



**Tailors & Textiles Workers Union v Ashton Apparels EPZ Limited & 2 others
(Cause E119 of 2023) [2024] KEELRC 1197 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1197 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E119 OF 2023**

**M MBARŪ, J
MAY 9, 2024**

BETWEEN

TAILORS & TEXTILES WORKERS UNION CLAIMANT

AND

ASHTON APPARELS EPZ LIMITED 1ST RESPONDENT

MOMBASA APPARELS EPZ 2ND RESPONDENT

ASHTON MOMBASA APPAREL EPZ LIMITED 3RD RESPONDENT

RULING

- 1 The ruling herein relates to the applications dated 31 October 2023 and 29 November 2023 by the claimant under the provisions of Section 3A of the [Civil Procedure Act](#), Section 3 of the [Employment and Labour Relations Court Act](#), Order 26 Rules 1 and 2 of the [Civil Procedure Rules](#) and Rule 17 of the [Employment and Labour Relations Court \(Procedure\) Rules](#), 2016.
- 2 Under the application dated 31 October 2023, the claimant is seeking orders that;
 - a. ...
 - b. The court be pleased to grant the applicant an Order directed to the respondents to deduct and or remit to the applicant the Union dues deductible and remittable to the union in compliance with Sections 48 and 49 of the [Labour Relations Act](#) pending hearing and determination of the instant suit.
 - c. This court do issue a further order to the respondents to effect deductions of union dues from over 525 and 535 members respectively current union members as required by law at the time of payment of salaries and wages on all union members and agency fees from the unionisable employees and in every subsequent month and remit the same to the applicant union.



- d. The court be pleased to issue an injunction against the respondents restraining them from laying off and or terminating the applicant's members and all unionisable staff in their employment from service on account of joining the union and or any other unlawful basis pending the hearing and determination of the instant suit.
- e. The cost of this application be paid for by the respondents.
- 2 The application is supported by the Affidavit of Rev. Joel Kandie Chebiithe National General Secretary of the claimant and on the grounds that the claimant is a registered trade union representing unionisable employees of the respondents. Under Sections 48 and 49 of the *Labour Relations Act, 2007* (the LRA) the respondents have failed to deduct and remit union dues from its members from September 2023 to date which sums the respondents would have released to the applicant. This is contrary to the *LRA* and despite the demand for remittance, the respondent has ignored it.
- 3 Rev. Chebii avers in this affidavit that the respondents have now threatened to lay off and/or terminate the services of its members and other unionisable employees because of their union membership and/or association. Unless the orders sought are issued, the claimant will suffer loss and damage and its members in the service of the respondents be victimized.
- 4 In reply to the claimant, the respondent filed the Replying Affidavit of Abizer Lokhandwala General Manager — Administration of Ashton Apparel EPZ Limited, the 1st respondent. He avers that he has the authority to respond herein.
- 5 The claimant has alleged that the Respondents have declined to withhold union dues from the monthly remuneration payable to each of the Respondents' employees who are its members and to thereafter remit the said dues to the Union. The claimant also alleged that the Respondents have threatened to terminate the contracts of some of their employees simply because they have elected to become members of the Union. Each of the Respondents should be ordered to sign a Recognition Agreement with the Union with immediate effect to pave the way for negotiations in respect of a CBA.
- 6 However, in the claim for union dues, through a letter dated 25 October 2023, the claimant forwarded 28 Check Off Forms signed by 525 employees of the 1st Respondent who have acknowledged being members of the Union and demanded that the 1st Respondent withhold and remit 2.5% of the basic salary of each of the 1st Respondent's employees who are its members each month into the Union's designated Bank Account. The claimant claimed to have recruited a total of 2569 members as of 23 October 2023. Before this date, the respondents had only received 28 check-off forms with 525 employees and members of the claimant. These lists only came to the respondents' attention after the filing of this claim.
- 7 The respondents verified the share lists and ascertained that the total number of claimant's members in its service was 525 and not 2569 as stated. The 1st Respondent's employees had signed the Check Off Forms and consequently agreed to have the Union dues withheld from their monthly remuneration and remitted to the Union.
- 8 Since 1st Respondent was duty bound to ensure that all persons listed in the said List were actually her employees and that every one of the said employees had to agree to have part of their monthly wages withheld as Union dues by the Company and remitted to the Union, and as a matter of prudence, the 1st Respondent took a few days with effect from 21.11.2023 up to 27.11.2023 (a total of 4 working days) to verify the employees listed in the said List against her employees as per her records and also published the said List to the employees for them to register their objections, if any, in respect of the deduction of the union's dues from their wages.



