



**Kenya Union of Commercial Food and Allied Workers v Gusii Water & Sanitation Company (Cause 3 of 2022) [2024] KEELRC 1866 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1866 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 3 OF 2022  
CN BAARI, J  
JULY 18, 2024**

**BETWEEN**  
**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS ..... CLAIMANT**  
**AND**  
**GUSII WATER & SANITATION COMPANY ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant herein initiated this suit through a Memorandum of Claim dated 19<sup>th</sup> July, 2018 and filed on 31<sup>st</sup> July, 2018, urging the Court to: -
  - i. Direct the Respondents to negotiate a Collective Bargaining Agreement with the Claimant within 30 days from the date of the judgment.
  - ii. Direct that the Claimant's proposal be signed as the Collective Bargaining Agreement (CBA), in case the Respondent fails to negotiate within 30 days.
  - iii. Declare the Respondent's action an unfair labour practice.
  - iv. Issue any other order it deems fit to achieve the ends of justice.
  - v. Costs of the suit.
2. After due consideration of the matter, Lady Justice Hellen Wasilwa delivered a judgment on the 21<sup>st</sup> September, 2021 in which she directed that the Respondent engages the Claimants with a view to conclude the CBA within 60 days.
3. The Judge then went ahead to place a tag on the negotiations with a view to making further orders should the negotiations not bear fruits.



4. On the 5<sup>th</sup> July, 2022 when the matter came up for mention, counsel for the Claimant informed the court that the Respondent had refused to proceed with the negotiations.
5. Counsel stated that they had run into headwinds due to lack of express orders directing the Central Planning and Monitoring Unit to file a report.
6. At the Court's instigation, the Claimant filed an application dated 15<sup>th</sup> July, 2022 in which it sought orders directing the Chief Economist at the Central Planning and Monitoring Unit to consult the parties and file an economic report within 30 days.
7. The Claimant equally sought an order directing the Respondent to co-operate with the Chief Economist to ensure expeditious preparation and filing of the economic report in court.
8. In a ruling delivered on 13<sup>th</sup> October, 2022, the Court allowed the application as prayed.
9. Despite numerous mentions to confirm filing of the economic report as directed by court, none was filed.
10. The record indicates that there always seem to be one hurdle after the other. For instance, on 5<sup>th</sup> February, 2024, the court directed that the Respondent be served with the request for information within 14 days. On 6<sup>th</sup> of March, 2024 when the matter was next mentioned, the Respondent had yet to fill the questionnaire. The court then made directions that the questionnaire be filled and forwarded within 3 days.
11. On 8<sup>th</sup> of April, 2024 when the matter came up for yet another mention, counsel for the ministry indicated that he had filed the report without the Respondent's input as he had not received the questionnaire. Mr Odhiambo for the Respondent however countered that he had filed a preliminary objection dated 5<sup>th</sup> April, 2024 challenging the Claimant's locus to pursue the matter.
12. Upon hearing representations from all parties, the court directed that the preliminary objection and the suit be canvassed together by way of written submissions.
13. In light of the foregoing, this court proposes to deal with the preliminary objection before delving into the main suit.

### **The Preliminary Objection**

14. The Preliminary Objection dated 5<sup>th</sup> April, 2024 by the Respondent seeks to strike out the suit on account that the Claimant lack locus to pursue the matter premised on the assertion that its employees are not members of the Claimant union, hence it cannot purport to negotiate and sign a CBA on their behalf.
15. In support of the Preliminary Objection, the Respondent filed submissions in which it asserts that its employees have since joined the Kenya Union of Water and Sanitation.
16. In urging the lack of locus, the Respondent cites the case of Ben Kiplagat Tunduny v Standard Chartered Bank [2015] eKLR which quoted with approval the holding in Kenya Chemical & Allied Workers Union v Polypipes Ltd (industrial Court Cause No.1112 of 2012) for the holding that: -

“The only way a union has locus is when it represents a party who is a member. The logical conclusion then is that the Claimant union had no capacity to bring a claim on behalf of the second grievant and to that extent; the claim was incompetent ab initio.”



