



**Kenya Union of Pre-Primary Education Teachers v County Public Service Board, Vihiga County Government & another; Salaries and Remuneration Commission (Interested Party) (Cause E007 of 2024) [2024] KEELRC 2096 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2096 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
CAUSE E007 OF 2024**

**JW KELL, J  
JULY 31, 2024**

**BETWEEN**

**KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS ..... CLAIMANT**

**AND**

**COUNTY PUBLIC SERVICE BOARD, VIHIGA COUNTY  
GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY VIHIGA COUNTY GOVERNMENT .... 2<sup>ND</sup>  
RESPONDENT**

**AND**

**SALARIES AND REMUNERATION COMMISSION ..... INTERESTED PARTY**

**RULING**

1. The ruling is on application by way of a Notice of Motion application and Notice of Preliminary Objection by the Respondent/Applicants (herein “Applicant”) both dated 11<sup>th</sup> April 2024. The application was premised under the provisions of Articles 50(1) and 159(2)(d) of *the Constitution*, Sections 1A, 1B & 3A of the *Civil Procedure Act* and the Employment and Labour Relations Court Rules, seeking the orders: -
  - a. Spent.
  - b. Until this application is finally determined and further or other orders issued, all other proceedings in the matter, save for this application shall be and are hereby stayed.
  - c. The Honourable Court does find and declares that Kenya Union of Pre-primary Education Teachers as a union and a Claimant in this cause is guilty of non-compliance in whole with the laws governing registration of trade unions at the national and branch level and their



recognition as such and therefore lacks the required legal capacity to represent pre-primary education teachers in Vihiga county or at all.

- d. The Honourable Court do find and declares that any strike or other industrial action called by Kenya Union of Pre-primary Education Teachers (KUNOPET) for Pre-primary education (ECDE) teachers in Vihiga County leading to the present litigation be and is hereby declared unlawful and or prohibited.
  - e. The present claim/suit having been instituted by or at the instance of Kenya Union of Pre-Primary Education Teachers (KUNOPET) which is found to lack the required locus standi be and is hereby struck out and or dismissed for being incompetent.
  - f. Costs of the proceedings shall be recovered from the Claimant.
2. The Notice of Preliminary objection was based on the following grounds: -
- a. The Honourable Court lacks the required jurisdiction to entertain or further bereft of the required jurisdiction on the main grounds that the Claimant has no locus standi to maintain and or prosecute this case and represent the pre-primary education teachers in Vihiga County.
  - b. The Claimant offends the provisions of Section 76 of the [Labour Relations Act](#) on grounds that there has been behind boy-cot of duties by pre-primary of teachers in Vihiga County terming it as strike which has totally paralyzed learning in ECDE educational institution thereby causing substantial loss and great anxiety for the Respondents /Applicant and yet there was no prior strike notice issued or served on the Respondents as required by law.
  - c. The current strike by the ECDE teachers in Vihiga County was never preceded by the required strike notice thereby calling into question the legal capacity of the Claimant who has claimed responsibility for the same to advance their union activities within the confines of [the Constitution](#) and the Law.
  - d. The claim offends Section 54 of the [Labour Relations Act](#) on grounds that the respondents/ Applicants have serious concerns about the Claimant's claim to be representing the pre-primary education teachers in the county without exhausting the legal processes necessary for their recognition as a union representing ECDE teachers in the county.
  - e. The Claimants have not filed any certificate of registration to prove that they are registered at the national and also branch level in Vihiga County to be able to claim the legal capacity to represent ECDE teachers in the County, and failed to dispel the suspicion and or belief that they are an illegal outfit not lawfully entitled to represent ECDE teachers in Vihiga County or call them to strike as they purported to do or maintain this claim in Court on behalf of the aforesaid teachers.
  - f. The Statement of Claim and all applications filed therein are incompetent and gross abuse of the process of the Honourable Court.
  - g. The Respondent shall be seeking this Honourable Court to strike out the statement of claim with costs.
3. The Notice of Motion was premised on the grounds on the face of the application and in the supporting affidavit sworn by Ezekiel Ayiego (County Secretary) on 11<sup>th</sup> April 2024 as follows: -
- i. That upon devolution, the county government took over the management of pre-primary schools and the county employed ECDE teachers to take charge of learning in the Pre-primary



schools in the county. That the county of Vihiga has over 450 ECDE teachers engaged on contract of up to three years.