- 9 Following the verification of the List in respect of the 1st Respondent's employees, the 1st Respondent was able to establish that; [
- a. a total of 1607 employees in the said List, were, as of 27 November 2023, her employees and indeed members of the Union and they had agreed to have 2.5% of their basic salary withheld by the 1st Respondent and remitted to the Union,
 - b. a total of 275 persons included in the Union's List were employees of Mombasa Apparel Limited, the 2nd Respondent in this suit,
 - c. a total of 714 persons included in the said List as members of the Union had been duplicated,
 - d. a total of 62 persons included in the said List as members of the Union were not employees of the 1st Respondent,
 - e. the names of a total of 150 persons included in the List as members of the Union did not match the national identity card numbers or vice versa and therefore required additional verification,
 - f. a total of 146 employees of Ashton Apparel were wrongly listed in the List for Mombasa Apparel,
 - g. a total of 16 persons included in the Union's List had objected to being members of the Union and consequently to having the Union dues withheld from their wages and,
 - h. a total of 25 employees included in the List had absconded from work for more than seven days and were therefore deemed to be no longer employees of the 1st Respondent unless reinstated following disciplinary proceedings.
- 10 Abizer avers that on this basis and in respect of the 1607 1st Respondent's employees who have already been validated, the 1st Respondent effective November 2023, starts withholding and remitting the Union dues. In respect of the 150 employees whose names and identity cards did not match, the 1st Respondent, in conjunction with the Union, to finalize the validation exercise and take necessary further action.
- 11 The 1st Respondent only received the 28 Check Off Forms from the claimant on 6 November 2023 upon being served with copies of the pleadings in this suit. These check-off forms were neither clear nor legible. The statutory period within which the 1st Respondent should start withholding and remitting the Union dues started running then and not earlier. The 1st Respondent should start remitting the said dues with effect from 31 December 2023 and not 31 October 2023.
- 12 Abizer aver that with regard to claims against the 2nd Respondent for union dues, the claimant forwarded 27 Check Off Forms signed by 535 employees of the 2nd Respondent who have acknowledged being members of the Union. A verification exercise was gone into and the 2nd Respondent was able to establish that;
- a. a total of 1518 employees in the said List, were, as of 27.11.2023, her employees and were indeed members of the Union and that they had agreed to have 2.5% of their basic salary withheld by the 2nd Respondent and remitted to the Union,
 - b. a total of 146 persons included in the Union's List were employees of Ashton Apparel EPZ Limited, the 1st Respondent in this suit,



