

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

(Before Hon. Lady Justice Monica Mbaru)

CAUSE NO. E089 OF 2024

**KENYA BUILDING CONSTRUCTION AND
FURNITURE INDUSTRIES EMPLOYEES' UNION.....CLAIMANT**

VERSUS

SMOKY HILL LIMITED.....RESPONDENT

JUDGMENT

The issue in dispute is the alleged refusal to pay terminal dues to 64 members of the Claimant in lock out dispute.

The Claimant is a registered trade union under the Labour Relations Act (the LRA). The Respondent is a limited liability company.

The Claimant reported a recognition dispute against the Respondent to the Minister through a letter dated 8th July 2022. The Labour Officer was appointed as a conciliator by letter dated 26th September 2022. Upon service of the check-off forms signed by employees who were members of the Claimant, to prevent them from joining the union, the Respondent began withholding their wages from

31st August 2022. The affected employees were not paid from June to August 2022.

In protest, the employees staged a sit-in demanding their delayed wages. The Claimant intervened with the labour officer and agreed to a return-to-work formula dated 31st August 2022, including an arrangement for the payment of wage arrears.

The meetings convened by the conciliator were frustrated by the Respondent's non-attendance. The claim issued a 7-day strike notice, but a meeting was held on 24th November 2022 to stop the strike. However, the Respondent failed to pay the wage arrears, leading to a strike on 22nd November 2022. On 6th December 2022, the employees assembled at the Respondent's premises since they had not been paid their wage arrears. Instead of making a payment, the Respondent called the police to have the employees dispersed. The Claimant's interventions went unaddressed, and the premises remained locked.

Following the conciliator's intervention, the Respondent was directed to pay the employees their wage arrears, but has refused and neglected to make such payments. The Claimant is seeking the following:

- a) Payment of wage arrears for September, October and November 2022.
- b) Accrued leave days
- c) Service pay
- d) Total claim of Ksh. 10,651,635 for the 64 grievants

e) Costs of the suit.

In evidence, the Claimant called Franklin Chilumo M'buyu a member of the Claimant and a former employee of the Respondent. He testified that together with other former employees of the Respondent, Suleinam Juma Mwangadi and Omar Baridi Simba, the 64 grievances have given them authority to testify herein.

Chilumo testified that he had formerly joined the Claimant union in January 2022, although he had been a member for many years. At the time, he was employed as a machine operator by the Respondent.

The Respondent had been ordered by the court in **Industrial Cause No. 881 of 2010** to recognise the Claimant union but failed to do so.

Chilumo testified that on 31 August 2022, the employees of the RSP had not been paid their wages for 3 months. There were constant delays since they joined the Claimant union. In August 2022, the employee staged a sit-in protesting the wage arrears. There was a return-to-work formula signed with the union, but the Respondent continued to fail to pay wages, resulting in arrears dating back to September 2022 by November 2022.

The claim made efforts to engage the Respondent, which were successful. On 22nd November 2022, the employees downed their tools and assembled outside the company premises. The Respondent called the police, who dispersed the

employees, leading to a lockout without payment of terminal dues and wage arrears.

In reply, the Respondent's case is that it is engaged in the extraction of machine-cut coral blocks and not construction works in the sector of the Claimant. The Claimant lacks locus standi to represent its employees.

The response is that it enjoyed cordial relations with its employees for many years. It had three 8-hour shifts, but in 2020, operations were affected by the COVID-19 pandemic and were reduced to two 6-hour shifts. All the employees were accommodated in the available shifts. This led to a reduction in revenue and a delay in salary payments, which was eventually addressed.

The Respondent enjoyed cordial relations with its employees until the Claimant entered the shop floor in January 2022. In November 2020, the general manager died due to COVID-19 complications, halting operations. In 2021, the Claimant invoked the employees' actions, leading to reduced operations. There were consultations that yielded no positive results. The Respondent had to seek alternative funds to pay the employees. However, in November 2022, the employee staged a sit-in and refused to work.

The claim is without merit and should be dismissed with costs.

In evidence, the Respondent called Benson Okeyo Onkoba, the human resource manager, who testified that the Respondent carries on a quarry extraction

business at Ng'ombeni Location in Kaya Symilani, and not in construction work, where the Claimant operates. Due to the COVID-19 pandemic in 2020, operations were affected, leading to reduced business and income. Great efforts were made to accommodate all employees, but sales declined, and they could not pay salaries on time.

Onkoba testified that due to financial constraints, salaries were delayed. The Claimant instigated insubordination, absenteeism and incitement among the employees. In November 2020, the general manager, Tom Amollo, succumbed to COVID complications, which affected operations. There was decreased revenue. In 2021, the Claimant incited the employees to stage a sit-in. The junior administrator, Oscar Ngala Pembe, was threatened by some employees, causing fear, and the Respondent was forced to call in the police.

On the wage arrears, these were paid on 31st August 2022, and a Certificate of Agreement was signed by the parties. This addressed the wage arrears from June to August 2022.

