

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
ELDORET

ELRC CAUSE NO. E006 OF 2024

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

VERSUS

NANAK ENGINEERING WORKS
RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the Labour Relations Act and is mandated in its constitution under Rule No. 5 to represent employees in the commercial and food sector.
2. The Respondent is according to its certificate of registration, a business name registered under the Registration of Business Names Act.
3. It is the averment of the Claimant that it is empowered under its constitution to represent employees of the Respondent.
4. The Claimant avers that between the months of January, 2021 and September, 2023 it recruited nine (9) out of ten (10)

employees of the Respondent into its membership, equivalent to 90% which is over and above the requisite simple majority for purposes of recognition.

5. The Claimant avers that by letter dated 14th July, 2023, it sent check off forms to the Respondent for purposes of deduction and remittance of union dues.
6. That following attainment of the threshold requisite for Recognition, the Claimant/Applicant by a letter dated 24th July, 2023 sought audience with the Respondent with a view of signing of Recognition Agreement.
7. The Claimant avers that through an undated letter from the Respondent's Advocates, it alleged lack of proof of membership.
8. The Claimant avers that the Respondent refused to sign Recognition Agreement. That the Claimant made efforts to have the issue resolved at the Parties own level in vain as the Respondent remained adamant.
9. It is the Claimant's averment that following the adamance of the Respondent and the security of the Employees of the Respondent who are members of the Claimant, the Claimant

invoked Section 74 of the Labour Relations Act, 2007 and reported a dispute to the Minister for Labour. That the dispute herein is therefore properly before this court for hearing and determination.

10. The Claimant avers that it is the right union to represent employees of the Respondent, that the employees have a right to join a trade union of their choice for purposes of collective bargaining and trade union activities and that the Respondent's employees cannot bargain for better terms and conditions of service in the absence of a recognition agreement.
11. The Claimant further avers that the continuous denial of the Respondent to sign recognition agreement is tantamount to infringing the rights of its employees under Articles 36 and 41 of the Constitution of Kenya, section 48 and 50 of the Labour Relations Act, section 19 of the Employment Act and ILO Conventions on freedom of association.
12. Consequently, the Claimant prays for the following remedies:
 - (i) Do declare that the Respondent's refusal to sign Recognition Agreement is unlawful and order the Respondent to recognize the Claimant Union.

- (ii) Engage the Claimant in collective bargaining within thirty (30) days upon signing Recognition Agreement.
- (iii) Do order the Respondent to commence deduction of union dues from the date of judgment and to continue doing so.
- (iv) Order payment of costs of this claim to the claimant.
- (v) That this Honourable Court do grant any other relief found appropriate to meet the ends of justice.

13. In its Memorandum of Response dated 2nd April, 2024 the Respondent avers that it is a business name registered under the Registration of Business Names Act.

14. It denies the description attributed to it in the Claim that it is a limited liability company and that it is a shop stocking and selling engineering appliances including scrapes, spare parts and other hardware products. The Respondent avers that it carries out the business of engineering workshop for motor vehicle engines and does not involve itself in stocking and selling parts. The Respondent denies that the constitution of the Claimant allows it to recruit, enroll and represent the Respondent's unionisable employees.

15. The Respondent pleads that it is not aware that the Claimant recruited any of its employees into its membership. It denies that it contravened any provision of the Constitution, Labour Relations Act or any other law.
16. According to the Respondent, the Claimant lacks *locus standi* to represent its employees and the purported representation of the Respondent's employees is ultra vires the Claimant's constitution. The Respondent thus avers that its refusal to sign a recognition agreement with the Claimant is premised and supported by law.
17. According to the Respondent, the Claimant has brought these proceedings with a view of harassing the Respondent and the proceedings are therefore frivolous and brought in bad faith. It prays that the suit be dismissed with costs.

Evidence

18. At the hearing the Claimant called Rodgers Ombati Momanyi who testified as CW1. Mr. Ombati stated that he is the Branch Secretary of the Claimant Union's North Rift Region and does recruitment, organization and handling of disputes. He adopted

his witness statement dated 14th February, 2024 together with the bundle and documents filed by the Claimant as part of his evidence in chief. He testified that he recruited 9 out of the 10 unionisable employees of the Respondent into union membership. That he wrote to the Respondent seeking recognition but when he met the management they refused to submit union dues and to recognize the union.