- ii. That in 2023, the county decided to place all public officers on permanent and pensionable terms, a process that is been implemented progressively and some ECDE teachers have received their conversion letters to permanent and pensionable Terms.
- iii. That county employees on a contract basis are entitled to gratuity benefits as pension which is administered by an independent service provider, to whom an employee is supposed to apply to be paid, and all that the county does is to clear an employee, but the county does not pay the gratuity, save for the remittance of the same to the said scheme provider.
- iv. That the county under Governor Wilber K. Otichillo has been working to improve the working conditions of ECDE teachers and the teachers were added to the County Public Service Payroll in place of the top over remittance where they used to be paid when it was convenient.
- v. That the county did not have any issues with the ECDE Teachers and if any, they were resolved immediately.
- vi. That on 6<sup>th</sup> February 2024, the County Secretary received a notification (EA-1) from the Officer Commanding Station of Mbale Police Station that ECDE Teachers would be marching to the county on 8<sup>th</sup> February 2024 to present a petition in a peaceful protest organized by KUNNOPET who were purporting to be representing the ECDE Teachers.
- vii. That it was then that they came to know of KUNNOPET as a union representing teachers and came to know that the ECDE Teachers had problems that they wanted the county to resolve.
- viii. That despite not knowing that the ECDE teachers were in a Union which had not introduced itself to the county, the protesting ECDE Teachers were allowed to present their petition which was received by the relevant office.
- ix. That before the county could address the concerns presented by the ECDE, they learned that the teachers had also proceeded to the County Assembly and presented the same petition.
- x. That the County Executive was summoned before the County assembly where they explained their position regarding the ECDE Teachers and the Assembly directed that the county and the teachers hold a meeting (EA-2)).
- xi. That at the meeting at the assembly, they learned that the teachers were on strike and they had abandoned teaching. That the strike notice has never been served upon the county nor had the list of the unionized teachers been supplied to the county.
- xii. That the county was not able to comply with the direction of the Assembly, as at the same time the county was served with the present claim.
- xiii. That it is through the Court claim that the county learned that there was a conciliator appointed to resolve the dispute between the county and the Union that was never brought to the County's attention.
- xiv. That from the claim in Court, there is no mention of the status of the registration of the union, its membership, or a recognition agreement with the county that had employed the ECDE Teachers.



- xv. That as per the rule of law and *the constitution*, employees have the right to join a union and participate in its activities but the union must meet the legal thresholds and demonstrate so.
  - xvi. That since the union has not satisfied the legal threshold, it has no legal capacity to represent the teachers, to call a strike and to maintain the present suit.
  - xvii. That the union is in breach of Sections 12, 13, 14, 15, 19, and 23 of the *Labour Relations Act* and thus lacks the required capacity to maintain this suit and the right of the audience before the Court does not entertain lawbreakers and that the Court allow application and the orders sought and strike out the claim.
4. The Application was opposed by the Claimant/respondent through a replying affidavit sworn by Samuel A. Opiyo, who described himself as the General Secretary of the Claimant, sworn on 12<sup>th</sup> July 2024 stating that: -
- i. The application is brought under irrelevant provisions of the law as the Application seeks to stay the proceedings.
  - ii. That the issue of a Recognition agreement was referred by the Court to conciliation, and the Respondents refused to engage in the conciliation process maintaining that the union lacks moral standing in the conciliation.
  - iii. That the conciliator having considered the written proposals by the parties and relevant material issued a Conciliation report(“A1”) recommending that parties sign a recognition agreement after confirming that the Union has surpassed the simple majority threshold required for the recognition having recruited 764 out of a possible 800 ECDE teachers employed by the respondent.
  - iv. That despite the allegations by the Respondents that the Claimant is in breach of the law, it is indeed the Respondents who have failed to disclose to the Court that they commenced deduction of union dues in September 2023 until February 2024 as they were satisfied that the Claimant indeed was a registered union, with a deduction of union dues order vide Legal Notice, as well as a Certificate of Registration.
  - v. That despite the respondents’ assertion that the strike was unlawful, the 1<sup>st</sup> Respondent as the employer was duly served with strike notice(A2).
  - vi. That the assertion that the Claimant lacks locus for the Court is misconceived and without any legal underpinning.
  - vii. That the assertion by the respondents that the Claimant has failed to file their Registration Certificate has no basis as no order is in place directing the Claimant to file its Certificate, and in any event, In the first letter to the 2<sup>nd</sup> Respondent as relates deduction of union dues dated 5<sup>th</sup> June 2023(A3) all necessary documents including the union registration document was sent under cover of the said letter.
  - viii. That the aforesaid letter of 5<sup>th</sup> June 2023 which enclosed the Claimant’s Certificate of Registration was received by one Roselyne Amiani, a staff at the office of the County secretary on 7<sup>th</sup> June 2023 at 9.43am as evidenced(A4)
  - ix. That the application ought to be dismissed for been frivolous and a waste of judicial time, given that the Respondents are on record for having staged a walkout from the Conciliation which was sanctioned by this Honourable Court.



