



Kenya Glass Workers Union v Kenya Engineering Workers Union; Impala Glass Industries Limited (Interested Party) (Cause E611 of 2021) [2024] KEELRC 2189 (KLR) (6 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2189 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E611 OF 2021
NJ ABUODHA, J
SEPTEMBER 6, 2024**

BETWEEN

KENYA GLASS WORKERS UNION CLAIMANT

AND

KENYA ENGINEERING WORKERS UNION RESPONDENT

AND

IMPALA GLASS INDUSTRIES LIMITED INTERESTED PARTY

RULING

1. The Claimant a registered trade union filed its Memorandum of Claim dated 27th July,2021 and pleaded inter alia as follows: -
 - a. The Claimant averred that it has valid recognition agreement and a CBA in force with the Interested Party herein which CBA was due to expire on 1st June,2021 and was to remain in force until a new CBA was in place.
 - b. The Claimant averred that its Constitution under rule 3 and 4 provided for membership of those at Interested Party employ. That on or about 16th July,2021 the Respondent wrote a letter to the Interested Party requiring it to effect deduction of union dues attaching form S containing 98 employees of the Interested Party who were members of the Claimant union covered by the Recognition Agreement and current CBA between it and the Interested Party.
 - c. The Claimant averred that the Interested Party being aggrieved by the Respondent’s decision and or request, opted to inform it of the intended sabotage of everlasting industrial peace which had been existing between the Claimant and the Interested Party and requested the Claimant to intervene and restore the said industrial peace which has been existing since 2013 by filing the suit.



2. The Claimant in the upshot prayed for the following against the Respondent;
 - a. A Declaration that the action and or inaction by the Respondent in encroaching and recruiting Claimant's members are null and void ab initio.
 - b. An Order compelling the Respondent to desist from recruiting and or holding itself as representing the Interested Party's employees and or Claimant's members in any manner whatsoever.
 - c. A permanent Order restraining the Interested Party from deducting and remitting trade union dues to the Respondent from the employees who are members of the Claimant Union.
 - d. Costs of the claim.
3. The Respondent in reply filed its statement of Response dated 4th August ,2021 which was unfortunately given a different number as ELRC Cause No. E649 of 2021.
4. Parties on 21st September,2021 agreed by consent to abandon both the Claimant's Application and the Respondent's Preliminary Objection to expedite hearing of the main suit. Parties did not call witnesses orally and proceeded on written submissions.

Claimants' Submissions

5. The Claimant filed its written submissions dated 29th October, 2021 and submitted that article 41 of *the Constitution* was not absolute since under article 24(5) it could be limited by legislation. That the *Labour Relations Act*,2007 was a statute specifically enacted to regulate all the affairs of Trade Unions and that once such a statute exists the limitation becomes lawful.
6. On the issue of whether a trade union whose objectives in its constitution do not cover a particular sector or trade or industry is allowed to represent employees in that sector or trade or industry, the Claimant submitted that the limitation under Article 41 as read with section 14(1)(e) and 2 of the *Labour Relations Act*, it submitted that the Registrar has power to consider the objectives of Trade union which must provide for the areas of representation in terms of sectors or trade or industry.
7. It was the Claimant's submissions that the limitation enables trade unions and employers to engage in a manner which do not impede the economy because of protracted disputes between very many unions with a single employer. That this was escalated by section 54 of the *Labour Relations Act*.
8. It was the Claimant's submissions that it was registered under its rule 3(a) of its constitution to represent workers in the glass industries or people dealing with glass individually and collectively. That in the Respondent's constitution it was registered under rule 3(a) to represent employees engaged in General Mechanical Engineering and Metal Allied Manufacturing Industries.
9. It was the Claimant's submissions that the right of a trade Union to represent workers is limited by law. That a registered trade union cannot be allowed to tower all over sectors or trade or industries in the name of article 41 of *the Constitution*. The Claimant distinguished the case of Mombasa ELRC Cause No 393 of 2015 between Amalgamated Union of Kenya Metal Workers V Dock Workers Union and Another by stating that both constitutions of Dock Workers Union and Amalgamated Union of Kenya & Allied Workers were sectorial and both drew their membership from transport sector of economy while in this case the unions are registered as Industrial unions.
10. It was the Claimant's submissions that unless section 14(1) (e) and 2 of the *Labour Relations Act* is either repealed or amended the law does not allow a trade union whose constitution does not confer upon a jurisdictional sector or trade or industry to represent its employees.



11. On the issue of whether the Interested Party could effect deductions the same month it received form S from the Respondent the Claimant submitted that the Interested Party could only effect the instructions the next month and not the current month. That since the Respondent issued the instructions to the Interested Party on 16th July,2021 the Interested Party could only effect deductions in August 2021 Payroll. That the deductions made on members on the month of July,2021 were unlawful and illegal.
12. On the issue of reliefs sought the Claimant submitted that it was entitled to the same having proved that actions of the Respondent union to enlist employees who were in Glass industries in to its membership was in contravention of its own constitution as well as section 14(1) (e) and 2 of the [Labour Relations Act](#) and the fact that the Interested Party breached provisions of section 48 (5) of the [Labour Relations Act](#).