19. Under cross examination by Mr. Kariuki Mwaniki, counsel for the Respondent, CW1 testified that commerce sector under which the Respondent operates is covered under rule 5 of the Claimant's constitution on membership. He further testified that he recruited the 9 members over a period of time after they confirmed that they were employees of the Respondent.
20. CW1 further testified that the letter dated 14th July, 2023 with the list of members that he wrote to the Respondent on union dues was responded to by an undated letter from the counsel for the Respondent.
21. CW1 testified that there is a shop in the Respondents business premises which sells new spare parts and other products. That there is also a workshop and machines in the premises.

22. He testified that the Respondent refused to meet the union even after he sent reminders.
23. After close of the Claimant's case the Respondent called one witness, Mr. Manpreet Singh who testified as RW1. RW1 adopted his witness statement dated 4th October, 2025 and the list and bundle of documents filed on behalf of the Respondent as his evidence.
24. RW1 testified that at Nanak Engineering they deal with engine repairs and do not sell spare parts or any food commodities. He further testified that the Respondent is not a limited company but a partnership.
25. Under cross examination RW1 stated that the Respondent does not have any employees who are members of the union, that apart from the Claimant there is no other union that has recruited the Respondent's employees.
26. RW1 testified that the Respondent carries out repair of cars and lathe works, manufacturing certain worn out parts which are sold to clients.

Submissions

27. The Claimant filed submissions in which it set out two issues for determination being:
 - (i) Whether the Respondent should recognize the Claimant union; and ,
 - (ii) Whether the Respondent should deduct and remit union dues.
28. On the 1st issue the Claimant reiterated the averments in the Memorandum of Claim and in addition, submitted that the evidence on record points to a misunderstanding by the Respondent of issues relating to recognition of trade unions.
29. The Claimant submitted that the Respondent's witness admitted during cross examination that the Respondent does manufacturing and that there is no other union representing the Respondent's employees other than the Claimant. That the employees willingly subscribed to the union.
30. It is the submission of the Claimant that the Respondent cannot dictate to its employees which union to join since the

Constitution guarantees the right to employees to join unions of their choice.

31. The Claimant submits that since recruitment is continuous, it is still in the process of recruiting employees of the Respondent.
32. On the 2nd issue the Claimant submitted that it recruited 9 employees of the Respondent's workforce and forwarded check-off forms to the Respondent for purposes of deduction and remittance of union dues.
33. The Claimant submitted that under Article 41(2)(c) and 36 of the Constitution, and section 4(1) of the Labour Relations Act, freedom of association is guaranteed, including the right of an employee to belong to a trade union. That under section 48 of the Labour Relations Act payment of union dues by members is an obligation that goes hand in hand with the right to join a union.
34. The Claimant further submitted that the wording of section 48(3) is mandatory and it is not up to an employer to comply. That the section compels the employer to deduct and remit union dues to the union's designated bank account.

35. For the Respondent the following issues were identified for determination:

- a) Whether the suit as instituted against "NANAK ENGINEERING WORKS LIMITED" is competent and sustainable, given that the correct legal entity is "NANAK ENGINEERING WORKS," a registered business name.
- b) Whether the Claimant, whose constitutional mandate is restricted to the commercial, food, and allied sectors, has the locus standi to recruit, represent, and seek recognition from the Respondent's employees who are engaged in the engineering sector.
- c) Whether the Claimant has satisfied the statutory threshold for recognition by proving it has recruited a simple majority of the Respondent's unionisable employees, in light of the contradictory evidence on record.

36. On the 1st issue the Respondent submitted that the fundamental principle governing this issue is the immutable doctrine of separate legal personality. That the Claimant instituted proceedings against "Nanak Engineering Works Limited," an entity that the Respondent's own documentary evidence (the Certificate of Registration and PIN Certificate) conclusively confirms is non-existent. The Respondent is "Nanak Engineering Works," a partnership operating under a registered business name.
37. The Respondent submitted that it is trite law that a suit against a non-juristic person is a legal nullity. That the Claimant's failure to identify the correct persona juridica is not a mere misnomer but a jurisdictional defect that vitiates the entire action ab initio. That the Court of Appeal in **Victor Mabachi & Another v Nurtun Bates Ltd [2013] eKLR** affirmed this orthodox principle with judicial clarity stating:

"A company is a persona juridica, a legal person separate from its directors, agents, or related entities. The suit must therefore be filed against the correct juristic person."