## Written Submissions

5. The Court directed that the Preliminary objection and the application be canvassed concurrently by way of written submissions. The parties complied. The Respondent/Applicants' written submissions dated 8<sup>th</sup> July 2024 were filed by James Mukabi, County Solicitor, office of the County Attorney-Vihiga. The Claimant/Respondent's written submissions dated 24<sup>th</sup> July 2024 were filed by Samuel. A. Opiyo, General Secretary on an even date.

## Determination

### Issues for determination.

6. The Applicants addressed the following issue in their written submissions: -
  - a. Whether the Claimant has locus to sue on behalf of the teachers
  - b. Whether the preliminary objection should be allowed with costs.
7. The Claimant/Respondent addressed the following issues in their written submissions: -
  - a. Whether the Preliminary Objection raised any pure point of law.
    - i. Jurisdiction
    - ii. Claimant locus standi for lack of recognition agreement
  - b. Whether the Claimant lacks mandate to call strike for its members without Recognition Agreement
  - c. Whether the Claimant is a registered trade union
  - d. Whether the Claimant issued and or served a strike Notice.
8. The Court having perused the notice of Preliminary Objection and the Notice of Motion Application of 11<sup>th</sup> April 2024, the response and written submissions by the parties was of the considered opinion that the issue placed before the Court by the parties for determination of the application is: -

Whether the Claimant has locus standi to bring the Claim and if not whether the application and preliminary objection were merited

### **Whether the Claimant has locus standi to bring the Claim and if not whether the application and preliminary objection were merited**

#### The Applicant's case and submissions

9. In written submissions, the Applicant / Respondent submits that the Claimant has no locus to represent the ECDE teachers as it is not registered and that no Recognition agreement is in place with the Respondent according to Sections 54 of the [Labour Relations Act](#).
10. They submit that the Claimant has not attained the threshold of the minimum simple majority of unionisable employees and that the Claimant has failed to produce a list of its recruited members pursuant to Regulation (3)(1) of the Labour Relations (General) Regulations.
11. The Applicant submits that without a Recognition Agreement, the Claimant cannot purport to have interests to protect.



12. The Applicant contends that despite the Claimant's assertion that it has recruited some members out of the 800 ECDE employees, which they deny, they state that no deductions for union dues have been made as at the time of filing the suit.
13. The Applicant submitted that the claimants have only provided a list of the respondent's employees and further filled a copy of Form 5 for 60 employees who it purports are unionisable yet there is no evidence the list was forwarded to the respondent for implementation.
14. That there is no evidence of when the alleged check-offs were received by the Respondent.
15. The Applicant asserts that the Claimant cannot purport to represent employees who are not its members which could only be possible if he complied with Section 54 of the *Labour Relations Act* and Regulation 3(1) and 8 of the Labour Relations (General) Regulations. The Respondents rely on the decisions in *Kenya Electrical Traders & allied Workers Union v Kenya Electricity Transmissions Company Ltd* (2021); *Law Society of Kenya v Commissioner of Lands and others*, Civil Case No. 464 of 2000 KLR 706; *Kudbeiba Workers V Board of Management Kihumbi-ini Secondary school* (2015) Eklr.
16. The Respondent submits that the Claimant has not satisfied requirement for recognition as it does not have the unionisable staff of the respondent. That the Claimant only has locus over its members and cannot represent employees who are not registered in their register as members as per Trade Union Rules Number 13.
17. That the same is only possible if there is a recognition agreement and proof that the union is registered to represent these employees.
18. They submit that as per Section 25(1) of the *Labour Relations Act*, a union must register its branches, but in the instant case, the alleged branch is not known in law, because it does not have a recognized office where the members conduct their meetings.
19. They submit that as per Section 4 of *Labour Relations Act*, employees are allowed to join a union and by Section 54(1) of the Act a union is to negotiate and enter into a Collective Bargaining Agreement which becomes binding upon Registration under section 59 of the *Labour Relations Act*.
20. That before negotiations for a Collective Bargaining Agreement, the Union must be registered. In the instant case, the Claimant has not produced proof that they are registered either nationally or at the branch level for them to file the claim in Court, and in the absence of a registration certificate, lack of a Recognition Agreement and a Collective Bargaining Agreement, the Claimant lacks standing before Court.
21. The Applicant submits that although the law allows unionization, the union must be registered under the law and have recognition in the absence of which they lack locus. The Respondent to buttress this relied on the decision in *Communication Workers Union V Safaricom Limited* (2014)e KLR.
22. The Applicant states that the Claimant has not stated the members it seeks to represent nor attached a witness statement from the teachers to confirm that they are indeed members of the trade union. That in the absence of the proof of members and the certificate of registration, the Claimant lacks locus standi to institute the suit on behalf of teachers.
23. The Applicant sought that their preliminary objection be upheld.