- c. a total of 329 persons included in the said List as members of the Union had been duplicated, [iv] a total of 155 persons included in the said List as members of the Union were not employees of the 2nd Respondent,
 - d. the names of a total of 118 persons included in the List as members of the Union did not match their national identity card numbers or vice versa and therefore required additional verification,
 - e. a total of 275 employees of Mombasa Apparel had wrongly been listed as employees of Ashton Apparel,
 - f. a total of 178 persons included in the Union's List had objected to being members of the Union and consequently to having the Union dues withheld from their wages and lastly,
 - g. a total of 12 employees included in the List had absconded from work for more than seven days and were therefore deemed to be no longer employees of the 2nd Respondent unless reinstated following disciplinary proceedings.
- 13 The 1518 2nd Respondent's employees who have already been validated, the 2nd Respondent effective November 2023, start withholding and remitting the Union dues. In respect of the 118 employees whose names and identity cards did not match, the 2nd Respondent, in conjunction with the Union, to finalize the validation exercise and take necessary further action.
- 14 Abizer aver that the 2nd Respondent only received the 27 Check Off Forms from the claimant on 6 November 2023 after being served with copies of the pleadings in this suit. The 2nd respondent is willing to commence union dues deductions and remittance with effect from 31 December 2023 and not 31 October 2023 as claimed by the claimant.
- 15 Abizer also aver that on the orders sought by the claimant seeking for an injunction against the 1st and 2nd Respondent's restraining them from laying off or terminating the Union's members as victimization, this is deliberate and meant to mislead this Court. The claimant members have engaged in unlawful strike and work stoppage leading to the stoppage of day-to-day operations of the 1st and 2nd Respondents for almost 5 days, but the respondents elected to engage in negotiations with their employees under the supervision of the Ministry of Labour and Social Protection, and the Export Processing Zones Authority (EPZA). The negotiations were ultimately successful and culminated in an amicable agreement by the employees to return to work. There is an agreement between the respondents, the County Labour Officer, Mombasa and EPZ representatives dated 25 October 2023.
- 16 There is therefore no factual basis for the claim that any employee has been victimized or discriminated against by the Respondents due to unionization. The orders sought in their nature should not be issued in the interim. There is no risk of damage or loss to the Union's members to be protected by this Court vide an order of an interlocutory restraining injunction pending suit.
- 17 Under the application dated 29 November 2023, the claimant is seeking orders that;
1. ...
 2. ...
 3. The court be pleased to issue an injunction against the respondents restraining them from laying off, declaring them redundant and/or terminating the claimant/applicant's members and all unionisable staff in their employment from service on account of joining the union and/or other unlawful basis pending the hearing and determination of the instant suit.



4. The respondent be directed to deposit security estimated at Kshs.5 Million comprising the undeducted union dues as security for the claimant/applicant's claim to cushion the anticipated judgment by the court when the matter is determined to the satisfaction of this court.
 5. The costs of this application be paid for by the respondents.
- 18 The application is supported by the Affidavit of Rev. Joel Kandie Chebiithe National General Secretary of the claimant and on the grounds that he believes that the 1st and 2nd Respondents are in the process of winding up their operations in Kenya and proceeding towards closure of the business. The 2nd Respondent is currently in the process of closing its operations in the Country and transferring its assets to the 1st Respondent. The 1st and 2nd Respondents have served their employees who are members of the Claimant/Applicant Union with a notice of intention to declare them redundant without following procedure. It is only fair and just that the orders sought be granted.
- 19 In his Affidavit, Rev, Chebii aver that in the Statement of Claim dated 31st of October, 2023 filed contemporaneously with the Notice of Motion dated 31 October 2023, the claimant is seeking the deduction and remittance of Union dues. The suit is necessitated out of a belief that the respondents are in the process of closing down their operations by transferring their assets to an entity known as Ashton Mombasa Apparels EPZ Limited and this information is contained in the notices dated 21st November 2023.
- 20 Rev. Chebii aver that the 1st and 2nd Respondents have communicated to its employees who are members of the Union their intention to declare them redundant and have already issued some of the employees with redundancy letters without following procedure. There is information within the public domain that was circulated in the local daily newspapers to the effect that the 1st and 2nd Respondents are in the process of winding up their operations and intend to declare their employees redundant on 23rd December 2023. It is just, fair and equitable that the 1st and 2nd Respondents should provide security for the payment of the claim and costs especially since Judgment is pending because the 1st and 2nd Respondents are winding up their operations and declaring their employees redundant without following procedure, the Union is apprehensive that the Respondents will not be in a position to pay costs if the Claim is successful. The respondents be ordered to jointly provide security for the undeducted union dues estimated at Kshs. 5 Million.
- 21 In reply, the respondents filed the Replying Affidavit of Abizerwho admitted that the Respondents are in the process of transferring their assets and winding up their operations in Kenya but there is no intention to wind up their operations in Kenya without settling any accrued dues to the Union, whether as claimed by the Union or at all.
- 22 The respondents also admit that the claimant served the Respondents with the Check Off Forms on 6 November 2023 when they served the pleadings in this suit via email. These records were not clear and required verification. The claimant only availed clear copies on 21 November 2023 within which the respondents had 30 days under the law to effect union dues. As a matter of law, the respondents could only seek to enforce payment of the union dues with effect from 31st December 2023 upon the claimant having satisfied all other applicable statutory pre-conditions.
- 23 Abizer aver that arising from a validation exercise carried out by the Respondents in respect of the List made available by the claimant on 21 November 2023, the respondents were able to validate a total of 1607 employees in the case of the 1st Respondent and a total of 1518 employees in the case of the 2nd Respondent, a total of 3,125 consolidated employees as eligible for payment of union dues.