38. The Respondent submitted that the consequence of this fatal flaw is that the action against the non-existent entity is a legal nullity, a *brutum fulmen* which the court cannot cure. That this Honourable Court's own bench reinforced this position in **Consumer's Pride Café v King'ori [2023] KEELRC 2131**, holding: "...suing a wrong legal persona renders the suit incompetent against that party." The word "incompetent" goes to the root of the Court's authority; jurisdiction was never acquired over the phantom 'Limited' entity.
39. The Respondent submitted that the Claimant's belated and casual description of this defect as a "typographical mistake" is an affront to the principles of corporate law. That despite this defect being explicitly raised in the P.O., the Claimant took no corrective steps to amend the Memorandum of Claim. That this constitutes a profound failure of diligence, which cannot be excused by the Court, and confirms that the claim is incurably incompetent.
40. On the 2nd issue for determination the Respondent submitted that the constitution of the Claimant does not cover the sector in which the Respondent operates. That whereas the

Claimant's constitution authorizes it to represent employees in distributive and commerce sector which includes supermarkets, retail and wholesale outlets, distribution and supply companies, the Respondent's business permit establishes that its operations are in the engineering works and repair sector.

41. For emphasis the Respondent relied on the decision in **Kenya Plantation and Agricultural Workers Union v Kenya Chemical and Allied Workers Union & 2 other [2018] eKLR**. It is submitted that the Respondent's core function is that of an engineering workshop
42. On the 3rd issue the Respondent submitted that the grant of recognition and collective bargaining rights is subject to recruitment of a simple majority of 50% + 1 of unionisable employees.
43. It is submitted that in the instant case the Claimant states it recruited 9 out of 10 unionisable employees of the Respondent constituting 90% majority yet while testifying on behalf of the Claimant CW1 stated that the Claimant recruited 4 out of 4 employees. For emphasis the Respondent relied on the

decision in **Muriithi Kinyua v Patrick Gichohi & another [2021] eKLR** where the court discussed the implication of contradictory evidence.

44. The Respondent, while relying on the decision in **Kenya Union of Commercial Food and Allied Workers v Nyeri County Government [2014] eKLR**, further submitted that the Claimant failed to submit a valid check-off form while the Respondent's uncontroverted evidence indicated that the sole employee whose name appeared on the check off forms had since left employment, leaving the Claimant with no member in the Respondent's employment.
45. The Respondent submitted that the mandatory obligation of employers under section 48 of the Labour Relations Act is conditional upon the order issued by the Minister under subsection (2) and (3) thereof as fortified in the decision in **Kenya Petroleum Oil Workers Union v Hashi Energy Ltd [2018] eKLR**.
46. The Respondent urged the court to dismiss the Claimant's Memorandum of Claim with costs.

Analysis and Determination

47. I have considered the pleadings, evidence and submissions of the parties. The issues arising for determination are the following:
- a) Whether the Claimant has the right to represent employees of the Respondent, and,
 - b) Whether the Claimant is entitled to the orders sought.
48. It is the Respondent's contention that it does not operate in the sector covered by the membership clause in the Claimant's constitution. The Claimant on the other hand insists that it is the right union as the Respondent operates a shop within its premises where it sells to customers goods manufactured at its premises.
49. The Claimant's witness CW1 informed the court that he had been to the premises to recruit members and he believed there was a shop in the premises which sells new spare parts to the Respondent's customers.
50. The Respondent's witness on the other hand informed the court that the business of the Respondent is essentially an engineering company dealing with engine repairs.

51. The Respondent's business permit describes the business activity as 'engineering works and repairs.
52. The Claimant's constitution provides at Rule 5 on membership that it is open to employees in the following sectors:

(a) Distributive & Commerce Sector:

Which shall embrace all employees engaged or employed in:

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(i) Warehouses, Merchandises, Import and Export business

(ii) Flour, coffee, & spice Mills

(iii) All Food Processing Industries

(iv) Banks, Insurance and Financial Institutions

(v) Cinema halls, Show grounds and Exhibitions

(vi) Supermarkets, Shops, Retail and Wholesale outlets, Distribution and Supply Companies,

(vii) Dairy and milk Industries

(viii) Co-operative Societies

(ix) Statutory Boards

(x) Slaughter Houses and butcheries

(xi) Property management

(xii) Cooking oil refineries

(xiii) Water Conservation and Pipeline Corporation and water service regulatory boards.

(b) Bottling & Brewing Sector

Which shall embrace all employees engaged or employed in bottling, brewing, distilling of alcoholic beverages, bottling of soft drinks and drinking water.

(c) Laundry Cleaners & Dyers Sector

Which shall embrace employees engaged in dyeing, dry cleaning services and laundry industries,

(d) Tobacco Trade Sector

Which shall embrace all employees engaged in tobacco manufacturing industries,

(e) Union Officials

Which shall embrace all full time Officials of the Union.

53. It is my view that the Respondent does not operate within the sectors set out in Rule 5 of the Claimant's membership rule of its constitution.