## Response and submissions

24. The Claimant asserted that it is a registered union and vide its letter Ref: KUN/038/S48/1/23 dated 5<sup>th</sup> June 2023, and that it provided the respondent with a copy of its registration certificate.
25. It submits that the issue of whether the union is registered or not is not a pure point of law as evidence needs to be ascertained through the production of evidence and thus fails the test for a Preliminary objection as enumerated in the Mukisa Biscuits case.
26. The Claimant states that the issue of locus of a union to institute a suit was settled by the Court of Appeal in *Kenya Shoe and Leather Workers Union V Modern Soap Ltd, Civil Appeal No. 37 of 2019*, where the Court found thus:-
  - “ 18. A recognition agreement is defined under Section 2 of the *Labour Relations Act* as an agreement in writing made between a trade union and an employer, group of employers or employers’ organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers’ organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in Court. As the learned Judge correctly stated, the two roles are distinct.”
27. The Claimant asserts that the Preliminary objection is designed to cause delays as it raises matters that are not purely points of law but issues that are disputed that form the stratum of the claim and the issue of a recognition Agreement has been determined through conciliation and a report thereof filed in Court.
28. The Claimant states that it requested the Respondent vide its letter of 5<sup>th</sup> June 2023 to effect deductions for union dues for 85 members.
29. The Claimant states that the right to strike is guaranteed under Article 41(d) of *the Constitution* and no conditions are attached for going on a strike save those under Section 76 of the *Labour Relations Act* that a trade union issues a seven-day strike notice and serves both the Minister of Labour and the Employer.
30. That the Claimant did comply thus and relied on the authority in *Chongqing Construction Ltd v Kenya Union of Road Contractors, Civil Cause no E774 of 2021*, that with or without a Recognition agreement the claimants has a right to call strikes for its members.
31. The Claimant states that on whether it is registered or not is not a point of law and that the respondent started deducting union dues from some 201 members of the Claimant from September 2023 after receiving the necessary documents which documents include the Claimant’s registration certificate that the Respondents are pretending not to have seen.
32. On whether the Claimant issued and served the strike notice, the Claimant states that the same is not a pure point of law and the Preliminary objection should fail and be dismissed with costs.



## Analysis

33. The Claimant states that it forwarded its Registration Certificate to the Respondent under cover of the letter dated 5<sup>th</sup> June 2023(A3) which it alleged was received at the County Secretary's office on 7<sup>th</sup> June 2023 and received by Roselyne Amiasi as per the courier receipt from Fargo (A4). The Claimant attached the letter which they purport forwarded the following: -
- i. Copy of the Union's Registration Certificate
  - ii. Union Dues Collection Order Vide Legal Notice No. 160 of 2021
  - iii. Copy of Union's KRA pin Certificate
  - iv. Letter dated 8<sup>th</sup> June 2018 assigning IPPD Code to the union.
  - v. List of 85 members.
  - vi. Check -off forms(forms) for the 85 members".
34. The Claimant despite producing the letter it states was forwarded to the County Secretary forwarding the above documents, conspicuously, the said documents were not attached to the letter.
35. The parties went for Conciliation and a Conciliation report dated 28<sup>th</sup> June 2024 indicates that the union indicated that it had recruited 766 members and that deductions of union dues had been done by the respondent for 201 members from September 2023 and stopped in February 2024. The respondent requested for a list of all registered members of the union, their ID Numbers and PF numbers and the Chief officer sought more time to verify the documents but stated that the issue be handled by the Court.
36. The conciliator found that the Claimant recruited 766 members out of 800 meeting the threshold under section 54 of the *Labour Relations Act*.
37. The Conciliator observed that the union had served the Respondent with check-off forms for 453 members which had not been effected. The Conciliator also noted that the Respondent persistently held that there was no recognition agreement with the union and thus the union had no mandate to participate in the conciliation.
38. The Conciliator held that it is not in doubt that the Claimant is a registered trade union, the conciliator observed that the Respondent failed to accommodate the union in the entire conciliation process since they did not have a Recognition agreement with the Respondent. The Issue of registration of the union was not raised before the Conciliator.
39. Before Court(Par. 5 of Replying affidavit by Samuel Opiyo) the Claimant states that it has recruited 764 Teachers which is at variance with the information before the conciliator that it recruited 766 employees. The Claimant did not attach before Court the Check-offs and the list of the said employees.
40. An issue of its registration of the union having been raised, the Claimant ought to have produced their Registration Certificate which the Court has not had the benefit to see. The Claimant alleged that no Court order is in place ordering them to produce the certificate. The Court returns that the statement left doubt as to whether the union is indeed registered. The letter of 5<sup>th</sup> June 2023 (A3) although it states that the said documents mentioned were forwarded, was not proof that the registration certificate was enclosed.