- 24 The Respondents made an undertaking to the Court on 28 November 2023, and elected not to wait until 31 December 2023 to effect union dues and instead started withholding and remitting the said dues to the claimant with effect from 30 November 2023. The claimant acknowledged receipt of the funds.
- 25 The persons included in the Lists made available by the Union on 21 November 2023 whose dues (if any) were not remitted on 30 November 2023, were because of many problems which needed to be resolved jointly by the Respondents and the claimant, particularly concerning certain employees who claimed that they were no longer members of the Union and had therefore not agreed to pay Union dues.
- 26 On the lists shared some 1st Respondent's employees who are members of the Union had been listed as employees of the 2nd Respondent and, vice versa and this error needed to be corrected. The lists contained persons who were no longer in the employment of the respondents. some employees had been absent from work without leave for a period exceeding 7 days and had therefore been deemed to have ceased working pending disciplinary proceedings and possible reinstatement.
- 27 Abizer avers that the claimant provided additional Lists to the Respondents well after the institution of these proceedings and that said Lists were not accompanied by Check Off Forms duly signed by the individual employees. For instance, by a letter dated 27 November 2023, the claimant served the 2nd Respondent with a List containing 993 names of their alleged members.
- 28 The failure by the Union to serve the clear and legible Check-Off Lists well before 6 November 2023 outside the statutory period for payment of Union dues on 31 October 2023 together with statutory omissions is what led to the non-payment of Union dues for October 2023.
- 29 Abizer aver that the Respondents, in good faith, have continued validating the Lists made available by the claimant and the validation exercise, in addition to the 3,125 employees whose Union dues were settled on 30 November 2023, has so far yielded only an additional 648 members of the Union rather than the claimed 1176 members. Even though the Union is yet to satisfy all applicable statutory preconditions, the Respondents have, as a show of good faith, elected to settle the Union dues in respect of all validated employees, amounting to a total of 3,776 employees on or before 20 December 2023. until each of the statutory requirements prescribed by the law for the Respondents to start paying the Union dues after receipt of clear and legible Check-Off Forms from the claimant has been satisfied, the orders sought by the claimant are premature. the demand for payment of dues, which in principle is not contested by the Respondents, is not justified.
- 30 With regard to the redundancy, Memorandum of Agreement dated 7 December 2023 signed between the claimant, the Respondents and Officials from the Ministry of Labour and Social Protection, parties agreed on how the Respondents would proceed with the intended redundancy and there is, as of to date, no complaint by the Union that the Respondents are not complying with the terms of the Memorandum of Agreement. Orders sought in this regard and without merit.
- 31 There is an undertaking given by the Respondents to pay the claimant union dues applicable in respect of the 3,776 (comprising of 3,125 + 648) employees who have so far been validated as members of the Union by 20 December 2023. Hence there is no longer any need for this Court to sustain the status quo orders made on 1st December 2023 and should therefore be discharged.
- 32 In response, the claimant filed a Supplementary Affidavit and Further Supplementary Affidavit of Rev. Chebi who aver that