54. Section 54(8) provides:

(8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister

55. Based on the foregoing it is my finding that the Claimant has not convinced this court that it is permitted under its constitution to represent employees of the Respondent.

56. The Respondent raised other substantive issues including the manner in which it was described in the Memorandum of Claim as a limited company, and the issue of proof of membership.

57. On the issue of description of the parties, the Claimant stated that this was a typing error. I have noted from the letters addressed to the Respondent by the Claimant prior to filing suit

that in the said communication the Respondent is properly referred to as Nanak Engineering Works. The parties are not strangers to each other and it is in my view it is not fatal for the Claimant to describe the Respondent as a limited company when it is registered under the Business Names Act, applying substantive justice as provided in section 20(1) of the Employment and Labour Relations Court Act which provides:

(1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities:

Provided that the Court may inform itself on any matter as it considers just and may take into account opinion evidence and such facts as it considers relevant and material to the proceedings.

58. Further, Article 159(2)(d) provides:

“...justice shall be administered without undue regard to procedural technicalities...”

59. It is my view that the misdescription of a party alone cannot result in the party being denied justice where there is no

avermment that the same caused any confusion or prejudice to the party raising the issue.

60. I thus find that this issue, though material, does not deny the Claimant the right to be heard on the substantive issues in dispute in the suit.

61. On the issue of proof of membership, the Respondent submitted that section 48 has conditions requiring the Minister's Order on payment of union dues. Section 48(2) and (3) provide:

(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.*

62. **“Form S set out in the Third Schedule”** is what the Claimant served upon the Respondent and which is commonly referred to as **“Check-off Form”**. This is the form at the reverse of pages 26, 27 and 28 of the Claimant's List and Bundle of Documents filed in court which the Respondent acknowledged it received. The Claimant thus fully complied with the requirements of section 48 of the Act. The section does not require a union to submit any other details other than those provided for in the check-off form. The reverse of the check-off form is reproduced below:

THE EMPLOYMENT AND LABOUR RELATIONS ACT (2007)

TO: THE ACCOUNTANT

NANAK ENGINEERING WORKS

P. O. BOX 2079

ELDORET

1. (a) *In pursuant of an order in Legal Notice No. 7 made with effect from 5th January, 2022 by the Cabinet Secretary Ministry for Labour, under the Labour Relations Act 2007 Appearing in the Kenya Gazette of 28th January 2022, I on behalf of Kenya Union of Commercial, Food And Allied Workers hereby request you to deduct from the wages of the employees listed on the reverse of this Notice, being employees who have acknowledged membership, of the Kenya Union of Commercial, Food and Allied Workers, a sum equal to two percent (2%) of the basic salary of a member but subject to a minimum of Kenya Shillings 200/= monthly as their current Trade Union dues. The deductions to commence within thirty (30) days of being served with this Order.*

(b) The total amount of deductions so made is required to be remitted within ten (10) days of the deduction by

crossed cheque or electronic funds transfer payable to the Kenya Union of Commerce Food and Allied Workers into the Union's Account No. 094 1822290 at Absa Bank Kenya PLC Queensway House Branch, P.O. Box 30011, Nairobi.

(c) Furthermore, in pursuance of the Kenya Gazette Notice No. 6912 dated 2 September 2016, you required to deduct another sum of Kenya Shillings one hundred and fifty only (150/-) from the monthly wages of every employee and, by crossed cheque or electronic funds transfer payable to the Central Organization of Trade Unions (Kenya) remit into the Organization's Account No. 110-898-7486 at Kenya Commercial Bank, Moi Avenue, P.O. Box 48400, Nairobi.

- 2. Notice of remittance under 1 (a) and above should be delivered to Kenya Union of Commercial, Food and Allied Workers P.O. Box 46818 - 00100, Nairobi and under (c).to the Central Organization of Trade Unions (Kenya) P.O. Box 13000-00200, Nairobi.*

3. *The employer to whom this order is addressed is required to make returns to. the Registrar of Trade Unions, P.O. Box 40326-00100, Nairobi within one (1) month of making all the payments to Union.*

4.

Date:

Yours Faithfully

Signed

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Conclusion

63. Having found that the Claimant did not prove that the Respondent operates within the sectors set out in its membership clause of its constitution, the only conclusion that this court is espoused to arrive at is that the Claimant has no *locus standi* to represent the employees of the Respondent as the sector in which the Respondent operates is not covered by the membership clause of the Claimant's constitution.
64. The suit is accordingly dismissed. There shall be no orders for costs.

65. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON
THIS 19TH DAY OF FEBRUARY, 2026**

**MAUREEN ONYANGO
JUDGE**