41. The Claimant chose to only attach the forwarding letter before the Court and has through and through avoided the same issue. There is no indication that the Claimant produced the registration Certificate before the Conciliator, as it is only its submissions that were noted by the Conciliator.
42. The Claimant and the Respondent appeared before the Conciliator as evidenced by the Letter dated 23<sup>rd</sup> May 2024, where the Claimant was asked to provide the Respondent with a list of all its members. (A1). The List of its unionized members has been an issue known by the Claimant.
43. The issue of its registration has been raised and the list of the unionised employees by the Respondent. The Claimant has avoided the said issues. The Registration Certificate has not been supplied before this Court, neither have the Claimants produced their constitution. The Claimant is the custodian of its Registration Certificate and thus ought to have availed the same. The registration status of the Claimant has to be proved.
44. The Claimant states that there were deductions for union dues from its members from September 2023 until February 2024. There is no indication of the number in its pleadings, only at the submissions stage does the Claimant state that deductions were for some 201 members. Submissions are not pleadings.
45. On the issue of whether or not there was a cause of action against the Respondent. There was no evidence that the Claimant recruited workers of the respondent as no check-offs were produced by the Claimant. The Claimant states that deductions were effected from September 2023 to February 2024. The Conciliation Report of 28<sup>th</sup> June 2024 confirms that the Conciliator saw a Bi -product showing that the respondent was deducting union dues. The same was not produced in Court.
46. The Court recognizes the right of the employees to join a union and to enjoy the benefits of unionization offered by the union which include representation at shop floor and collective bargaining. The right is anchored in international law, *the Constitution* and statutes. See Article 8 International Covenant on Economic, Social and Cultural Rights:-

“1. The States Parties to the present Covenant undertake to ensure:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;” ; *The International Labour Organization Convention* 87 (1948), Right to Organize and Collective Bargaining: Convention 98 (1949); Article 41 of *the Constitution* to wit:

”1) Every person has the right to fair labour practices.

- (2) Every worker has the right— (a) to fair remuneration; (b) to reasonable working conditions; (c) to form, join or participate in the activities and programmes of a trade union; and (d) to go on strike. (3) Every employer has the right— (a) to form and join an employers organisation; and (b) to participate in the activities and programmes of an employers organisation. (4) Every trade union and every employers’ organisation has the right— (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining.” The *Labour Relations Act* section 4 to wit:-“ 4. Employee’s right to freedom



of association (1) Every employee has the right to— (a) participate in forming a trade union or federation of trade unions; (b) join a trade union; or and section 5. “Protection of employees (1) No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act.” The Court has obligation to enforce the foregoing rights in its application of the law.