- 33 The respondents have not complied with the directions of this court given on 8 November 2023. This is in bad faith. The 1st Respondent has proceeded to issue redundancy notices to the Union members to avoid the deduction of union dues. The union members having signed their check-off forms authorised the deduction of Union dues which is within their right to join a Union of their choice and the Respondent's actions in declaring the Union's members redundant amounts to vilifying the employees on account of their Union membership. Unless the Court intervene by directing the Respondents to deduct and remit union dues of the Union's members and to stop them from declaring the employees redundant on 23 December 2023, their claim will be rendered nugatory.
- 34 Rev. Chebii also avers that on 30 November 2023, the claimant filed the instant matter together with a Notice of Motion Application in respect of which Interim Orders were issued on the 1st of December, 2023. Parties recorded a Consent Order on 13 December 2023 compromising the suit which Consent Orders the Respondents have failed to comply with. The Claimant wrote to the Respondent informing them of the shortfall in the deduction and remittance of Union dues which the Respondents have refused, failed and/or ignored to remedy.
- the Claimant has recruited a total of 5865 members but only received deductions in respect of 4553 thereby giving a shortfall of 1312 membership deductions and remittance. The intention is to reduce the numbers and finally lock out the Union. The orders sought will protect the claimant and its members.
- 35 In his Further Replying Affidavit, Abizer aver that there are three (3) listed respondents. Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited and Ashton Mombasa Apparel EPZ Limited are three (3) separate and distinct legal entities incorporated at different times and owned by different persons, both natural and juristic.
- 36 At the end of the end of exchange of pleadings, parties attended and filed written submissions and attended court to highlight the same.

Determination

- 37 On both applications dated 31st October 2023 and 29 November 2023, the issues which emerge for determination are;
- 38 Whether an order directing the respondents to deduct and remit union dues to the claimant should be issued under Sections 48 and 49 of the LRA;
- 39 Whether the court should order the respondents to effect union dues from over 525 and 535 members from the 1st and 2nd respondents respectively;
- 40 Whether the court should restrain the respondents from laying off and terminating the employment of unionisable employees;
- 41 Whether the court should order the respondents to deposit security comprising the undeducted union dues as security for the due performance of the judgment herein.
- 42 On the last issue seeking a security deposit for the due performance of the judgment, this is a matter for the court to determine based on the facts and circumstances of each case. The main purpose should be to secure the integrity of the proceedings and outcome as held in the case of Mbula v Nzangani (Civil Appeal E150 of 2022) [2023] KEHC.
- 43 The law governing the security of costs is set out under Order 26 of the Civil Procedure Rules which provides that;



1. In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.
2. If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out the defence the grounds of the defence together with a statement of the deponent's belief in the truth of the facts alleged.
3. Where it appears to the court that the substantial issue is which of two or more defendants is liable or what proportion of liability two or more defendants should bear no order for security for costs may be made.

44 Hence, an order for security for costs is discretionary. The court should grant parties the opportunity to pursue their claims in court but such rights must be guaranteed while taking into account the rights of others. The application for security of costs should not be used oppressively to stifle a genuine claim or shut out a good response.

45 As appreciated by the parties, on 13 December 2023 the court adopted the consent of the parties dated 12 December 2023 to the effect that;

1. Pending hearing and determination of this suit by the court, the respondents to deposit as security for the payment of union dues for the month of December 2023, the sum of Kes. 5,000,000 (five million) (the Security deposit) only in a joint escrow bank account to be opened in the names of the advocates for the claimant and the advocates for the respondents at I & M bank, Mombasa Branch, on or before 20.12.2023.
2. The union dues in respect of the aggregate 3776 employees who have already been validated to be members of the Union as at 8.12.2023 are to be directly paid by the respondents to the union on or before 20.12.2023.
3. The Union is to provide the respondents with signed Check Off Forms in respect of any other additional members of the Union on or before 15.12.2023 for validation by the respondents and upon validation, the union dues payable in respect of these additional members to be also paid directly to the Union by the respondents on or before 20.12.2023.
4. In default of payment, the claimant to be at liberty to issue execution against the respondents.
5. Upon full compliance with the orders herein by the respondents, the interim order made on 1.12.2023 by this court directing the respondents to maintain the status quo at the shop floor as of 1.12.2023 to stand automatically discharged and/or vacated.
6. Upon full payment of the said dues to the Union, the Security Deposit to be forthwith released back to the respondents by being paid into the respondents' nominated account in the same bank and the escrow account to be thereafter closed.
7. There be liberty to subsequently apply for all the parties to this claim.

46 On 13 December 2023, the court adopted the Consent Order outlined above and added the following conditions;

47 Consent dated 12 December 2023 and filed on 13 December 2023 is hereby adopted as the Order of the court and interim Orders herein vacated.

