. In order for the claim to succeed, strict proof was required from the Claimant’s end.
47. In view of the foregoing, I cannot help but find that the Claimant has failed to prove its claim to the requisite standard.

Orders

48. In the end, I find the claim to be without merit and the same is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Muunda instructed by Mr. Nyumba

For the Respondent Ms. Njeri

Court Assistant Millicent Kibet

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