47. The foundation of the relationship between workers and unions is membership fees as envisaged under section 48 of the Labour Relations Act to wit:- ‘48.1) In this Part “trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.’ It is this membership that gives the union locus to represent members.
48. The procedure of membership is then prescribed under the section as follows:-  
‘2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to— (a) deduct trade union dues from the wages of its members; and (b) pay monies so deducted— (i) into a specified account of the trade union; or (ii) in specified proportions into specified accounts of a trade union and a federation of trade unions. (3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee’s wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction. (4) The Minister may vary an order issued under this section on application by the trade union. (5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer. (6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union. (7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given. (8) An employer shall forward a copy of any notice of resignation he receives to the trade union.’ Ofcourse the trade union must be resgistered to begin recruitment.
49. The Claimant did not produce the notice to the employer authorising deductions nor the Legal Notice No. 160 of 2021. There is no information on how the deductions were to be made. The Claimant states that it had 764 members. There is no indication of how many employees’ check -off were made and how much each was to make as a deduction. I do find that the Claimant has not satisfied the provisions of section 48 of the LRA Act to wit ..’trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership’
50. Section 50 (8) LRA Act gives conditions for the union dues deductions as follows:- ‘8) No employer shall— (i) fail to comply with an order or a notice issued under this Part; (ii) deduct any money and not pay it into the account designated in the notice issued by the Minister; or (iii) pay money into an account other than the account designated in the notice issued by the Minister.’
51. The were no checks-off produced in Court nor the Legal Notice No. 160 of 2021 authorising deductions before the Court. The Claimant alleged that it forwarded the same to the Respondent but does not produce them in Court. There is no proof either that the deductions were made. The Conciliator noted that she saw a BI-Product that deductions were made. This Bi-Product is also not before the Court.
52. The Claimant states that deductions were made, but does not provide proof thereof, only alleges that deductions were stopped in February 2024. Then where is the proof of the previous deductions?



53. The respondents state that they do not know the list of the unionized employees who are members of the Claimant and the Claimant has refused to provide the said list.
54. The Court in *Kenya Tertiary and Schools Workers Union v Rocky Driving school (2018) (Justice Wasilwa)* held that where there exist employees who had signed check-off forms and desired to join the union that right was guaranteed under Article 41 of *the Constitution*.
55. While employees may have signed check-off forms the same have not been produced even before the Court. The Respondent states that it is not aware of the number of unionised employees.
56. It is thus doubtful how many employees the Claimants have recruited and whether the requisite number of employees to warrant recognition of the number being at least 50% plus 1 has been met.
57. The Claimant urges that it has recruited 764 employees. The same proof should be provided to the respondent together with the check-offs for the respondents to comply with deductions for the said employees.
58. The Court taking into consideration the fact that the union must be registered and with authority to operate nationally, the representative must be authorised by the registered secretary general / general secretary to file claim and further taking into consideration the replying affidavit of Samuel Opiyo of 12<sup>th</sup> July 2024 attaching a letter dated 5<sup>th</sup> June 2023 alleging to attach the union's certificate and check off forms but not availed to Court, in the interest of justice the Court finds that the Preliminary Objection and Notice of Motion raise valid issues touching on the jurisdiction of the Court. The P.O. raised matters of disputed facts hence not properly applying the *Mukisa Biscuits* case. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969]EA 696* at page 700 paragraphs D-F Law JA as he then was had this to say:

....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.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:-

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

59. In the instant case the P.O. raised facts that required to be ascertained hence not proper. The P.O. is dismissed for being improper with no order as to costs.
60. On the Notice of Motion application determination, the Court returns that serious issues have been raised on the legitimacy of the claimant. Taking into account the interest of the affected employees, the Court finds that it has to be satisfied on the locus standi of the Claimant first and stays any further proceedings in this suit and application pending its determination and final orders in the application dated 11<sup>th</sup> April 2024 on the following conditions:-
61. That pending any further proceeding in the claim and conclusive orders in the instant application, the Claimant is hereby Ordered to produce in Court the following documents as proof of its locus standi before Court:-



- a. Certified copy of the Claimant's registration certificate by the Registrar of trade unions
  - b. Certified copy of the registered officials of the national office of the union and local branch (if applicable) and evidence of Samuel Opiyo as the General Secretary.
  - c. Certified copy of the registered union's constitution.
  - d. Letter of authorization of Samuel Opiyo by the Secretary General of the union to represent the Claimant in this Court.
  - e. Signed Check-off forms for employees of the 1<sup>st</sup> Respondent and letter of authorization to deduct.
62. The Claimant is ordered to file and serve the above documents(a-e) within 30 days of this Order. The Court lists the matter for mention on the 17<sup>th</sup> of September 2024 to confirm compliance and for final orders under the application dated 11<sup>th</sup> April 2024. The final order in the ruling due today is vacated to 17<sup>th</sup> of September 2024 when the court will confirm the status of compliance by the Claimant with the above orders.
63. The above Directions and Orders to apply in the suit between the parties in Kakamega E009 OF 2024.
64. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF JULY 2024.**

**J.W. KELI**

**JUDGE**

IN THE PRESENCE OF: -

Court Assistant: Macheso

Respondent /Applicants: - Absent

Claimant/Respondent: Opiyo