Respondent's Submissions

13. The Respondent filed its written submissions dated 5th November,2021 and on the issue of whether individual entity constitution and Acts of parliament can supersede the country's constitution the Respondent submitted the answer was a no as [the constitution](#) provides that any law that was or is in place which contradicts constitution was null and void.
14. That the Claimant's constitution was a closed shop representation which contradicted fundamental individual constitutional rights on the freedom of association and freedom to form and belong to union of their choice. The Respondent relied on the case of Mombasa ELRC Cause No. 393 of 2015 between Amalgamated Union of Kenya Metal Workers V Dock Workers Union and Another.
15. On the issue of whether individual entity can take away fundamental rights ,the Respondent submitted on the negative that Interested Party employees chose a union of their choice being the Respondent in line with Article 36 and 41 of [the Constitution](#) by first withdrawing their membership from the Claimant and voluntarily joining the Respondent by signing check -offs forms (Form S).
16. The Respondent submitted that this was not the first suit between the parties herein as there was another suit of this nature being ELRC Cause No. 761 of 2019 between the parties and Hebuttullah Brothers Ltd whose judgment was delivered in favour of the Respondent.
17. On the issue of whether union can be allowed to represent nonmembers in court who are members of another union without written authority or instructions, the Respondent submitted in the negative stating that the matter was not properly in court as Interested Party employees never complained on deductions of union dues as per sections 48 and 50 of the [Labour Relations Act](#).
18. On the issue of whether the prayers sought were available in law the Respondent submitted that the same contravened the law which was Article 36 and 41 of [the Constitution](#) and section 48 of the [Labour Relations Act](#).
19. On the issue of whether the Claimant had a single member at the Interested Party establishment the Respondent submitted to the negative because there was no check off forms filed before the court by the Claimant yet it is a mandatory requirement under section 48 of the [Labour Relations Act](#). That the Claimant could not purport to have members just because its constitution covers glass workers without the legal requirements and that the employees at the Interested Party are technicians specialized in engineering hence their rightful union was the Respondent.
20. On the issue of Article 93 of [the Constitution](#) on establishment of the Parliament under Article 94(6) the Respondent submitted that the same was not disputed as it was enacted in 2010 when the Claimant



Union was already in place and the Labour Relations Act 2007 hence the same should be amended to the spirit of the current constitution on the rights and/or fundamental freedoms.

21. The Respondent submitted that the Claimant should not force Interested Party's employees in its union against their rights and limit their association with the Respondent. That the court should be on the forefront to protect the weak in the society because most trade unions after registration they become brief case unions without serving members just because in their mind it is closed shop practice that no other union should recruit from the sector hence exposing the employees to be at the mercy of employers when coerced to believe the union Secretary Generals are above the constitution even without service delivery to their members.

Determination

22. The court has reviewed and considered the pleadings and submissions by the parties is of the view that the parties herein have not exhausted the internal dispute resolutions by referring this dispute to the Minister for conciliation. A trade dispute is defined under section 2 of the Labour Relations Act as :

trade dispute” means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers’ organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union;

23. I have This court notes that the main issue in dispute herein is which Union should represent the Interested Parties employees. The two unions are fighting for the Interested Parties employees and the Court is of the that the issue be submitted to the Minister first as provided under Labour Relations Act. Section 62 of the Labour Relations Act provides for reporting of trade disputes to the Minister who appoints conciliators to resolve the dispute. The Conciliators have power to resolve the dispute under section 67 of the Labour Relations Act.

24. If the I If the matter is not resolved after conciliation as per section 69 of the Act it is when the matter is referred to the court. This court is of the view that this dispute is not one of those urgent referrals to the Court under section 74 of the Labour Relations Act which provides as follows: -

A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns——

- (a) the recognition of a trade union in accordance with section 62; or
- (b) a redundancy where -
 - (i) the trade union has already referred the dispute for conciliation under section 62(4); or
 - (ii) the employer has retrenched employees without giving notice; or
- (c) employers and employees engaged in an essential service.

25. ThThe issueThis court notes that this dispute is not one of those listed above hence it should be referred to the Minister for conciliation first before being referred to the Court

26. Whereas Whereas this court notes that the employees have a right under the Constitution and section 4 of the Labour Relations Act to join any trade union of their choice, this court notes that the employer



herein has not participated in the court's proceedings hence it would be justified the matter be reported to the minister who will hear all the parties herein and hopefully provided a solution to dispute.

27. Section 9 of *Fair Administrative Action Act* under 9(2) provides that the High Court/ELRC or a subordinate Court shall not review an administrative action or decision under the Act unless the mechanism including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Subsection 3 directs the court when faced with such an application to direct the applicant to first exhaust such remedy before proceeding to the court.
28. This court in the recent case of *Banking Insurance and Finance Union v Consolidated Bank of Kenya Limited (Cause E728 of 2022)* [2024] KEELRC 654 (KLR) (14 March 2024) (Judgment) held as follows:-

The exhaustion principle is a fundamental principle of administrative law whose intention is to subject disputes to available formal or even informal dispute resolution mechanisms before they are placed before a court of law for determination. It is an acknowledgment that disputes resolved through the alternative dispute resolution mechanisms are more sustainable and long lasting than Court judgments which are costly and more often than not strain if not destroy relationships.

35. The Court of Appeal in the case of *Speaker of National Assembly v Karume* [1992] KECA 42 stated thus: "Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures. See also *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others*"

29. In addition in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others* (2015) eKLR the court observed as follows:-

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

30. This court has nothing useful to add as the courts in the above cases referred the matter for conciliation as provided for in the recognition agreement and as per provisions of section 62 of the *Labour Relations Act*. In the interest of serving justice to the parties herein the dispute herein is referred to the Minister to be resolved in 60 days and a report filed before the court for the recording of final orders or other directions
31. The matter to be mentioned on November 11, 2024 for further directions.
32. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF SEPTEMBER, 2024 DELIVERED VIRTUALLY THIS 6TH DAY OF SEPTEMBER, 2024



ABUODHA NELSON JORUM
JUDGE

