



**Kenya Union of Commercial Food and Allied Workers v Transmattresses Limited  
(Cause E009 of 2023) [2025] KEELRC 172 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 172 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE  
CAUSE E009 OF 2023  
MA ONYANGO, J  
JANUARY 30, 2025**

**BETWEEN**

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

**AND**

**TRANSMATTRESSES LIMITED ..... RESPONDENT**

**RULING**

1. The application before me for determination is dated 19<sup>th</sup> March 2024 and is filed by the Respondent. It is brought under the provisions of Section 80 of the *Civil Procedure Act*, Order 45 Rules 1,2 and 3 of the Civil Procedure (Amendment Rules.) 2020, seeking for the following orders:
  - i. That this court be pleased to review its judgment dated, signed and delivered on 8<sup>th</sup> February 2024.
  - ii. That pending the inter parties hearing of this application, the Honourable court be pleased to grant a temporary order of stay of the execution of its orders made on 8<sup>th</sup> February 2024.
  - iii. That costs of this Application be provided for
2. The application is supported by the affidavit of Lucy Nyarui, the Respondent’s Human Resource Manager, sworn on 19<sup>th</sup> March 2024. She deposes that the judgment of the court dated 8<sup>th</sup> February 2024 ought to be reviewed for reasons that the Claimant and Respondent did not produced documentary evidence to show that the Claimant no longer has any member among the employees of the Respondent. That as such there would be no ground upon which to enter into negotiations in a Collective Bargaining Agreement.



3. The Respondent further contends that it has at all times enforced and even exceeded the minimum wage statutory guidelines as established by law a fact which is recognized in the judgment of court. This, according to the Respondent, serves as a testament that it is committed to the welfare of its employees.
4. While asserting that courts do not issue orders in vain and the orders issued must be capable of enforcement, the Respondent avers that the judgement of the court delivered on 8<sup>th</sup> February 2024 recommends for avenues to negotiate fresh Collective Bargaining Agreement terms for a community of employees who no longer draw any protection from the Claimant. It is on this basis that the Respondent argues that if the judgment of the court is not reviewed, it would be recommending directives incapable of being executed.
5. The Respondent states that the Claimant, as a reaction to the judgement delivered on 8<sup>th</sup> February 2024, has already invited the Respondent's representatives to a meeting to agree and sign a new Collective Bargaining Agreement for purposes of implementation, whereas there are no members the said intended Collective Bargaining Agreement will serve or benefit.
6. The Respondent thus urged the court to review its judgment and set aside the judgment delivered on 8<sup>th</sup> February 2024.
7. The application is opposed. The Claimant filed a Replying Affidavit sworn on 7<sup>th</sup> June 2024 by its National Organizing Secretary, Mike O. Oranga. Mr Oranga deposes that the instant application seeks orders to review the judgment of the court which judgment reviewed the very first Collective Bargaining Agreement which would have taken effect from 1<sup>st</sup> May 2019 for a period of two years. That the court, however moved the said effective date ahead to 1<sup>st</sup> May 2020 for two years, thus suspending the period between 1<sup>st</sup> May 2019 to 30<sup>th</sup> April 2020 due to the Covid-19 Pandemic.
8. According to the Claimant, the issues placed before the court resulting in the judgment of 8<sup>th</sup> February 2024 was not Recognition Agreement as alluded by the Respondent and the issue of membership threshold was not a pre-requisite for the judgment on the Collective Bargaining Agreement. The Claimant contends that the cause of action before court and which has been determined in the judgement sought to be reviewed was "Revision of Collective Bargaining Agreements."
9. The Claimant further contends that the Respondent has already filed a Petition dated 20<sup>th</sup> July, 2023 at the National Labour Board thus exercising its lawful right under Section 54(5) of the *Labour Relations Act*, 2007 to raise any issues it may have on Recognition Agreement and the said Petition has not been heard; that there is no recommendation on the same so far and the existing Recognition Agreement has not been revoked or terminated.
10. The Claimant has taken the position that the question of trade union membership is a subject to be considered at the National Labour Board where the Respondent has already lodged a Petition. That the same was not a subject before this court for determination.
11. In its opposition to the application for review, it is the Claimant's argument that there is no discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the Respondent and which it could not produce at the time the Judgment was pronounced.
12. In response to the prayer for stay of execution of the orders of 8<sup>th</sup> February 2024, the Claimant avers that the grant of stay will greatly interfere with the labour interests of the Respondent's employees whose terms of service were last reviewed with effect from 1<sup>st</sup> May 2017. The Claimant has thus taken



issue with the Respondent's failure to propose how it intends to cushion employees from the effects of the rise in cost of living should the orders of stay of execution be granted by the Court.