48 On the pending question of recognition of the claimant by the respondents, mention on 24 January 2024 for further directions



- 49 With these orders, consent order (5) was addressed. The need to maintain the shop floor as of 1st December 2023 was allowed to change.
- 50 The core issue remained the verification of the list of claimant's members, payment of union dues and the recognition of the claimant by the respondents. For these purposes, a security deposit was issued.
- 51 It is common cause that parties have had back and forth from October 2023 to May 2024 over the claimant's member lists. This has kept changing for different reasons. Some are that the ownership of the respondents has changed and the initial 1st and 2nd respondents increased to a 3rd respondent (not a respondent in the initial pleadings).
- 51 The 3rd respondent is misplaced in these proceedings. No particular orders are sought against this respondent.
- 52 The court recognizes submissions by the respondents that;
- a. Ashton Mombasa Apparel EPZ Limited was incorporated on 9 November 2023 and as an EPZ enterprise on 20 December 2023;
 - b. Ashton Mombasa Apparel EPZ Limited began operations as an EPZ enterprise on 2 January 2024 and took in employees on new fixed-term contracts, all of the former employees of Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited.
 - c. Following the acquisition of their assets and entire business undertaking, Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited, declared 100% redundancy of all of their employees and ceased their day to day operations.
- 53 The 1st respondent, Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited have since been sold and taken over by Ashton Mombasa Apparel EPZ Limited, the 3rd respondent.
- 54 It is also a common cause that the employer is the custodian of work records. Any need for verification of the record of employees vests with the employers. In this regard, the claimant does not contest that on different dates, different lists of its members were shared with the respondents who verified that same and shared the same. These lists have since been validated by the respondents and the final tally of the same reveals the following;
- a. The consent Order dated 12 December 2023 related to an aggregate of 3776 employees;
 - b. In the Further Affidavit of Abizer dated 14 March 2024, he has attached the following lists;
 - a. Annexure "JKC-2" List of 1473 employees of Additional Employees of Ashton Mombasa Apparel EPZ, not a party herein;
 - b. Annexure "AL-3" comprising copies of documents establishing payment of an aggregate sum of Kshs. 1,885,163.87 as dues to the Union, for a total number of 4553 employees.
- 55 The claimant in its submissions recognizes that it has been recruiting new members from the respondents including the 3rd respondent. Indeed these changes in the shop floor are bound to change numbers up and down with the 3rd respondent's adoption of engaging its employees on fixed-term contracts.
- a. By 25 October 2023 the Claimant Union had recruited a total of 2569 members from the 1st Respondent Company;



- b. By 27 November 2023 the claimant had a record of 5020 employees as members;
- 56 In the supporting Affidavit of Rev, Chebii he appreciates the employee records of the 2nd Respondent, out of the 5020 employees, about 1030 employees are in the management cadre while 3990 employees are unionisable.
- 57 The numbers oscillate from the Consent Order number of 3776. This can be explained due to the fluid nature of employment.
- 58 Should the court direct the respondents to deduct and remit union dues to the claimant? The respondents have admitted the exercise gone into to verify the lists shared by the claimant and the validation thereof and even before the Consent Order was confirmed by the court on 13 December 2023 had made an undertaking to settle the union dues and further, for any additional lists, upon verification, to settle the union dues. With the changes within the respondents and the emergence of the 3rd respondent, the payments made by the respondents with regard to union dues to the claimant cannot be faulted.
- 59 As outlined above, as of 13 December 2023, the issues agreed upon related to 3776 union members spread between the 1st and 2nd respondents. The additional list by the claimant that the Respondents did not withhold and remit Union dues in respect of 1312 employees, assessed from the various lists and letters dated 20 February 2024, 12 February 2024 and 6 March 2024 all related to the 3rd respondent, a third party in these proceedings. Union dues payable by Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited, the two Respondents in this Claim, are complete.
- 60 Any claims arising with regard to the payment of Union dues by Ashton Mombasa Apparel EPZ Limited which, is a separate and distinct legal entity with separate and distinct legal obligations in respect of the payment of union dues to the claimant should be separated from these proceedings and addressed with such entity.
- 61 Whether the respondent should pay union dues for 525 and 535 members from the 1st and 2nd respondents respectively is hence addressed.
- 62 With regard to whether the court should restrain the respondents from laying off and terminating the employment of uninsurable employees, following Consent Order (5), the shop floor status quo has changed. A third party has acquired the respondents. Whether to lay off employees or not is a legal issue contemplated under Section 40 of the *Employment Act*, 2007 and where the respondents are alleged to have applied the fact of unionization to victimize the employee affected under the layoff, such requires the call of evidence.
- 63 Rev. Chebii in his Affidavits has not offered any live cases of the affected employees. The facts of such matter cannot be discerned from the affidavits on record. This therefore requires a call of evidence.
- 64 On the other hand, termination of employment is regulated by law. It must be justified and in accordance with due process. Whether the respondents have since transferred assets and liabilities to third parties, where a claim exists from any member of the claimant, such acquisition by third party cannot negate the motions of Section 35(4) of the *Employment Act*, 2007 that requires;
- (4) Nothing in this section affects the right—
- (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or