17. In further support of the Preliminary Objection, the Respondent equally cites the celebrated case of *Mukisa Biscuit v West End Distributors Ltd* [1969] E.A 696 on the nature of a Preliminary Objection being on a pure point of law.
18. The Claimant did not file submissions in opposition to the Preliminary Objection.

### **Determination**

19. The basis of the Respondent's Preliminary Objection is that its employees have moved to a different trade union and not the Claimant's.
20. As correctly submitted by the Respondent, Sir Charles Newbold, in *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd* [1969] EA 696, succinctly described a Preliminary Objection thus: -

“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...”
21. The court is alive to the fact that recognition is granted on the strength of the actual collective bargaining unit, and the presence of a simple majority is a dynamic and continuous requirement. Where a trade union's membership falls below 50% of the unionisable work force, the union may be de-recognized and the recognition agreement terminated. (See *Kenya Union of Printing, paper manufacturers & Allied Workers v. Packaging Industries Ltd* (2014) eKLR)
22. Under Section 54(5) of the *Labour Relations Act*, an employer has a right to apply to the National Labour Board or seek an order of the court for de-recognition of a trade union, and which de-recognition effectively terminates the recognition agreement.
23. The Respondent has not placed before this Court evidence of having applied for the de-recognition of the Claimant is union premised on its having lost their simple majority membership in the employ of the Respondent.
24. It is also true that the issue concerning membership to a trade union is a matter of fact that needs to be ascertained. There needs to be production of evidence that the employees are members of the Kenya Union of Water and Sanitation. The Respondent has not led evidence showing that indeed, its employees are members of a union different from the Claimant.
25. For the foregoing reason, the Preliminary Objection does not meet the threshold in the *Mukisa Biscuit* case, and is dismissed with costs.
26. Turning to the main suit, the Claimant filed written submissions while the Respondent did not.
27. In urging their case, the Claimant submits that it has a valid recognition agreement with the Respondent dated 2<sup>nd</sup> February, 2015. It avows that the Respondent has always hindered attempts at negotiating a CBA by erecting one roadblock after the other. It cites the Respondent's refusal to engage in negotiations and its refusal to cooperate with both the conciliator and the Chief Economist.
28. The Claimant therefore submits that its proposals as captured in the memorandum of collective bargaining agreement be adopted.



29. The law is that where a dispute arises in the negotiation of a CBA, and which dispute is unresolved through conciliation, either party may refer the dispute to this court for adjudication. The power of the court to impose terms on a party is one that needs to be exercised judiciously and on a case by case basis premised on credible reports. Courts exercise this limited jurisdiction through reference to economic reports from the Central Planning and Monitoring Unit.
30. I have taken cognisance of the Respondent's conduct throughout this matter. The Respondent adopted an uncooperative stance by disregarding court directions and refusing to engage the Claimant union. I further note that the Respondent's assertion that its employees belong to another union without production of any proof, does bear any legal basis.
31. This being a follow up to the Judgment by Justice Wasilwa directing parties to negotiate, and given that the Respondent's refused to co-operate with the Chief Economist, the Court is left with no option but to allow the Claimant's claim.
32. Consequently, the claim is allowed in the following terms: -
- a. The Claimant's proposals marked "A" attached to the Claim are adopted as the terms of service for the Respondent's Unionisable employees for 24 months from 1<sup>st</sup> July, 2024.
  - b. The Respondent is directed to align the terms of service with the adopted proposals within 60 days of this judgment.
  - c. In the interest of social partnership, parties are ordered to bear their own costs.
33. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18<sup>TH</sup> DAY OF JULY, 2024.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:

N/A for the Claimant

Ms. Acholla h/b for Mr. Odhiambo for the Respondent

Ms. Anjeline & Debra- C/As