13. According to the Claimant, the court ought to weigh the economic interests of the Respondent and its desire to do away with Trade Union representation on one hand and the labour interests of its employees who continue serving it under intense threat with unrevised terms of service from May 2019. The Claimant thus urged the court to make a finding that the scale tilts in favour of not granting the orders sought. The court was urged to dismiss the application with costs.
14. In a rejoinder, the Respondent filed a supplementary affidavit sworn on 25<sup>th</sup> September 2024 by Lucy Nyariki. That affidavit reiterated the contents of the affidavit in support of the Respondent's application dated 19<sup>th</sup> March 2024. In addition, it is the Respondent's deposition that the Collective Bargaining Agreement referred to by the Claimant ceased its purpose and function the moment its unionisable members withdrew their membership and that as such, the Claimant could not purport to engage the employer on behalf of employees.
15. The Respondent contends that the Claimant by instituting this claim opened a Pandora's box. That for this matter to be determined justly, the question of membership had to arise at some point and in any event, without members to its name, the Claimant cannot enforce the judgment of the court delivered on 8<sup>th</sup> February 2024.
16. The Respondent maintained that the withdrawal of members from the Claimant is prima facie evidence that the Union has no simple majority. In this regard, the Respondent averred that Article 41(2)(b) and (5) of *the Constitution* is limited to the extent that the Claimant cannot purport to represent members who have no membership to its name. That the question of membership is at the core of the matter herein.
17. In response to the averment by the Claimant that there is no discovery of new and important matter which was not within the knowledge of the Respondent and could not be produced at the time the Judgment was delivered, the Respondent has maintained that at the time of filing the Petition with the National Labour Board and the subsequent participation in the current proceedings, the documents showing membership records of its employees were not traceable and were only traced after judgment was pronounced due to the restructuring of its records offices.
18. The Claimant in a rejoinder to the averments made by the Respondent in the supplementary affidavit sworn on 25<sup>th</sup> September 2024, filed a supplementary affidavit sworn by Mike O. Oranga on 17<sup>th</sup> October 2024 and reiterated the averments made in the Replying affidavit.
19. According to the Claimant, the issue which had been placed before the court for hearing and determination which gave rise to the Judgment now the subject of the Respondent's Application touched on Revision of the May 2017 - April 2019 Collective Bargaining Agreement; that the parties herein were not able to agree and so the proposed clauses were subjected to conciliation and eventually filed in this court for hearing and determination.
20. It is the Claimant's case that by filing the Petition dated 20<sup>th</sup> July 2023 at the National Labour Board seeking to have the parties Recognition Agreement revoked the Respondent confirmed that it had a dispute over the continuity of the existing Recognition Agreement. The Claimant further states that the alleged membership revocation notices have dates in the year 2019 and the same were produced in the Respondent's Petition dated 20<sup>th</sup> July 2023 at the National Labour Board but were not produced before this court.



21. The Claimant has also contended that the ground upon which the Respondent is seeking to review the court's judgment, that membership records were not traceable and were only traced after judgment, is not a ground for review of a judgment, order or decree of the court when viewed against Rule 74 of the rules of this court.
22. With regard to the prayer for stay of execution orders sought by the Respondent, the Claimant maintains that the Respondent has not met the requirements of Order 42 Rule 6 of the Civil Procedure Rules and as such there is no sound and proper reason to prompt the court to exercise its discretion to review the judgment and grant an order of stay of execution of its judgment.
23. The application was disposed of by way of written submissions. The Claimant's submissions are dated 7<sup>th</sup> June 2024 while the Respondent's submissions are dated 3<sup>rd</sup> October 2024. These submissions by and large reiterate the averments made by the parties in their rival affidavits.
24. In its submissions, the Claimant reiterated that parties herein executed a Recognition Agreement way back on 26<sup>th</sup> August 2017 following which the first Collective Bargaining Agreement effective 1<sup>st</sup> May 2017 for two years was concluded, registered and is fully implemented. It is the Claimant's submission that the said Collective Bargaining Agreement is still in force under clause no. 27 providing for continuity without any vacuum.
25. The Claimant submitted that there cannot be a vacuum in any Collective Bargaining Agreement process and as such the process can only be stopped when Recognition Agreement is revoked or terminated.
26. The Respondent on the other hand submitted that the instant application is founded on discovery of new evidence to wit, that the Claimant herein has no unionisable employees from the Respondent as evidenced by the documents that were found only after restructuring of its records offices and could not be traced earlier.
27. It is therefore the Respondent's submission that the judgment as delivered cannot be enforced on the basis that the Claimant has no single unionisable member among the Respondent's employees, which according to the Respondent has not been denied by the Claimant.