The Respondent also called Oscaar Ngala Penmbe, who reiterated the response and stated that he was threatened by the Claimant members while at work and forced to call in the police to disperse the employees who had staged a sit-in at the company premises. On 22 November 2022, the workers went on strike,

resulting in termination of employment for absconding. Efforts to have the Claimant hold a meeting with the labour officer failed.

Determination

At the close of the hearing, parties filed written submissions, which were analysed, and the issue for determination is whether there was a refusal to pay terminal dues to 64 members of the Claimant in a lockout dispute.

The Respondent challenged the *Claimant union's locus standi* to represent the grievants and 64 employees who joined the union. Under articles 36 and 41 of the Constitution, every person has the right to association and unionisation. Such rights are enjoyed by every employee, allowing them to join an association or trade union of their choice. Unless for a justifiable cause, such rights should not be restricted.

The Claimant has the right to represent its members in court.

The question of recognition applies only when the parties seek to negotiate a collective agreement (CBA).

In this case, the grievants and 64 former employees of the Respondent opted to join a trade union of their choice, the Claimant. Such is a constitutional right and also secured under the LRA. Every employee has the right to join the trade union of his choice. Further, under section 46 of the Employment Act (the Act),

no employee should be victimised for joining and undertaking the lawful activities of their trade union of choice.

However, under the LRA, no employee should engage in industrial action, including

a strike or sit-in, without court protection. To proceed with a strike or sit-in without a court-sanctioned process is unlawful and renders the same invalid.

In this case, the Claimant admitted that it recruited the Respondent's employees as its members in January 2022. Chilumo testified that he had been a member of the Claimant union for many years, and, through Industrial Cause No. 881 of 2010, the court directed the Respondent to recognise the Claimant union. There seems to have been no follow-up since the court order.

The Claimant went for fresh recruitment in January 2022. It had 64 members in the employment of the Respondent. This seemed to coincide with the past COVID pandemic period of 2020/2021. Many sectors were affected, and operations were curtailed due to the pandemic.

The Respondent admitted that due to reduced operations, it impacted the business and there were delays in payment of wages. In August 2022, there were salary arrears payments. Due to persistent constraints, wage payments were further delayed until November 2022, when the company was unable to

pay the grievants. They, too, got agitated and staged a sit-in on the premises, leading to a lockout, and the police had to be called in.

On the one hand, the Claimant and its members issued a strike notice that commenced on 22nd November 2022. On the other hand, the Respondent had not paid the employees for up to 3 months, leading to the sit-in and strike on 22nd November 2022.

Under sections 2 and 40 of the Act, an employer facing operational challenges, such as the responsibility in 2022, may declare redundancy and pay employees their dues. Such is to insulate the employer from incurring further costs and delayed salaries. At the end of employment, section 40 of the Act sets out the procedure for paying employees their terminal dues.

Equally, under the LRA, the employees who engage in an unprotected industrial action, including a sit-in, commit a serious employment violation. In this regard, the employees' grievances were justified to the extent that they had not been paid their wages for 3 months. The particulars of the arrears are addressed under the Memorandum of Claim.

Under section 18 of the Act, at the end of employment, the employee is entitled to their terminal dues. This includes wages for days worked and not paid for.

There is a Certificate of Agreement dated 31 August 2022. Parties agreed to the payment of wage arrears for June, July, and August 2022.

With regard to wage arrears up to 22 November 2022, the Respondent has not submitted any records thereof.

The Claimant, too, has not specifically pleaded what each of the 64 grievants was entitled to save, to set out a list of the employees. This is a requirement under Rule 9 of the repealed Employment and Labour Relations Court (Procedure) Rules, 2016. The claim for payment of a global sum of Ksh. 10,651,635 is not given a foundation.

The Respondent too has not offered any material evidence or record of payment of the timely dues, particularly for the period of September, October and November 2022. This is a statutory requirement under section 10(6) and (7) of the Employment Act.

There being an unprotected industrial action on 22nd November 2022, leading to a lockout, the Claimant cannot justify a claim for notice pay save for the wage arrears unpaid until such date.

The County Labour Officer responsible for the area of Ng'ombeni Location in Kaya Symilani shall access the relevant premises and records, assess the wage arrears owed to the 64 employees who left employment on 22nd November 2022, tabulate the dues, and file a report with the court. The Respondent shall

cooperate, and, where these wage arrears have already been settled, the details shall be made available to the Labour Officer.

Accordingly, Judgment is entered for the Claimant for the payment of wage arrears unpaid for the period from September to 22nd November 2022 only. The Labour Officer responsible for the Ng’ombeni Location in the Kaya Symilani areas shall access the Respondent's records, assess these dues, and file a report with the court within 30 days. Any attendant costs for the Labour Officer shall be met by the Respondent.

Mention 15 May 2026 to confirm the Labour Officer report. Each party to bear its costs, save the costs incurred by the Labour Officer as directed above, shall be met by the Respondent.

Delivered in open court at Nairobi, this 23rd day of April 2026

**M. MBARŪ
JUDGE**

In the presence of:

Court Assistant: Catherine and Omar

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