(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.

65 This position is emphasized by the court in the case of *Akrim v Mobile Consultations Africa Limited* (Employment and Labour Relations Cause E055 of 2022) [2023] KEELRC.

66 In *David Obama v Kenol Plc* (2021) eKLR the court held that ultimately even where there is a bona fide defence, in employment and labour relations disputes, under Section 35(4) of the *Employment Act* 2007 provisions must come to bear. This is a fundamental provision to protect an employee who is possessed of a legal right secured within his/her employment.

67 Again, this requires a call for evidence. On the available material, the court cannot discern any specific claim by the claimant.

68 The last issue with regard to deposit security comprising the undeducted union dues as security for the due performance of the judgment herein, the 1st and 2nd respondents have fully complied with the consent order dated 12 December 2023. The Consent Order did not relate to third parties such as the 3rd respondent, Ashton Mombasa Apparel EPZ Limited which, is a separate and distinct legal entity with separate and distinct legal obligations in respect of the payment of union dues to the Union.

69 The said Consent Order was and is still in respect of Union dues payable by the two (2) Respondents for December 2023, Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited.

70 It is not in dispute that the matter of the sale transaction of Ashton Apparel EPZ Limited and Mombasa Apparel EPZ Limited__ to Ashton Mombasa Apparel EPZ Limited was brought to the attention of the claimant and leading to these proceedings and subject to the Consent Order herein. To secure the claimant pending the hearing and determination of two applications dated 31st October and 29 November 2023, it was necessary to order a security deposit. This is further reinforced by the Consent Order of the parties dated 12 December 2023. With the matters herein addressed as above, the parties followed up with the joint validation exercise, the parties signed a document recording and affirming that the total or aggregate number of employees who were members of the Union as of 18 December 2023 was 4553. The document was signed by a representative of the claimant noted as Brother Richard Musaa.

b. The joint validation established that out of the initial 3776 Union members for the two (2) Respondents, the actual number of claimant's members was 3772.

c. The exercise established that the additional or new members of the Union for the two (2) Respondents were 761, thereby making up a total or aggregate number of 4553 employees.

d. the parties signed a document recording and affirming that the total or aggregate number of employees who were members of the Union as of 18 December 2023 was 4553.

e. 19 December 2023, the Respondent made separate payments totalling up to Kshs. 1,885,163.87 on account of Union dues for the 4553 employees.

71 In this regard, the court finds the respondents are in full with the terms of Clauses (2) and (3) of the Consent Letter. There is the payment of a total sum of Ksh. 1,885,163.87 as dues to the claimant for the aggregate or total number of 4553 employees.

72 Accordingly, the respondents having complied with the Consent Orders through a letter dated 12 December 2023, applications dated 31st October and 29 November 2023 are hereby marked as spent. Security deposit is hereby released to the respondents. The claimant is to issue instructions to the Bank



to liquidate the escrow account held in the names of the advocates for the two parties in this Claim and to remit the said funds back to the Respondents within the next 14 days from the date hereof.

73 Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 9 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