### **Determination**

28. Upon consideration of the application, the rival affidavits as well as the submissions on record, I find that the only issue that presents itself for my determination is whether the Applicant has made out a case to justify the grant of orders of review.
29. Section 16 of the *Employment and Labour Relations Court Act* provides for review of decisions of this court as follows:

The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules
30. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides-
33.
  - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—



- (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
- (b) on account of some mistake or error apparent on the face of the record;
- (c) if the judgment or ruling requires clarification; or
- (d) for any other sufficient reason.

31. The Respondent's main ground for seeking review of the judgment in the instant application is that the parties did not produce documentary evidence showing that the Claimant no longer has any of the Respondent's employees in its membership. The Respondent avers that the said documentary evidence has now been traced and if the court had the advantage of interrogating them before, it would have arrived at a different determination.
32. In essence, the Respondent is inviting the court to review its judgment by interrogating the new evidence which is alleged to have been traced after the court delivered its judgment on 8<sup>th</sup> February 2024.
33. According to the Respondent, if the judgment delivered on 8<sup>th</sup> February 2024 is not reviewed, the orders of this court remain to be a paper judgment and would be in vain as the Claimant has not even a single member that would warrant the Respondent to enforce the Collective Bargaining Agreement.
34. I have carefully considered the material presented by the Respondent in its arguments in support of the grant of the orders sought. The Respondent in its affidavit annexed copies of letters by the Claimant's members withdrawing their membership from the Claimant union. It is on this basis that the Respondent argues that the judgment delivered by this court on 8<sup>th</sup> February 2024 ought to be reviewed as it cannot be enforced.
35. The Claimant has vehemently opposed the application for review. According to the Claimant, the judgment that is sought to be reviewed dealt with Revision of Collective Bargaining Agreement Clauses and not the Recognition Agreement in which membership threshold is a pre-requisite condition.
36. With reference to the circumstances when the court may review judgment, rule 33(1) is clear that it can only be upon discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made.
37. The Respondent has not demonstrated that the evidence it has presented in support of the application is new, or could not be produced after exercise of due diligence, or was not within the knowledge of the Respondent at the time of the hearing of this suit. As stated by the Claimant, the evidence was produced in the Respondent's petition before the National Labour Board. Further, the nature of the evidence is such that it could not have been forgotten by the Respondent at the hearing of the suit. Indeed the issue came up on 26<sup>th</sup> July 2023 when Mr. Mbeche for the Respondent applied for delay of the hearing of the suit to await the decision of the National Labour Board, which was declined by the court.
38. On this score alone, the application would fall.
39. Besides the foregoing, section 54 of the *Labour Relations Act*, provides as follows –



54. Recognition of trade union by employer.
- (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
  - (2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.
  - (3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.
  - (4) The Minister may, after consultation with the Board, publish a model recognition agreement.
  - (5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.
  - (6) If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.
  - (7) If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.
  - (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.
40. In this case, the parties signed a Recognition Agreement on 26<sup>th</sup> August 2017. They subsequently negotiated and signed a Collective Bargaining Agreement. The instant suit dealt with review of the Collective Bargaining Agreement signed by the parties after signing the recognition agreement.
41. Section 54(5) provides for the procedure for termination of recognition agreement by an employer or group of employers. That procedure is completely separate from the procedure for negotiation of Collective Bargaining Agreement. It is a different cause of action that can only be brought to court under a separate suit.
42. Even if the evidence that has been produced by the Respondent in support of the application herein was available to the court at the time of hearing this suit the same would not have affected the outcome of the suit as the evidence is irrelevant for purposes of this suit.
43. The argument that the Collective Bargaining Agreement will not apply to any employee of the Respondent is misguided. Section 59 of the *Labour Relations Act* provides for effect of the Collective Bargaining Agreements as follows:

Effect of collective agreements.



59.

- (1) A collective agreement binds for the period of the agreement
  - (a) the parties to the agreement;
  - (b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or
  - (c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.
- (2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer association.
- (3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.
- (4) A collective agreement shall be in writing and shall be signed by
  - (a) the chief executive officer of any employer, the chief executive or national secretary of an employers' organisation that is a party to the agreement or a representative designated by that person; and
  - (b) the general secretary of any trade union that is a party to the agreement or a representative designated by the general secretary.
- (5) A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.

44. Section 59 refers to unionisable employees and not members of the union. It means that the employees of the Respondent who are unionisable are bound by the agreement whether or not they are members of the union. The Respondent too is bound to implement the Collective Bargaining Agreement in respect to its unionisable employees by virtue of the Recognition Agreement which it is a party to.

45. Section 59 further provides that the terms of the collective agreement shall be incorporated into the contract of every employee who is covered by the agreement.

46. Consequently, I find the application dated March 19, 2024 to be without merit and I hereby dismiss it with costs.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 30<sup>TH</sup> DAY OF JANUARY, 2025.**

**M. ONYANGO**

**JUDGE**

